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UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

Final Reports of the Panel

The reports of the Panel on *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* are being circulated to all Members, pursuant to the DSU. The reports are being circulated as an unrestricted document from 11 July 2003 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). 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:

These Panel Reports 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 Reports are appealed to the Appellate Body, they shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of these Panel Reports is available from the WTO Secretariat.

In the disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259, as explained in paragraph 10.725 of the Panel's Findings, the Panel decided to issue its Reports in the form of a single document constituting eight Panel Reports, each of the Reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page, a common Descriptive Part and a common set of Findings in relation to the complainants' claims that the Panel decided to address. This document also contains Conclusions and Recommendations that, unlike the Descriptive Part and the Findings, are particularised for each of the complainants. Specifically, in the Conclusions and Recommendations, separate document numbers/symbols have been used for each of the complainants (WT/DS248 for the European Communities, WT/DS249 for Japan, WT/DS251 for Korea, WT/DS252 for China, WT/DS253 for Switzerland, WT/DS254 for Norway, WT/DS258 for New Zealand and WT/DS259 for Brazil). In addition, separate pagination has been used in the Conclusions and Recommendations for each individual complainant. For instance, the pagination of the Recommendations and Conclusions for the European Communities' complaint is A-1 to A-4, that for Japan is B-1 to B-4, that for Korea is C-1 to C-4, that for China is D-1 to D-4, that for Switzerland is E-1 to E-4, that for Norway is F-1 to F-4, that for New Zealand is G-1 to G 4 and that for Brazil is H-1 to H-4.

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ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES REFERRED TO IN THE REPORT

SHORT TITLE	FULL TITLE
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575.
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515.
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001.
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003.
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
Border Tax Adjustments	Report of the Working Party on Border Tax Adjustments, adopted 2 December 1970, BISD 18S/97.
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:VIII, 3327.
Canada – Periodicals	Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 20 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481.
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207AB/R.
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943.
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031.
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002.
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002.

SHORT TITLE	FULL TITLE
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9.
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999:I, 315.
Japan – Alcoholic Beverages I	Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 November 1987, BISD 34S/83.
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125.
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:1, 3.
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49.
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3.
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541.
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001.
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – Carbon Steel	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002.
US – Cotton Yarn	Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by the Appellate Body Report, WT/DS192/AB/R.
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001.
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003.

SHORT TITLE	FULL TITLE
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677.
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:IV, 1619.
US – Fur Felt Hats	Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, adopted 22 October 1951.
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29.
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R.
US – Hot–Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001.
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R.
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R.
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002.
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003.
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002.
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
US – Stainless Steel	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001.
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31.

SHORT TITLE	FULL TITLE
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11.
US – Wheat Gluten	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R.
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001.
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

LIST OF ABBREVIATIONS

AD Agreement	Anti-Dumping Agreement
AUV	Average Unit Value
BOF	Basic Oxygen Furnaces
CCFRS	Certain Carbon Flat-Rolled Steel
COGS	Costs of Goods Sold
CR	Confidential Report
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ERW	Electric Resistance Weld
FFTJ	Fittings, Flanges and Tool Joints
FTA	Free-trade areas
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GOES	Grain Oriented Electrical Steel
HS	Harmonized System
LDLP	Large Diameter Line Pipe
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
OCTG	Oil Country Tubular Goods
PR	Public Report
SCM Agreement	Subsidies and Countervailing Measures Agreement
SG&A	Selling, General and Administrative
TPSC	Trade Policy Staff Committee
USITC	United States International Trade Commission
USTR	United States Trade Representative
VRA	Voluntary Restriction Agreement

I. INTRODUCTION

A. FACTUAL BACKGROUND

1. Initiation of safeguards investigation by the USITC

1.1 On 22 June 2001, the USTR requested the initiation of a safeguard investigation under Section 201 of the Trade Act of 1974 to determine whether certain steel products were 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 products like or directly competitive with the imported products.[1]

1.2 Four broad groups of products were covered by this request:

(a) certain carbon and alloy flat products;

(b) certain carbon and alloy long products;

(c) certain carbon and alloy pipe and tubes;

(d) stainless steel and alloy tool steel products.[2]

1.3 A number of products were excluded from the request. These included wire rod and line pipe (covered by existing Section 201 relief or specifically excluded in the Section 201 relief), certain OCTGs, certain stainless steel products, certain semi-finished steel products, certain carbon and alloy flat-rolled products and certain tin mill flat-rolled products.[3]

1.4 The USITC initiated its investigation on 28 June 2001. Public notice of this investigation was published on 3 July 2001.[4] It provided for hearings on injury commencing on 17 September 2001 and hearings on remedy commencing on 5 November 2001 and allowed for submissions of pre- and post-hearing briefs by interested parties.

1.5 The United States notified the initiation of the safeguard investigation to the Committee on Safeguards on 4 July 2001 and this notification was circulated to WTO Members on 9 July 2001.[5]

2. USITC injury determination

1.6 Pre-hearing briefs on injury were filed by 10 September 2001 and hearings took place from 17 September 2001 to 5 October 2001. Post-hearing briefs were allowed from 27 September 2001 to 9 October 2001 for the various steel products under investigation.

1.7 To collect data, the USITC split the four broad product categories into 33 product classes:[6]

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[1] USTR request to the USITC to initiate a safeguard investigation under Section 201 of the Trade Act of 1974, Exhibit CC-1.

[2] Ibid., Annex I.

[3] Ibid., Annex II.

[4] USITC, Institution and Scheduling of Investigation, Investigation No. TA-201-73, Federal Register Vol. 66 of 3 July 2001, p. 35267, Exhibit CC-2.

[5] Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it (G/SG/N/6/USA/10 of 9 July 2001), Exhibit CC-3.

(a) seven carbon and alloy flat products[7] covering: (i) slabs; (ii) plate; (iii) hot-rolled steel; (iv) cold-rolled steel; (v) coated steel; (vi) GOES; (vii) tin- mill products;

(b) ten carbon and alloy long products[8] comprising: (i) billets; (ii) hot-rolled bar; (iii) cold-finished bar; (iv) rebar; (v) rails; (vi) heavy structural shapes; (vii) fabricated units; (viii) wire; (ix) nails, staples and woven cloth; (x) strand, rope, cable and cordage;

(c) five carbon and alloy pipe and tube[9] divided into: (i) welded pipe; (ii) seamless pipe; (iii) welded OCTG; (iv) seamless OCTG; (v) fittings, flanges and tool joints;

(d) 11 stainless steel and alloy tool steel products[10] classified in: (i) slabs; (ii) plate; (iii) bar; (iv) rod; (v) wire; (vi) cloth; (vii) seamless tubular products; (viii) welded tubular products; (ix) fittings and flanges; (x) tool steel; (xi) rope.

1.8 From the 33 products sub-categories for which data had been collected, the USITC defined 27 separate domestic industries. These were:

(a) three domestic industries producing carbon and alloy flat products: (i) certain carbon flat-rolled steel (comprising slabs, plate, hot-rolled, cold-rolled and coated products); (ii) GOES; (iii) tin mill products[11];

(b) ten domestic industries producing carbon and alloy long products comprising: (i) billets; (ii) hot-rolled bar; (iii) cold-finished bar; (iv) rebar; (v) rails; (vi) heavy structural shapes; (vii) fabricated units; (viii) wire; (ix) nails, staples and woven cloth; (x) strand, rope, cable and cordage (including stainless steel rope)[12];

(c) four domestic industries producing carbon and alloy pipe and tube split into: (i) welded pipe; (ii) seamless pipe; (iii) OCTG both welded and seamless; (iv) fittings, flanges and tool joints[13];

(d) ten domestic industries producing stainless steel products divided into: (i) semi finished products (slabs, blooms, billets and ingots); (ii) plate; (iii) bar; (iv) rod; (v) wire; (vi) cloth; (vii) seamless tubular products; (viii) welded tubular products; (ix) fittings and flanges; (x) tool steel.[14]

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[6] USITC, Certain Steel Products, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001): Volume I – Determinations and Views of the Commissioners; (hereinafter USITC Report, Vol. I"), Exhibit CC-6, p. 32, footnote 40 and p. 36, footnote 62.

[7] USITC Report, Vol. I, Appendix A, pp. 9 and 10, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

[8] USITC Report, Vol. I, Appendix A, pp. 11 to 13, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

[9] USITC Report, Vol. I, Appendix A, pp. 13 and 14, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

[10] USITC Report, Vol. I, Appendix A, pp. 14 to 16, Descriptions and Harmonized Tariff Schedules (HTS) subheadings.

[11] USITC Report, Vol. I, p. 36.

[12] USITC Report, Vol. I, p. 79.

[13] USITC Report, Vol. I, p. 147.

[14] USITC Report, Vol. I, p. 190.

1.9 On 22 October 2001, the USITC voted on injury and made negative determinations for the following 15 product groups (based on the 33 product categories it had investigated):

(a) for carbon and alloy billets, imports have not increased[15];

(b) for 13 products comprising: (i) carbon and alloy GOES[16]; (ii) rails[17]; (iii) heavy structural shapes[18]; (iv) fabricated units[19]; (v) wire[20]; (vi) nails, staples and woven cloth[21]; (vii) strand, rope, cable and cordage (including stainless steel rope)[22]; (viii) seamless pipe[23]; (ix) OCTG (including seamless and welded)[24]; (x) stainless steel slabs[25] (xi) plate[26]; (xii) cloth[27]; (xiii) seamless tubular products[28] and (xiv) welded tubular products[29]; there was no injury;

1.10 The United States notified these negative determinations to the Committee on Safeguards on 26 October 2001 and this notification was circulated to WTO Members on 1 November 2001.[30]

1.11 The USITC made affirmative injury determinations for eight of these product groups:

(a) for seven products, including (1) certain carbon flat-rolled steel[31], (2) carbon and alloy hot-rolled bar[32], (3) carbon and alloy cold-finished bar[33], (4) carbon and alloy rebar[34], (5) carbon and alloy fittings, flanges and tool joints[35], (6) stainless steel bar[36] and (7) stainless steel rod[37], imports were a substantial cause of serious injury;

(b) for carbon and alloy welded pipe, imports were a substantial cause of threat of serious injury[38];

1.12 For four products, the USITC delivered divided determinations:[39]

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[15] USITC Report, Vol. I, p. 117.
[16] USITC Report, Vol. I, p. 67.
[17] USITC Report, Vol. I, p. 118.
[18] USITC Report, Vol. I, p. 122.
[19] USITC Report, Vol. I, p. 127.
[20] USITC Report, Vol. I, p. 132.
[21] USITC Report, Vol. I, p. 142.
[22] USITC Report, Vol. I, p. 136.
[23] USITC Report, Vol. I, p. 186.
[24] USITC Report, Vol. I, p. 181.
[25] USITC Report, Vol. I, p. 224.
[26] USITC Report, Vol. I, p. 228.
[27] USITC Report, Vol. I, p. 239.
[28] USITC Report, Vol. I, p. 242.
[29] USITC Report, Vol. I, p. 246.
[30] Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed (G/SG/N/9/USA/4 of 1 November 2001), Exhibit CC-4.
[31] USITC Report, Vol. I, p.55.
[32] USITC Report, Vol. I, p. 95.
[33] USITC Report, Vol. I, p. 104.
[34] USITC Report, Vol. I, p. 111.
[35] USITC Report, Vol. I, p. 174.
[36] USITC Report, Vol. I, p. 208.
[37] USITC Report, Vol. I, p. 217.
[38] USITC Report, Vol. I, p. 158.

(a) for carbon and alloy tin mill products, three Commissioners found that imports were not a substantial cause of injury[40], whereas three Commissioners ruled the opposite[41];

(b) for stainless steel wire, three Commissioners found no injury[42], two Commissioners found that imports were a substantial cause of threat of serious injury[43] and one Commissioner found that imports were a substantial cause of serious injury[44];

(c) for stainless steel fittings and flanges, three Commissioners found no injury[45], but three Commissioners found that imports were a substantial cause of serious injury[46];

(d) for stainless steel tool steel, three Commissioners found no injury[47], two Commissioners found that imports were a substantial cause of serious injury[48] and one Commissioner found that imports were a substantial cause of threat of serious injury[49];

1.13 The United States notified these affirmative and divided determinations to the Committee on Safeguards on 26 October 2001 and this notification was circulated on 1 November 2001.[50]

3. Remedy recommendation by the USITC

1.14 On 26 October 2001, the TPSC requested public comments on potential safeguard action on imports of certain steel products, including the possibility to request products exclusions.[51]

1.15 Pre-hearing briefs on remedy were filed by 29 October 2001 and hearings on remedy took place from 6 to 9 November 2001. Post-hearing briefs were allowed from 13 to 15 November 2001 for the various steel products under investigation.

1.16 On 19 December 2001, the USITC forwarded its remedy recommendations, together with its injury determinations, in its report to the US President.

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[39] Under United States' law, when the USITC vote is equally divided, both the affirmative and the negative determinations are forwarded to the President and he may consider either one to be the determination of the USITC.

[40] USITC Report, Vol. I, p. 74.

[41] USITC Report, Vol. I, dissenting opinion of Commissioner Devaney, reflected in p. 36, footnote 64, p. 48, footnote 63 and p. 55, footnote 224; separate views on injury of Commissioner Bragg, p. 295; separate and dissenting views of Commissioner Miller on injury with respect to tin mill products, p. 307.

[42] USITC Report, Vol. I, p. 235.

[43] USITC Report, Vol. I, separate views of Chairman Koplan on injury, pp. 255 and 258 and separate views on injury of Commissioner Bragg, p. 302.

[44] USITC Report, Vol. I, separate views of Commissioner Devaney on injury, pp. 342 and 345.

[45] USITC Report, Vol. I, p. 250.

[46] USITC Report, Vol. I, separate views of Chairman Koplan on injury, pp. 255 and 266; separate views on injury of Commissioner Bragg, p. 303; separate views of Commissioner Devaney on injury, pp. 347 and 350.

[47] USITC Report, Vol. I, p. 231.

[48] USITC Report, Vol. I, separate views on injury of Commissioner Bragg, p. 301; separate views of Commissioner Devaney on injury, pp. 336 and 340.

[49] USITC Report, Vol. I, separate views of Chairman Koplan on injury, pp. 255 and 262.

[50] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/USA/8 of 1 November 2001), Exhibit CC-5.

[51] Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, Federal Register, Vol. 66, No. 208, 26 October 2001, p. 54312.

1.17 For the eight products for which affirmative injury determinations had been made, the USITC recommended a four-year programme of tariffs and tariff-rate quotas:[52]

(a) an additional duty of 20% *ad valorem*, to be reduced to 17% the second year, 14% the third year and 11% the fourth year for: (i) certain carbon flat-rolled steel (excluding slabs); (ii) carbon and alloy hot-rolled bar; (iii) carbon and alloy cold-finished bar; and (iv) stainless steel rod;

(b) an additional duty of 15% *ad valorem*, to be reduced to 12% the second year, 9% the third year and 6% the fourth year for (v) stainless steel bar;

(c) an additional duty of 13% *ad valorem*, to be reduced to 10% the second year, 7% the third year and 4% the fourth year for (vi) carbon and alloy fittings, flanges and tool joints;

(d) an additional duty of 10% *ad valorem*, to be reduced to 8% the second year, 6% the third year and 4% the fourth year for (vii) carbon and alloy rebar;

(e) a tariff-rate quota with an additional duty on imports in excess of year 2000 United States imports of 20% *ad valorem*, to be reduced to 17% the second year, 14% the third year and 11% the fourth year for (viii) carbon and alloy welded pipe;

(f) a tariff-rate quota with an additional duty of 20% *ad valorem* on imports in excess of 7 million short tons, to be reduced to 17% for imports in excess of 7.5 million short tons the second year, 14% for imports in excess of 8 million short tons the second year and 11% for imports in excess of 8.5 million short tons the second year for (ix) slabs.

1.18 In addition, the USITC recommended that the remedy on certain carbon flat-rolled steel (including slabs) apply to Mexico but not to Canada, the remedy on carbon and alloy hot-rolled bar, cold-finished bar and stainless steel bar apply to Canada but not Mexico, the remedy on carbon and alloy rebar and stainless steel rod not apply to either Canada or Mexico and the remedy on carbon and alloy fittings, flanges and tool joints apply to both Canada and Mexico. The USITC recommended that the remedy on carbon and alloy welded pipe not apply to Mexico but was equally divided concerning its application to Canada.[53]

1.19 The USITC further recommended that no remedy apply to Israel, to beneficiaries of the Caribbean Basin Economic Recovery Act, the Andean Trade Preference Act, or to Jordan.[54]

1.20 The USITC finally recommended that the remedy on carbon and alloy welded pipe not apply to certain large diameter products, as primary producers of these products did not object to such exclusion.[55]

1.21 Dissenting opinions on remedy from some Commissioners proposed higher additional duty rates (up to 40%)[56] or three year programme of quotas, as well as other treatment in respect of imports from Canada and Mexico.[57]

[52] USITC Report, Vol. I, pp. 2 and 3.
[53] USITC Report, Vol. I, p. 3.
[54] USITC Report, Vol. I, p. 3.
[55] USITC Report, Vol. I, pp. 3, 378 and 379.

4. Request for supplementary information

1.22 Following issuance of the USITC Report, the United States submitted to the Committee on Safeguards a supplementary notification regarding the USITC determinations with respect to serious injury or threat thereof to the domestic industry producing certain steel products.[58] In this notification, the USITC recommendations were referred to as "proposed measures".

1.23 On 3 January 2002, the USTR requested additional information from the USITC on: (i) unforeseen developments; (ii) economic analysis of remedy options; and (iii) injury for imports from all sources other than Canada and Mexico for the products for which the USITC recommended the application of the remedy to Canada and/or Mexico.[59]

1.24 This request for additional information was notified to the Committee on Safeguards on 15 January 2002 and the notification was circulated to WTO Members on 15 January 2002.[60]

1.25 The USITC produced supplementary information on the economic analysis of remedy options on 9 January 2002[61] and on unforeseen developments and on injury for imports from all sources other than Canada and/or Mexico on 4 February 2002.[62]

1.26 On 14 March 2002, the United States notified the Committee on Safeguards that copies of the public versions of the supplementary information provided by the USITC were available for review in the Secretariat of the WTO and this supplementary notification was circulated on 18 March 2002.[63]

5. Trade Policy Staff Committee actions

1.27 In addition to the information requested of the USITC, the USTR conducted its own separate investigation through the multi-agency TPSC.

1.28 On 26 October 2001, before the USITC finished its investigation, the TPSC requested public comments on the potential safeguard action on imports of certain steel products, including domestic producers' written proposals on adjustment actions, requests to exclude products, and what action (if

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[56] USITC Report, Vol. I, pp. 3 and 4.

[57] USITC Report, Vol. I, p. 5.

[58] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/USA/8/Suppl. 1 of 7 January 2002), Exhibit CC-8.

[59] Letter from Mr. R. B. Zoellick to Mr. S. Koplan, 3 January 2002 (USTR supplementary information request), Exhibit CC-7.

[60] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/USA/8/Suppl. 2, 15 January 2002), Exhibit CC-9.

[61] USITC supplementary information on the economic analysis of remedy options on 9 January 2002, Exhibit CC-10 (hereinafter referred to as First Supplementary Report).

[62] USITC supplementary information on unforeseen developments and "affirmative" injury determination for imports from all sources other than Canada and/or Mexico on 4 February 2002, Exhibit CC-11 (hereinafter referred to as Second Supplementary Report).

[63] Notification pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6/Suppl. 2 and G/SG/11/USA/5/Suppl. 2, 18 March 2002), Exhibit CC-12.

any) the President should take in response to affirmative injury and remedy findings by the USITC.[64] Written comments in response to these submissions were also permitted.

1.29 In addition, during January 2002, the TPSC held a series of meetings with various parties. The meetings were scheduled informally, via e-mail correspondence, and conducted informally. Unlike the USITC hearings, opposing parties were not present and no formal transcript was maintained. Rather, parties met individually with TPSC staff from as many as fifteen federal agencies to summarize their positions and answer questions.

6. Presidential Proclamation

1.30 Under Proclamation No. 7529 of 5 March 2002, bearing the title "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products" , completed by a Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR, the US President imposed definitive safeguard measures on imports of certain steel products.[65]

1.31 The United States notified these definitive safeguard measures and Proclamation No. 7529 to the Committee on Safeguards on 12 March 2002 and these notifications were circulated to WTO Members on 14 and 15 March 2002.[66]

1.32 The products concerned by these definitive safeguard measures are not only those for which the USITC reached affirmative determinations, but also two of the four products for which the USITC made divided determinations.

1.33 On 26 March 2002, the United States made a supplementary notification to the Committee on Safeguards under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports for carbon and alloy tin mill products and stainless steel wire. In the same notification, the United States provided supplementary information to be notified where a safeguard investigation is terminated with no safeguard measure imposed with respect to stainless steel tool steel and stainless steel flanges and fittings.[67]

1.34 Proclamation No. 7529 lists 11 distinct safeguard measures applicable to 15 steel products. These measures are:

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[64] Trade Policy Staff Committee: Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54312, 54323 (26 Oct. 2001) (Exhibit CC-59).

[65] Proclamation No. 7529 of 5 March 2002, "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10553; Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR of 5 March 2002 on the "Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America", Federal Register Vol. 67, No. 45 of 7 March 2002, p. 10593, Exhibit CC-13.

[66] Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6 and G/SG/11/USA/5, 14 March 2002 and G/SG/10/USA/6/Suppl. 1 and G/SG/11/USA/5/Suppl. 1, 15 March 2002). Exhibit CC-14. Two corrigenda were notified on 18 March 2002 (G/SG/N/10/USA/6/Corr.1 and G/SG/N/11/USA/5/Corr.1, 20 March 2002 and G/SG/N/10/USA/6/Corr.2 and G/SG/N/11/USA/5/Corr.2, 25 March 2002), Exhibit CC-15.

[67] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports and Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed (G/SG/N/8/USA/8/Suppl. 3 and G/SG/N/9/USA/4/Suppl. 1, 28 March 2002), Exhibit CC-16.

(a) A tariff of 30% imposed on imports of "Certain Flat Steel[68] other than Slabs", that is: (i) plate[69]; (ii) hot-rolled steel[70]; (iii) cold-rolled steel[71]; (iv) coated steel.[72]

(b) A tariff rate quota on the fifth product of the product group "Certain Flat Steel", that is slabs.[73] The out-of-quota tariff (applicable beyond 5.4 million short tons) is 30%.

(c) A tariff of 30% is imposed on imports of tin mill products[74];

(d) A tariff of 30% is imposed on imports of hot-rolled bar[75];

(e) A tariff of 30% is imposed on imports of cold-finished bar[76];

(f) A tariff of 15% is imposed on imports of rebar[77];

(g) A tariff of 15% is imposed on imports of certain tubular products[78];

(h) A tariff of 13% is imposed on imports of carbon and alloy fittings and flanges[79];

(i) A tariff of 15% is imposed on imports of stainless steel bar[80];

(j) A tariff of 8% is imposed on imports of stainless steel wire[81];

(k) A tariff of 15% is imposed on imports of stainless steel rod.[82]

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[68] This category comprises slabs, plate, hot-rolled, cold-rolled and coated steel and is referred to elsewhere in this Report as certain carbon flat-rolled steel (CCFRS).

[69] As defined in the superior text to subheadings 9903.72.50 through 9903.72.60 in the Annex to the Proclamation.

[70] As defined in the superior text to subheadings 9903.72.62 through 9903.72.77 in the Annex to the Proclamation.

[71] As defined in the superior text to subheadings 9903.72.80 through 9903.72.98 in the Annex to the Proclamation.

[72] As defined in the superior text to subheadings 9903.72.99 through 9903.73.14 in the Annex to the Proclamation.

[73] As defined in the superior text to subheadings 9903.72.30 through 9903.72.48 in the Annex to the Proclamation.

[74] As defined in the superior text to subheadings 9903.73.15 through 9903.73.27 in the Annex to the Proclamation.

[75] As defined in the superior text to subheadings 9903.73.28 through 9903.73.38 in the Annex to the Proclamation.

[76] As defined in the superior text to subheadings 9903.73.39 through 9903.73.44 in the Annex to the Proclamation.

[77] As defined in the superior text to subheadings 9903.73.45 through 9903.73.50 in the Annex to the Proclamation.

[78] As defined in the superior text to subheadings 9903.73.51 through 9903.73.62 in the Annex to the Proclamation.

[79] As defined in the superior text to subheadings 9903.73.66 through 9903.73.72 in the Annex to the Proclamation.

[80] As defined in the superior text to subheadings 9903.73.74 through 9903.73.81 in the Annex to the Proclamation.

[81] As defined in the superior text to subheadings 9903.73.91 through 9903.73.96 in the Annex to the Proclamation

1.35 The safeguard measures were effective from 20 March 2002 at 12:01 a.m., EST.[83] Nevertheless, the US President instructed the Secretary of Treasury to prescribe by regulation a date at which estimated duties should be deposited.

1.36 Accordingly, on 20 March 2002, the United States Customs Services published a notice[84] indicating that the deposit of estimated duties on imports would be deferred until 19 April 2002. This did not affect collection of duties with effect from the entry into force of Proclamation No. 7529. This notice was notified to the Committee on Safeguards on 26 March 2002 and this notification was circulated on 27 March 2002[85] (Exhibit CC-17).

7. Country exclusions

1.37 On the basis of the Supplementary Report of the USITC of 4 February 2002, the US President decided to exclude imports from Canada and Mexico from all the safeguard measures.[86] Imports from Israel and Jordan were also excluded.[87]

1.38 Imports from developing Members of the WTO, whose share of total imports allegedly does not exceed 3% individually and 9% collectively, were exempted from the safeguard measures. On this basis, the following imports were not excluded from the safeguard measures:[88]

(a) Slabs and certain flat steel from Brazil;

(b) Carbon and alloy fittings and flanges from India, Romania and Thailand;

(c) Carbon and alloy rebar from Moldova, Turkey and Venezuela;

(d) Certain tubular products from Thailand.

8. Product exclusions

1.39 In addition to the exclusions mentioned in the request to initiate a safeguard investigation of 22 June 2002 and accounted for in the scope of the definitive safeguard measures[89], Proclamation No. 7529 provided for additional products exclusions.[90] These additional exclusions did not only concern certain tubular products of large diameter, for which the USITC recommended not to apply any safeguard action[91], but also a large number of other products.[92]

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[82] As defined in the superior text to subheadings 9903.73.83 through 9903.73.89 in the Annex to the Proclamation.

[83] Proclamation, clause (8).

[84] Notice on payment of duties on certain steel products, Federal Register Vol. 67, No. 54, 20 March 2002, p. 12860.

[85] Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6/Suppl. 3 and G/SG/11/USA/5/Suppl. 3, 27 March 2002), Exhibit CC-17. This notification also comprised technical corrections to the Annex to Proclamation No. 7529.

[86] Proclamation, para. 8.

[87] Proclamation, para. 11.

[88] Proclamation, para. 12 and Annex to the Proclamation, para. 11. (d).

[89] Annex to the Proclamation, para. 11. (b) (i) to (ix).

[90] Annex to the Proclamation, pp. 10558 to 10592 of the Federal Register, para. 11. (b), Exhibit CC-13.

[91] Annex to the Proclamation, para. 11.(b)(xlviiii)(A) to (G), reflecting the USITC Report, Vol. I, pp. 378 and 379, footnote 123.

1.40 The United States President further instructed the USTR to determine whether particular products should be excluded and, if so, within 120 days of the date of the Proclamation (not later than 3 July 2002), to publish a notice in the Federal Register to exclude them from the safeguard measures.[93]

1.41 In this context, on 5 April 2002, the USTR decided to exclude particular products from the safeguard action.[94] This decision was notified to the Committee on Safeguards on 11 April 2002 and this notification was circulated to WTO Members on 12 April 2002.[95]

1.42 On 18 April 2002, the USTR specified the procedures to be applied to further consider remaining exclusions requests.[96] Requestors and objectors were directed to file standardized questionnaires, respectively by 23 April 2002 and 13 May 2002. New exclusions requests were allowed by 20 May 2002.

1.43 On 21 May 2002, the USTR indicated that the same procedures would apply with respect to new exclusions requests filed by 20 May 2002.[97] On 3 June 2002, the USTR further explained that the same procedures would apply in the annual review process through which future new exclusion requests would be accepted.[98]

1.44 On this basis, the USTR published the list of exclusion requests filed before 5 March 2002 on 23 April 2002 and a first list of 150 new exclusion requests on 5 June 2002, a second list of 134 new exclusion requests on 14 June 2002, a third list of 135 new exclusion requests on 19 June 2002 and a fourth list of new exclusion requests on 27 June 2002.

1.45 The USTR also released a first list of exclusions concerning 61 products on 7 June 2002, a second list of exclusions for 47 products on 17 June 2002 and a third list of exclusions relating to 116 products on 24 June 2002.

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[92] Annex to the Proclamation, para. 11.(b)(x)to (xlviii) and (xlix).

[93] Annex to the Proclamation, para. 11. (c) and Memorandum, Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10596.

[94] Exclusion of Particular Products From Actions Under Section 203 of the Trade Act of 1974 With Regard to Certain Steel Products; and Conforming Changes to the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 67, No. 65, 5 April 2002, p. 16484.

[95] Notifications pursuant to Article 12.1(c) and Article 9, Footnote 2 of the Agreement on Safeguards on taking a decision to apply a safeguard measure (G/SG/10/USA/6/Suppl. 4 and G/SG/11/USA/5/Suppl. 4, 12 April 2002), Exhibit CC-18.

[96] Procedures for Further Consideration of Requests for Exclusions of Particular products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of March 5, 2002, Federal Register, Vol. 67, No. 75, 18 April 2002, p. 19307, Exhibit CC-19.

[97] Procedures for Consideration of New Requests for Exclusions of Particular Products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of 5 March 2002, Federal Register, Vol. 67, No. 98, 21 May 2002, p. 35842, Exhibit CC-20.

[98] New Requests for Exclusions of Particular products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of 5 March 2002; Information Collection and Procedures for Consideration, Federal Register, Vol. 67, No. 106, 3 June 2002, p. 38301, Exhibit CC-21.

1.46 By the deadline of 3 July 2002 provided for in Proclamation No. 7519 to consider pending exclusion requests, the President issued a new Proclamation[99], further extending this deadline until 31 August 2002. The three lists of product exclusions previously released were annexed to that Proclamation.

1.47 On 8 July, the USTR published a fifth list of 82 new exclusion requests. The USTR also released a fourth list of exclusions comprising 23 products on 11 July 2002 and a fifth list of exclusions concerning 14 products on 19 July 2002. The latest product specific exclusions were granted on 22 August 2002.[100]

II. WTO PROCEDURAL ASPECTS

A. CONSULTATIONS UNDER ARTICLE 12.3 OF THE AGREEMENT ON SAFEGUARDS

2.1 In its notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports of 28 December 2001, the United States offered to consult with Members of the WTO having a substantial interest as exporters of one or more of the products covered by the investigation.[101]

2.2 Brazil, the European Communities, Korea and New Zealand requested consultations with the United States under Article 12.3 of the Agreement on Safeguards, but each reserving their right to further consultations once the actual measures had been imposed.

2.3 In Proclamation No. 7529, the US President instructed the USTR to conduct, prior to the date of effective application of the definitive safeguard measures, consultations under Article 12.3 of the Agreement on Safeguards with any Member of the WTO having a substantial interest as an exporter of a product subject to the safeguard measures.[102] Korea requested consultations on 27 February 2002. The consultations took place in Washington, D.C. on 15 March 2002. On 6 March 2002, Japan requested consultations. These consultations took place in Washington D.C. on 14 March 2002. On 7 March, New Zealand and the European Communities requested consultations and Brazil made its request on 11 March 2002. All three sets of consultations were held in Geneva on 19 March 2002. Subsequently, on 12, 18 and 26 March 2002, Norway, China and Switzerland respectively also requested consultations with the United States. The consultations with Norway and China were held on 25 March and 22 March 2002 respectively, in Washington D.C., and the consultations with Switzerland were held in Geneva on 12 April 2002.

B. DISPUTE SETTLEMENT CONSULTATIONS

2.4 On 7 March 2002, the European Communities initiated the procedures under Article 4 of the DSU, Article XXII:1 of the GATT 1994 and Article 14 of the Agreement on Safeguards by requesting the United States to enter into dispute settlement consultations.[103] Similar requests were made by

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[99] Proclamation No. 7576 of 3 July 2002, To Provide for the Efficient and Fair Administration of Safeguard Measures on Imports of Certain Steel Products, Federal Register, Vol. 67, No. 130, 8 July 2002, p. 45285.

[100] Fact sheet: Exclusion of products from safeguard on steel products, 22 August 2002, Exhibit CC-91; List of additional products to be excluded from the Section 201 safeguards measures, as established in Presidential Proclamation 7529 of 5 March 2002, August 22, 2002, Exhibit CC-92.

[101] G/SG/N/8/USA8/Suppl.1, 7 January 2002.

[102] Memorandum, Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10596 (Exhibit CC-13).

[103] See document WT/DS 248/1

Japan[104] and Korea[105] on 20 March 2002. China[106], Switzerland[107] and Norway[108] also requested consultations with the United States on 26 March, 3 and 4 April 2002 respectively. Consultations were held in Geneva on 11-12 April 2002 jointly with the European Communities, Japan, Korea, China, Switzerland and Norway.

2.5 New Zealand[109] and Brazil[110] later requested dispute settlement consultations with the United States on 14 and 21 May 2002 respectively. These consultations took place in Geneva on 13 June 2002.

C. SINGLE PANEL UNDER ARTICLE 9.1 OF THE DSU

2.6 Given that none of the dispute settlement consultations succeeded in resolving the dispute, the parties proceeded separately to request the establishment of panels to examine the issues arising from the consultations.

2.7 In accordance with Article 6 of the DSU, the DSB established multiple panels to examine similar matters raised by the complainants:

(a) The European Communities was the first to present a request for the establishment of a panel.[111] The first panel to address this request was set up on 3 June 2002.

(b) Japan and Korea requested the establishment of a panel.[112] The United States opposed these requests at the special meeting of the DSB held on 3 June 2002. However, a single panel was established under Article 9.1 of the DSU at the special meeting of the DSB held on 14 June 2002 to consider the requests made by Japan, Korea and, previously, by the European Communities.

(c) China, Switzerland and Norway requested the establishment of a panel on 27 May and 3 June 2002.[113] The United States opposed China's first panel request at the special DSB meeting of 7 June 2002 and did the same with Switzerland's and Norway's first panel requests at the special meeting of the DSB of 14 June 2002. Requests made by China, Switzerland and Norway were accepted at the special meeting of the DSB of 24 June 2002. Under Article 9.1 of the DSU, these requests were referred to the single panel already established to consider the requests made by the European Communities, Japan and Korea.

2.8 A procedural agreement was concluded on 27 June 2002 between, on the one hand, the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand and, on the other hand, the United States.[114] Pursuant to this procedural agreement, the United States accepted the

[104] WT/DS249/1.
[105] WT/DS251/1.
[106] WT/DS252/1.
[107] WT/DS253/1.
[108] WT/DS254/1.
[109] WT/DS258/1.
[110] WT/DS259/1.
[111] WT/DS248/12.
[112] WT/DS249/6 and WT/DS251/7 respectively.
[113] WT/DS252/5, WT/DS253/5 and WT/DS254/5 respectively.
[114] WT/DS248/13, WT/DS249/7, WT/DS251/8, WT/DS252/6, WT/DS253/6, WT/DS254/6, WT/DS258/10.

shortening of the 60-day period for consultations under Article 4.7 of the DSU and the establishment of the panel pursuant to the first request presented by New Zealand, as well as the establishment of a single panel under Article 9.1 of the DSU for all the complainants involved. In return, the complainants agreed not to ask the Director-General to appoint the panelists before 15 July 2002 and agreed on longer time limits for submissions.

2.9 As noted above, New Zealand and Brazil had also requested dispute settlement consultations with the United States on 14 and 21 May 2002 respectively. These consultations took place in Geneva on 13 June 2002.

2.10 New Zealand requested the establishment of a panel on 28 June 2002.[115] The United States accepted this first panel request at the special meeting of the DSB of 8 July 2002. Under Article 9.1 of the DSU, this request was also referred to the single panel already established to consider the requests presented by the European Communities, Japan, Korea, China, Switzerland and Norway.

2.11 On 18 July 2002, a procedural agreement was also concluded between Brazil and the United States.[116] Under this agreement, the United States accepted the shortening of the 60-day period for consultations and the establishment of a panel pursuant to the first request presented by Brazil.[117] Both Brazil and the United States also accepted that, in accordance with Article 9.1 of the DSU, their dispute would be referred to the panel that had already been established to consider the requests of the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand.

2.12 Pursuant to the two agreements between the parties referred to above and in accordance with Article 9.1 of the DSU, the DSB agreed that all these disputes would proceed according to one single panel, whose mandate would be to examine all the requests for a panel mentioned above.[118]

2.13 This single Panel was established with the following standard terms of reference:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil in documents WT/DS248/12, WT/DS249/6, WT/DS251/7, WT/DS252/5, WT/DS253/5, WT/DS254/5, WT/DS258/9 and WT/DS259/10, the matter referred to the DSB by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[119]

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[115] WT/DS258/9.
[116] WT/DS259/9.
[117] WT/DS259/10.
[118] WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259.
[119] WT/DS248/15, WT/DS249/9, WT/DS251/10, WT/DS252/8, WT/DS253/8, WT/DS254/8, WT/DS258/12, WT/DS259/11.

2.14 The Director-General was requested to determine the composition of this single Panel with reference to paragraphs 7 and 10 of Article 8 of the DSU on 15 July 2002. On 25 July, the Director-General appointed the following persons to serve as the Panel:

Chairman:	Mr Stefán Jóhannesson
Members:	Mr Mohan Kumar Ms Margaret Liang

2.15 Canada, Chinese Taipei, Cuba, Malaysia Mexico, Thailand, Turkey and Venezuela reserved their rights to participate in the Panel proceedings as third parties. By a letter dated 23 October 2002, Malaysia informed the Panel of its decision to withdraw as a third party from the Panel proceedings.

2.16 On 29 July 2002, the Panel met with the parties for its organizational meeting. On 31 July 2002, the panel wrote to the parties issuing some preliminary organizational rulings and indicating the rules of procedure to be followed by the Panel.

2.17 On 29, 30 and 31 October 2002, the Panel had its first substantive meeting with the parties. The Panel sent questions to the parties on 31 October 2002 and parties forwarded their answers to the Panel's questions on 12 November 2002. On 10, 11 and 12 December 2002, the Panel had its second substantive meeting with the parties. The Panel sent questions to the parties on 13 December 2002. The Panel extended the deadline for responding to the Panel's questions from 21 December 2002 to 6 January 2003. The United States requested permission to comment further on some of the complainants' answers. On 16 January 2003, the Panel authorized all the parties to provide further comments on some of the panel's questions.

2.18 On 28 January 2003, the United States requested the Panel to issue separate reports pursuant to Article 9.2 of the DSU. On 30 January 2003, the complainants opposed that request. A series of communications between the parties followed. On 3 February 2003, the Panel wrote to the parties that a decision on the United States' request would be issued with the Interim Panel Report but that, in any case, should the United States' request be accepted by the Panel, all such separate Panel Reports would have the same descriptive part. The letter reads as follows:

> "On 28 January 2003, the Panel received a request from the United States pursuant to Article 9.1 of the DSU that the Panel issue eight separate panel reports rather than one consolidated report. This request was made by the United States in light of the fact that during the previous DSB meeting (held on 27 January 2003) some complainants expressed the view that "in the case of multiple complaints for which a single panel report was issued, individual parties could not seek adoption of the report only in respect of the panel requested by an individual complainant". The United States asserted in its letter that it did not understand the basis for this "all-or-nothing" approach because, for example, a responding party's right to seek a solution to one or more of the individual complaints without adoption of a report (or without an appeal) would be compromised. The United States noted in its letter that while it was sensitive to the work involved in preparing separate reports, in the *EC – Bananas III* dispute, the panel wrote one master report, and issued identical separate reports for each co-complainant, omitting inapplicable paragraphs where necessary.
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> On 30 January, the complainants wrote to the Panel opposing the request that had been made by the United States for a number of reasons, notably because the request had not been made in a timely fashion; that complying with the request would result

in additional delays; that had the complainants known that multiple reports would be issued, they would have presented their arguments differently and that the United States request was contrary to the procedural arrangements negotiated between all the parties (WT/DS248/13, WT/DS249/7, WT/DS251/8, WT/DS252/6, WT/DS253/6, WT/DS254/6, WT/DS258/10 and WT/DS259/9) and contrary to the Panel's working procedures.

On 31 January, late morning, the Secretariat, on behalf of the Panel, sent a fax to all parties informing them that the Panel was considering the US request of 28 January and the complainants' letter of opposition dated 30 January and that, by close-of-business Monday, 3 February, the Panel's response would be communicated to the parties, including the date of issuance of the descriptive part in disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252,WT/DS253, WT/DS254, WT/DS258 and WT/DS259.

On 31 January, late afternoon, the United States responded to the complainants' letter of 30 January. For the United States, the complainants appeared to confuse the fact that a single panel had been established to consider the separate panel requests with the question of whether that single panel must issue a single report. In the United States' view, the fact that this dispute has been operating as a single proceeding in no way means that the results of the single proceeding would be a single report. The United States insisted that it had never waived its rights under Article 9.2 of the DSU and that the Panel's working procedures do not exclude the possibility of multiple reports. It submitted that, up to this point, the United States had considered that even though it could have requested separate reports, its rights were sufficiently protected with a single report. That situation changed since the last DSB meeting when the United States became aware of the complainants' interpretation of Article 9 of the DSU, which, according to the United States, threatens the United States' dispute settlement rights. For the United States, its request of 28 January 2003 is, indeed, timely. To the complainants' claim that they would have structured their arguments differently had the United States made its request earlier, the United States responded that, throughout the proceedings, individual complainants had maintained their autonomy by raising different claims, arguments, answers to questions, etc. The United States added that the complainants have not indicated how they would have proceeded differently if they had known beforehand that there would be a single panel report. The United States essentially submitted that, in any case, the complainants cannot have more rights under a single report than under multiple reports, since they can have no more rights under a single proceeding than they would have had under separate proceedings. For the United States, the only difference between a single report and separate reports is that the latter approach would make perfectly clear that each complainant has rights only with regard to those claims that it raised. Finally, the United States reiterated that the Panel could use, for instance, the model used in the in the *EC – Bananas III* dispute, in which the panel wrote one master report, and issued separate reports with regard to each complaint that excised the findings not relevant to that complainant; such an approach for this dispute should minimize any burden to the Secretariat and not delay issuance of the reports.

On 31 January, early evening, Japan, Switzerland and, subsequently, the European Communities, asked the Panel to ignore the second letter from the United Sates of 31 January and to rule on the US request on the basis of only the first US letter of 28 January 2003 and the complainants' letter of 30 January. Those complainants raised

strong objection to the timing and manner in which the United States had chosen to file the letter of 31 January to the Panel, claiming, *inter alia*, that in so doing, the United States was fully aware that some of the complainants' capitals were already closed for the weekend. Japan argued that the United States was simply trying to delay the Panel's decision and that, in the process, the United States had totally ignored due process and fair play. For the European Communities, all of the arguments that had been raised by the United States were answered either by the text of the DSU, the Appellate Body Report in the *Byrd Amendment* case or the complainants' letter. The European Communities stated that it does not consider that the issuance of a single panel report, rather than multiple reports, reduces or adds to the rights of any of the parties. It also does not consider that multiple panel reports are needed to make this clear. Finally, the European Communities noted that all complainants have an interest in the complaints of the others as evidenced by the fact that they are all third parties in each other's cases.

Afterwards, in the evening of 31 January (just before the receipt of the European Communities' communication mentioned in the preceding paragraph), the United States responded that Japan and Switzerland's communications appeared to assume that complainants have the right to respond to the arguments that the United States has made but the United States should not have the right to respond to the arguments that the complainants have made.

Japan responded by reiterating that the United States was only trying to prolong the debate, burden the Panel and the Secretariat with further communications, and delay the solution of this important dispute. Japan queried why the United States waited a full day, until the evening of Friday, 31 January 2003 to re-start the exchange of communications. Finally, Japan reiterated that the Panel should make its decision only on the basis of the complainants' letter of 30 January 2003 and the first US letter of 28 January 2003.

* * * * *

The Panel is well aware of the time-limit obligations provided for in the DSU including those mentioned in Articles 12.8 and 20, and of the importance of proceeding expeditiously with this dispute (as with all disputes).

The Panel is also well aware of the provisions of Article 9 of the DSU, including the Panel's obligation to ensure that the rights that all parties would have enjoyed had separate panels been proceeded with be taken into account.

The Panel also recalls that the establishment of a single panel was agreed to by the parties. Further, the coordination of the complainants' oral presentations at both substantive meetings of the Panel (as well as parties' answers to the Panel's questions) was encouraged by the Panel and agreed to by all parties. The Panel notes in this regard that the United States, in its letter of 31 January, recognized that a single panel process may benefit all parties, reduce delays and ensure respect of WTO Members' rights in dispute settlement.

The Panel has decided that it will examine and assess the request made by the United States while it is completing its legal analysis of the complainants' claims. The Panel will form a conclusion on this US request, including whether separate panel reports

can be issued when a single panel has been established and when multiple disputes are being examined according to a single panel process and whether an answer to this question is necessary for the settlement of the present dispute. The Panel will communicate to the parties its decision on such matters when it issues its Interim Panel Report.

The Panel notes, however, that as indicated in Article 15 of the DSU, a Panel Report shall contain a Descriptive Part which includes a description of the factual and legal allegations and arguments of the parties to the dispute. The Panel believes that the Descriptive Part of any panel report should include an objective reflection of the relevant panel process. Therefore, in light of (i) the circumstances of the single panel process followed for the disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258and WT/DS259; (ii) the timing of the US request, that is, a few days before the issuance of the Descriptive Part; (iii) the fact that the Panel is examining a series of safeguard measures that are in place for only three years; (iv) the need to ensure due process, the Panel is of the view that a single Descriptive Part should, in any case, be issued by the Panel. Should the Panel reach the conclusion that multiple Panel Reports are to be issued, all such Panels Report will have the same Descriptive Part.

The parties will note when they receive the draft Descriptive Part of the Panel Report this week, that the Panel has tried to ensure that collective and individual complainant's claims, allegations and arguments are properly reflected, together with the relevant United States' defenses. As provided for in Article 15.1 of the DSU, all parties will be invited to comment and suggest changes to this draft Descriptive Part to ensure that it is an objective reflection of all the parties' legal and factual allegations and arguments.

The draft Descriptive Part in disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259 will, therefore, be issued on Thursday, 6 February 2003 and, pursuant to Article 15 of the DSU, all parties will be invited to comment on such draft Descriptive Part by 5 p.m. on Wednesday 19 February 2003.

Finally, the Panel would like to reassure the parties that, irrespective of the Panel's ultimate decision on whether or not to issue separate panel reports, the Panel's work will not be unduly delayed. The Panel is exercising its utmost efforts to proceed as expeditiously as possible in its examination of the complainants' claims, bearing in mind that the parties have submitted more than 3,500 pages of submissions, oral statements and answers to questions together with more than 3,000 pages of exhibits in support of numerous claims both under GATT 1994 and the Agreement on Safeguards, all of which raise complex and sensitive issues of facts and law."

2.19 On 6 February 2003, the Panel issued its draft Descriptive Part, pursuant to Article 15.1 of the DSU. On 19 February 2003, the Panel received comments from the parties on the draft Descriptive Part. On 26 March 2003, the Panel issued its Interim Reports to the parties. On 9 and 16 April 2003, the Panel received comments from the parties. On 2 May 2003, the Panel issued its Final Reports to the parties.

III. CLAIMS MADE BY THE COMPLAINANTS[120]

A. EUROPEAN COMMUNITIES

3.1 The European Communities claims that:

(a) The precondition of "unforeseen developments" laid down in Article XIX:1 of the GATT 1994 was not satisfied;

(b) There were no increased imports, as required by Article 2.1 of the Agreement on Safeguards, for many of the imported products under investigation;

(c) For certain products, there was an incorrect definition of the relevant domestic industries that produce like or directly competitive products to those allegedly being imported in increased quantities, as required by Articles 2.1 and 4.2(a) in conjunction with Article 4.1(c) of the Agreement on Safeguards;

(d) There was no serious injury or threat of serious injury being suffered by the relevant domestic industries, as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards;

(e) Any increase in imports that may have occurred did not cause any serious injury or threat of serious injury that may have been suffered by the relevant domestic industries, as required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards, in particular because injury was not being suffered by the relevant domestic industries and because injury or threat thereof caused by other factors was attributed to imports;

(f) The United States safeguard measures are not applied only to the extent necessary to prevent or remedy serious injury, as required by Article 5.1 of the Agreement on Safeguards;

(g) There is a lack of parallelism between the products for which an increase in imports within the meaning of Article 2.1 of the Agreement on Safeguards was found or claimed, and the products in respect of which the protective measures were imposed, contrary to the principle inherent in Articles 2.1, 4.2 and 5.1 of the Agreement on Safeguards;

(h) Neither the Report of the investigation nor the other relevant documents set forth adequately the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the measures actually imposed and for all other elements mentioned above, as required by Article 3.1 of the Agreement on Safeguards; nor did they provide the analysis and demonstration required by Article 4.2(c) of the Agreement on Safeguards.

[120] The claims set out in this section are as they appear in the parties' respective requests for establishment of a panel and are found in consecutive order in WT/DS248/12, WT/DS249/6, WT/DS251/7, WT/DS252/5, WT/DS253/5, WT/DS254/5, WT/DS258/9 and WT/DS259/10.

B. JAPAN

3.2 Japan claims that:

(a) The safeguard measures are inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 because, *inter alia*, they were imposed in the absence of the requisite increase in import volume;

(b) The safeguard measures are inconsistent with Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 because, *inter alia*, they were imposed despite the United States Government's failure to demonstrate causality between increased imports and serious injury and to ensure that serious injury caused by factors other than increased imports was not attributed to increased imports;

(c) The safeguard measures are inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Articles X:3 and XIX:1 of GATT 1994 because the USG failed to properly define the domestic industries producing products like or directly competitive with the imported products under investigation;

(d) The safeguard measures are inconsistent with Articles 2.1, 3.1, 4.2(a), (b) and (c) of the Agreement on Safeguards and Articles X:3 and XIX:1 of GATT 1994 because, *inter ali*a, the President imposed safeguard measures on tin mill products as a separate like product without making a uniform, impartial and reasonable determination that increased tin mill product imports had caused, or threatened to cause, serious injury to the domestic industry producing the like or directly competitive product or publishing any report setting forth the findings and reasoned conclusions;

(e) The measures on tin mill products and stainless wire products violate Article 3.1, 4.2(c) the Agreement on Safeguards and Article X:3 of GATT 1994 because the President's treatment of the USITC's tie injury votes on these and other products was not uniform, impartial and reasonable nor did the President publish any report setting forth the findings and reasoned conclusions supporting such treatment;

(f) The safeguard measures are inconsistent with Articles 2.1 and 2.2 of the Agreement on Safeguards and Article XIX:1 of GATT 1994 in that the sources of imports covered by the safeguards investigation do not parallel the sources of imports falling within the scope of the safeguard measures;

(g) The safeguard measures are inconsistent with Article 3.1 and 5.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994 because, *inter alia*, the measures imposed were more restrictive than those recommended by the USITC, and there was no investigation or published report setting forth the findings and reasoned conclusions on how they were no more restrictive than necessary to prevent or remedy serious injury;

(h) The safeguard measures are inconsistent with Article I:1 of the GATT 1994 and Article 2.2 of the Agreement on Safeguards because, *inter alia*, they exempt imports from WTO Members which are FTA partners of the United States, namely, Canada,

Mexico, Jordan and Israel, thereby discriminating between products originating in Japan and products originating in such WTO Members.

C. KOREA

3.3 Korea claims that:

(a) The United States failed to comply with the provisions of Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 with respect to the determination of the relevant domestic industries that produce like or directly competitive products;

(b) The United States also failed to satisfy the obligations contained in Articles 2, 3 and 4 of the Agreement on Safeguards as well as Article XIX of GATT 1994 with respect to the investigation, findings, and decision regarding increased imports, serious injury, threat of serious injury and causation. The United States was in violation of Article X:3(a) as well with respect to tin mill products;

(c) The United States is in breach of Article XIX:1 of GATT 1994 as regards the requirement to demonstrate that "unforeseen developments" led to the increase in imports. In this respect, not only did the United States fail to conduct separate analyses for each product concerned, but also the explanations were insufficient to satisfy the requirement;

(d) The United States violated Article 2.2 of the Agreement on Safeguards and Articles I, XIII and XIX of GATT 1994 for failing to apply the safeguard measures to all imports irrespective of their sources on an MFN basis;

(e) The United States' violation of Article 2.2 of the Agreement on Safeguards and Articles I and XIX of GATT 1994 was compounded with the violation of Article X:3 of GATT 1994 and Article 3 of the Agreement on Safeguards. In order to exempt imports from Canada and Mexico, the US President reversed the USITC's findings made in accordance with Section 311(a) of the NAFTA Implementation Act without providing sufficient, if any, explanation;

(f) The United States violated Article 2.1 of the Agreement on Safeguards in conjunction with Articles 2.2 and 4.2 of the Agreement on Safeguards by failing to meet the requirement of parallelism between the investigation and the measures;

(g) The United States committed violations under Article 3 of the Agreement on Safeguards, in conjunction with Articles 2, 4 and 5 of the Agreement on Safeguards, because it failed to afford an opportunity for sufficient participation by interested parties, to conduct an adequate investigation, to provide critical information on which it relied, and to set forth in the published report the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the actual measure imposed and the justification for the exclusion of Canada, Mexico, Israel and Jordan;

(h) The safeguard measures exceeded the extent necessary to prevent or remedy serious injury and to facilitate adjustment, and thus are in violation of Article 5 of the

Agreement on Safeguards. The measures were not limited to the serious injury caused by increased imports;

(i) The safeguard measures are also in violation of Article 7.1 of the Agreement on Safeguards because the duration of the measures extends beyond the period of time necessary to remedy or prevent serious injury;

(j) The United States also violated various procedural provisions of Article 12 of the Agreement on Safeguards by failing to provide "adequate opportunity" for consultations regarding the application of safeguard measures, to provide pertinent information, and to make appropriate notifications;

(k) The United States is in breach of Article 8.1 of the Agreement of the Agreement on Safeguards because a substantially equivalent level of concessions between exporting Members and the United States has not been maintained;

(l) The United States violated Article 9.1 of the Agreement on Safeguards by failing, *inter alia*, to exclude developing countries in a non-discriminatory manner.

D. CHINA

3.4 China claims that:

(a) The United States violated Article XIX:1 of the GATT 1994, since the precondition of the "unforeseen developments" was not satisfied;

(b) The United States violated Article 2.1 of the Agreement on Safeguards, since there were no increased imports for many of the imported products under investigation;

(c) The United States violated Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards, since, for certain products, there was an incorrect definition of "the product concerned" in order to determine any increase of imports and since some of the United States measures do not apply to "a product";

(d) The United States violated Articles 2.1 and 4.2(a) in conjunction with Article 4.1(c) of the Agreement on Safeguards, since, for certain products, there was an incorrect definition of the relevant domestic industries that produce like or directly competitive products to those allegedly being imported in increased quantities;

(e) The United States violated Articles 2.1 and 4.2(a) of the Agreement on Safeguards, since there was no serious injury or threat of serious injury being suffered by the relevant domestic industries;

(f) The United States violated Articles 2.1 and 4.2(b) of the Agreement on Safeguards, since any increase in imports that may have occurred did not cause any serious injury or threat of serious injury that may have been suffered by the relevant domestic industries, in particular because injury was not being suffered by the relevant domestic industries and because injury or threat thereof caused by other factors was attributed to imports;

(g) The United States violated Article 5.1 of the Agreement on Safeguard, since the United States safeguard measures are not applied only to the extent necessary to prevent or remedy serious injury;

(h) The United States violated Articles 2.1, 4.2 and 5.1 of the Agreement on Safeguards since there is a lack of parallelism between the products for which an increase in imports was found or claimed and the products in respect of which the protective measures were imposed;

(i) The United States violated Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT 1994, since the determination and the allocation of the tariff rate quota for slabs were incorrect and/or discriminatory;

(j) The United States violated Article 9.1 of the Agreement on Safeguards, since imports of some steel products from China as a developing country, were not excluded from the application of the safeguard measures;

(k) The United States violated Article I:1 of the GATT 1994 and Article 2.2 of the Agreement on Safeguards, since the United States measures discriminate between products originating in China and products originating in other countries;

(l) The United States violated Article 3.1 of the Agreement on Safeguards, since neither the Report of the Investigation nor the other relevant documents set forth adequately the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the measures actually imposed and for all other elements mentioned above; and Article 4.2(c) of the Agreement on Safeguards, since the above-mentioned documents did not provide the analysis and demonstration required;

(m) The United States violated Articles 12.1,12.2 and 12.3 of the Agreement on Safeguard since the United States failed to provide immediate notification with all pertinent information and deprived adequate opportunity for prior consultation with China having a substantial interest as exporters of the products concerned;

(n) The United States violated Article 8.1 of the Agreement on Safeguards, since the United States failed to endeavour, in accordance with Article 12.3, to maintain a substantially equivalent level of concessions and other obligations between it and China;

(o) The United States violated Article II of the GATT 1994, since the measures consist of withdrawal or modification of United States concessions without justification under Article XIX of the GATT 1994, nor the Agreement on Safeguards, nor any other provisions of the WTO Agreement.

E. SWITZERLAND

3.5 Switzerland claims that:

(a) The precondition of "unforeseen developments" laid down in Article XIX:1 of the GATT 1994 was not satisfied;

(b) The safeguard measures were imposed in the absence of the requisite increase in import volume for many of the imported products under investigation and are therefore inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards;

(c) The determination of the relevant domestic industries that produce like or directly competitive products to those allegedly being imported in increased quantities, as required by Articles 2.1 and 4 of the Agreement on Safeguards, is incorrect;

(d) The safeguard measures are inconsistent with Article 2.1 in conjunction with Articles 2.2 and 4.2 of the Agreement on Safeguards, in that the requirement of parallelism between the scope of the investigation of the injury arising from imported products and the scope of the safeguard measures is not met;

(e) The United States failed to demonstrate, as required by Articles 2.1 and 4.2 (b) of the Agreement on Safeguards, causality between the increased imports and serious injury and to ensure that serious injury caused by factors other than increased imports was not attributed to increased imports;

(f) The safeguard measures exceeded the extent necessary to prevent or remedy serious injury and to facilitate adjustment, and thus are in violation of Article 5(1) of the Agreement on Safeguards. The safeguard measures were not limited to the serious injury caused by increased imports;

(g) The United States violated Article 8.1 of the Agreement on Safeguards because they failed to maintain a substantially equivalent level of concessions and other obligations between the exporting Member and the United States;

(h) Neither the Report of the investigation nor the other relevant documents set forth adequately the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the measures actually imposed and for all other elements mentioned above, as required by Article 3.1 of the Agreement on Safeguards; nor did they provide the analysis and demonstration required by Article 4.2 (c) of the Agreement on Safeguards.

F. NORWAY

3.6 Norway claims that:

(a) The United States is in breach of Article XIX:1 of GATT 1994 because, *inter alia*, the United States failed to show, prior to the application of the measures, that increases in imports and conditions of importation of products covered by the above-mentioned measures were the result of "unforeseen developments";

(b) The United States also failed to satisfy the obligations contained in Articles 2, 3 and 4 of the Agreement on Safeguards as well as Article XIX of GATT 1994 with respect to the investigation, findings, and decision regarding increased imports, serious injury, threat of serious injury and causation. With respect to tin mill products the United States was also in violation of Article X:3(a), since the measure is not based on a uniform, impartial and reasonable administration of the relevant US laws and regulations;

(c) The United States failed to comply with the provisions of Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 with respect to the determination of the relevant domestic industries that produce like or directly competitive products;

(d) There is a lack of parallelism between the products for which an increase in imports within the meaning of Article 2.1 of the Agreement on Safeguards was found and claimed, and the products in respect of which the protective measures were imposed, contrary to the principle inherent in Articles 2.1, 4.2 and 5.1 of the Agreement on Safeguards. The United States measures are thus in violation of the said Articles;

(e) The safeguard measures exceeded the extent necessary to prevent or remedy serious injury and to facilitate adjustment, and thus are in violation of Articles 5.1 and 7.1 of the Agreement on Safeguards;

(f) The United States committed violations under Article 3 of the Agreement on Safeguards, in conjunction with Articles 2, 4 and 5 of the Agreement on Safeguards, because neither the USITC Report of the investigation nor the other relevant documents set forth adequately the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the measures actually imposed and for all other elements mentioned above, nor did they provide the analysis and demonstration required;

(g) The safeguard measures are inconsistent with Article I:1 of the GATT 1994 and Article 9.1 of the Agreement on Safeguards because of failure to correctly apply the criteria for non-application.

G. NEW ZEALAND

3.7 New Zealand claims:

(a) The United States has failed to demonstrate "unforeseen developments" as provided for in Article XIX:1 of the GATT 1994 ;

(b) The United States has failed to comply with the requirement of Article 2.1 of the Agreement on Safeguards that there be a requisite increase in imports before a safeguard measure is imposed;

(c) The United States has failed to correctly determine the domestic industry that produces like or directly competitive products, as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards;

(d) The United States has failed to demonstrate serious injury or threat of serious injury being suffered by the relevant domestic industries, as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards;

(e) The United States failed to demonstrate the existence of the requisite causal link between the alleged increased imports and the alleged serious injury or threat thereof, as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards. Furthermore, the United States attributed to imports injury caused by other factors, contrary to Article 4.2(b) of the Agreement on Safeguards;

(f) The United States failed to apply its safeguard measures only to the extent necessary to prevent or remedy serious injury as required by Article 5.1 of the Agreement on Safeguards;

(g) The United States granted relief beyond the period of time necessary to prevent or remedy any alleged serious injury and to facilitate adjustment, contrary to the requirements of Article 7 of the Agreement on Safeguards;

(h) The United States failed to satisfy the requirement of parallelism between the products for which an increase in imports within the meaning of Article 2.1 of the Agreement on Safeguards was found or claimed, and the products in respect of which the protective measures were imposed, contrary to the principles inherent in Articles 2.1, 2.2, 4.2 and 5.1 of the Agreement on Safeguards;

(i) The United States failed to apply its safeguard measures to product being imported irrespective of its source, as required by Article 2.2 of the Agreement on Safeguards;

(j) The United States failed to adequately set forth findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for measures actually imposed and for all other elements mentioned above, as required by Article 3.1 of the Agreement on Safeguards; nor did it provide the analysis and demonstration required by Article 4.2(c) of the Agreement on Safeguards;

(k) The United States failed to meet its obligations under Article 8.1 of the Agreement on Safeguards regarding the maintenance of a substantially equivalent level of concessions and other obligations to that existing under GATT 1994;

(l) The United States did not administer in a uniform, impartial and reasonable manner, its laws, regulations, decisions and rulings relevant to the steel safeguard and therefore acted contrary to Article X:3(a) of the GATT 1994.

H. BRAZIL

3.8 Brazil claims that:

(a) The United States violated Articles 2.1 and 4 of the Agreement on Safeguards and Article X:3 of the GATT 1994 because, *inter alia*, the determinations and resulting measures were not based on proper determinations of "like or directly competitive products" or of the domestic producers of products like or directly competitive with the imported products;

(b) The United States violated Article 2.1 and 4 of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 because, *inter alia*, the determinations of injury were not based on a proper determination of serious injury to the domestic industry;

(c) The United States violated Article 2:1 and 4 of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 because, *inter alia*, the determinations were deficient in terms of the requirements that imports be "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products";

(d) The United States violated Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994 because, *inter alia*, the determination failed to establish the necessary causal link between increased imports and injury and failed to ensure that injury from other factors was not attributed to imports;

(e) The United States violated Article XIX:1(a) of the GATT 1994 and Article 3:1 of the Agreement on Safeguards because, *inter alia*, of failure to establish that the increased imports and the conditions of their importation were the result of "unforeseen developments" and the effects of obligations assumed under the GATT 1994;

(f) The United States violated Article I:1 of the GATT 1994 and Article 2.2 of the Agreement on Safeguards because, *inter alia*, the measures discriminate based on source;

(g) The United States violated Article 2.1 of the Agreement on Safeguards, read in conjunction with Article 2.2, and Article 4.2(b) of the same Agreement because, *inter alia*, the determination failed to respect the requirement of parallelism between the scope of the investigation of injury and the scope of the safeguards measures;

(h) The United States violated Article 3 of the Agreement on Safeguards and Article X:3 of the GATT 1994 because, *inter alia*, of the failure to afford an opportunity for sufficient participation by interested parties and to conduct an adequate investigation, including undue reliance on confidentiality restriction to bar disclosure of information and the failure to set forth in the published report the findings and reasoned conclusions on all pertinent issues of fact and law, including the justifications for the exclusion of Canada and Mexico, the actual measures imposed by the President, and the treatment afforded to tin mill products;

(i) The United States violated Article 5 of the Agreement on Safeguards because, *inter alia*, the relief exceeded that necessary to prevent or remedy serious injury and to facilitate adjustment;

(j) The United States actions are also inconsistent with Article XVI of the Marrakesh Agreement establishing the WTO because the United States has failed to ensure conformity of its laws, regulations and administrative procedures with the obligations under the Agreement on Safeguards and the GATT 1994.

IV. CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS REQUESTED BY THE COMPLAINANTS

A. EUROPEAN COMMUNITIES

4.1 The European Communities requests the Panel to find that:

(a) The United States has, inconsistently with Article 2.1 of the Agreement on Safeguards, grouped together many different products for the purposes of determining whether there are increased imports under such conditions as to cause injury and has, inconsistently with Article 2.1 and Article 4.2(a) in conjunction with Article 4.1(c) of the Agreement on Safeguards, failed to identify the domestic industries producing like or directly competitive products to those allegedly being imported in increased quantities;

(b) The United States has, inconsistently with Article 2.1 of the Agreement on Safeguards, imposed its safeguard measures in the absence of a sharp, sudden, recent and significant increase in imports;

(c) The United States has, inconsistently with Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards, failed to provide an adequate and reasoned explanation of the existence of serious injury and has failed to examine the financial state of the domestic industry as a whole as required by Article 4.2(a) in conjunction with Article 4.1(a) and 4.1(c) of the Agreement on Safeguards;

(d) The United States has, inconsistently with Articles 2.1 and 4.2 of the Agreement on Safeguards, failed to establish any causal link between any increased imports and any serious injury since it simply examined whether the other causes of injury were not a source of injury to the domestic industry equal to or greater than the injury allegedly caused by increased imports and has not, or has not explained in a clear and unambiguous manner, demonstrated how it has ensured that injury caused by other factors is not attributed to increased imports and in particular that injury caused by imports from countries which have been excluded from the safeguard measures (i.e. Canada, Mexico, Israel and Jordan) has not been attributed to increased imports from other sources;

(e) The United States has, inconsistently with Articles 5.1 of the Agreement on Safeguards, failed to ensure that its safeguard measures are applied only to the extent necessary to prevent or remedy serious injury caused by increased imports;

(f) The United States has, inconsistently with to the principle inherent in Articles 2.1, 4.2 and 5.1 of the Agreement on Safeguards, failed to ensure parallelism between the products for which an increase in imports within the meaning of Article 2.1 of the Agreement on Safeguards was claimed, and the products in respect of which the safeguard measures were imposed;

(g) Neither the Report of the investigation nor the other relevant documents set forth adequately the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the measures actually imposed and for all other elements mentioned above, as required by Article 3.1 of the Agreement on Safeguards; nor did they provide the analysis and demonstration required by Article 4.2(c) of the Agreement on Safeguards.

4.2 The European Communities considers that the above violations of the GATT 1994 and of the Agreement on Safeguards have nullified and impaired benefits accruing to it under the WTO Agreement and accordingly asks the Panel to recommend that the United States bring its safeguard measures into conformity with the above provisions by repealing them.

B. JAPAN

4.3 Japan requests the Panel:

(a) To find that the safeguard measures imposed by the United States on certain steel products are inconsistent with the Agreement on Safeguards and GATT 1994, including:

(i) the requirement to define the domestic industry as those producers producing a product like or directly competitive with the imported product, particularly with regard to the various flat-rolled products, as set forth in Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994, and to make such a decision in a uniform, impartial, and reasonable manner as required by Article X:3(a) of GATT 1994;

(ii) the requirement to find that increased imports of tin mill and stainless wire products had caused serious injury to the industries producing those specific products, or identifying a published report supporting such decisions, as required by Articles 2.1, 3.1 and 4.2(c) of the Agreement on Safeguards, and to make such a decision in a uniform, impartial, and reasonable manner as required by Article X.3(a) of GATT 1994;

(iii) the requirement that the measures be imposed only if increased imports exist, as set forth in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1 of GATT of 1994;

(iv) the requirement that increased imports cause serious injury to a domestic industry producing a like or directly competitive product, – and that such injury is not falsely attributed to imports, as set forth in Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

(v) the requirement that the sources of imports covered by an affirmative injury finding parallel the sources against which the measures are imposed, as set forth in Articles 2.1 and 2.2 of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

(vi) the requirement that the measure be applied *only to the extent necessary*, as required by Articles 3.1 and 5.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994; and

(vii) the requirement that measures be imposed on imports *irrespective of their source*, as set forth in Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994.

(b) Find, pursuant to Article 3.8 of the DSU, that as a consequence of the infringement of the above cited provisions, the United States has nullified and impaired the benefits accruing to Japan under the Agreement on Safeguards and GATT 1994;

(c) Recommend that the DSB request that the United States Government bring its safeguard measures on certain steel products into conformity with the WTO Agreement; and

(d) Suggest to the DSB that in order to conform, the United States must terminate the measure.

C. KOREA

4.4 Korea considers that the Untied States is in violation of its obligations under GATT 1994 and the Agreement on Safeguards in the following respects:

(a) The United States failed to comply with the provisions of Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 with respect to the determination of the relevant domestic industries that produce like or directly competitive products;

(b) The United States also failed to satisfy the obligations contained in Articles 2, 3 and 4 of the Agreement on Safeguards as well as Article XIX of GATT 1994 with respect to the investigation, findings, and decision regarding increased imports, serious injury, threat of serious injury and causation. The United States was in violation of Article X:3(a) as well with respect to tin mill products;

(c) The United States is in breach of Article XIX:1 of GATT 1994 as regards the requirement to demonstrate that "unforeseen developments" led to the increase in imports. In this respect, not only did the United States fail to conduct separate analyses for each product concerned, but also the explanations were insufficient to satisfy the requirement;

(d) The United States violated Article 2.2 of the Agreement on Safeguards and Articles I, XIII and XIX of GATT 1994 by failing to apply the safeguard measures to all imports irrespective of their sources on an MFN basis;

(e) The United States' violation of Article 2.2 of the Agreement on Safeguards and Articles I and XIX of GATT 1994 was compounded with the violation of Article X:3 of GATT 1994 and Article 3 of the Agreement on Safeguards. In order to exempt imports from Canada and Mexico, the United States President reversed the USITC's findings made in accordance with Section 311(a) of the NAFTA Implementation Act without providing sufficient, if any, explanation;

(f) The United States violated Article 2.1 of the Agreement on Safeguards in conjunction with Articles 2.2 and 4.2 of the Agreement on Safeguards by failing to meet the requirement of parallelism between the investigation and the measures;

(g) The United States committed violations under Article 3 of the Agreement on Safeguards, in conjunction with Articles 2, 4 and 5 of the Agreement on Safeguards, because it failed to afford an opportunity for sufficient participation by interested parties, to conduct an adequate investigation, to provide critical information on which it relied, and to set forth in the published report the findings and reasoned conclusions on all pertinent issues of fact and law, including the justification for the actual measure imposed and the justification for the exclusion of Canada, Mexico, Israel and Jordan;

(h) The safeguard measures exceeded the extent necessary to prevent or remedy serious injury and to facilitate adjustment, and thus are in violation of Article 5 of the Agreement on Safeguards. The measures were not limited to the serious injury caused by increased imports;

(i) The safeguard measures are also in violation of Article 7.1 of the Agreement on Safeguards because the duration of the measures extends beyond the period of time necessary to remedy or prevent serious injury;

(j) The United States also violated various procedural provisions of Article 12 of the Agreement on Safeguards by failing to provide "adequate opportunity" for consultations regarding the application of safeguard measures, to provide pertinent information, and to make appropriate notifications;

(k) The United States is in breach of Article 8.1 of the Agreement on Safeguards because a substantially equivalent level of concessions between exporting Members and the United States has not been maintained;

(l) The United States violated Article 9.1 of the Agreement on Safeguards by failing, *inter alia*, to exclude developing countries in a non-discriminatory manner.

4.5 Accordingly, Korea requests that the Panel consider and find that the United States measures concerning imports of certain steel products are inconsistent with the above-listed provisions of the WTO Agreement.

D. CHINA

4.6 China requests the Panel to:

(a) Find that the United States safeguard measures on certain steel products, imposed by Proclamation No. 7529 of 5 March 2002, entitled "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products" and explained in a Memorandum of 5 March 2002, entitled "Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America" (published in the Federal Register Vol. 67, No. 45 of 7 March 2002), are inconsistent with:

(i) Article XIX:1 of the GATT 1994, since the precondition of the "unforeseen developments" was not satisfied;

(ii) Articles 2.1, 4.2(a) and 4.2(b) in conjunction with Article 4.1(c) of the Agreement on Safeguards, since, for certain products, there was an incorrect definition of "the imported product concerned" and of the relevant domestic industries that produce like or directly competitive products to those allegedly being imported in increased quantities;

(iii) Article 2.1 of the Agreement on Safeguards, since there were no increased imports for many of the imported products under investigation;

(iv) Articles 2.1 and 4.2(a) of the Agreement on Safeguards, since for certain products the USITC failed to provide an adequate and reasoned explanation supporting its findings on injury;

(v) Articles 2.1 and 4.2(b) of the Agreement on Safeguards, since any increase in imports that may have occurred did not cause any serious injury or threat of serious injury that may have been suffered by the relevant domestic industries, in particular because injury was not being suffered by the relevant domestic industries and because injury or threat thereof caused by other factors was attributed to imports;

(vi) Article 5.1 of the Agreement on Safeguards, since the United States safeguard measures are not applied only to the extent necessary to prevent or remedy serious injury;

(vii) Articles 2.1, 4.2 and 5.1 of the Agreement on Safeguards, since there is a lack of parallelism between the products for which an increase in imports was found or claimed and the products in respect of which the protective measures were imposed;

(viii) Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT 1994, since the determination and the allocation of the tariff rate quota for slabs were incorrect and/or discriminatory;

(ix) Article 9.1 of the Agreement on Safeguards, since imports of some steel products from China as a developing country were not excluded from the application of the safeguard measures;

(x) Article I:1 of the GATT 1994, since the United States measures discriminate between products originating in China and products originating in other countries.

(b) Find, pursuant to Article 3.8 of the DSU, that as a consequence of the infringement of the above cited provisions, the United States has nullified and impaired the benefits accruing to China under the Agreement on Safeguards and GATT 1994;

(c) Recommend that the DSB request that the United States bring its safeguard measures on certain steel products into conformity with the WTO Agreement; and

(d) Suggest to the DSB that in order to conform, the United States must terminate the measure.

E. SWITZERLAND

4.7 Switzerland requests the Panel to:

(a) Find that the safeguard measures imposed by the United States on certain steel products are inconsistent with the Agreement on Safeguards and GATT 1994, including:

(i) the precondition of "unforeseen development" laid down in Article XIX:1 of GATT 1994 was not satisfied;

(ii) the requirement to define the domestic industry as those producers producing a product like or directly competitive with the imported product, particularly with regard to welded tubular products (other than OCTG), as set forth in Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

(iii) the requirement to find that increased imports of welded tubular products (other than OCTG) had caused serious injury to the industries producing

those specific products, as required by Articles 2.1 and 4.2(c) of the Agreement on Safeguards;

(iv) the requirement that increased imports cause serious injury to a domestic industry producing a like or directly competitive product, and that such injury is not falsely attributed to imports, as set forth in Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

(v) the requirement that the sources of imports covered by an affirmative injury finding parallel the sources against which the measures are imposed, as set forth in Articles 2.1 and 2.2 of the Agreement on Safeguards and Article XIX:1 of GATT 1994;

(vi) the requirement that the measure be applied only to the extent necessary, as required by Article 5.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994; and

(b) Find, pursuant to Article 3.8 of the DSU, that as a consequence of the infringement of the above cited provisions, the United States has nullified and impaired the benefits accruing to Switzerland under the Agreement on Safeguards and GATT 1994;

(c) Recommend that the DSB request that the United States Government bring its safeguard measures on certain steel products into conformity with the WTO Agreement; and

(d) Suggest to the DSB that in order to conform, the United States must terminate rapidly the measure.

F. NORWAY

4.8 Norway requests the Panel to find that:

(a) By failing to demonstrate the existence of "unforeseen developments", the United States violated Article XIX:1 of the GATT 1994;

(b) Furthermore, the lack of justification and demonstration, in the report of the competent authorities, of "unforeseen developments" also results in a violation of Article 3.1 of the Agreement on Safeguards;

(c) As a consequence of the fact that the USITC only considered the issue of unforeseen developments belatedly in February 2002, third parties were not provided with an opportunity to "present evidence and their views" on the issue of unforeseen developments. The United States has thereby committed a separate violation of Article 3.1 of the Agreement on Safeguards*;*

(d) By failing to identify each specific product that is being imported, by failing to identify properly the "like product", and by failing to appropriately define the domestic industry of that like product, the United States acted inconsistently with its obligations under Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994;

(e) By excluding all informative tables regarding the domestic industry producing the like product, including their names, there is no way of ascertaining how the determinations are made in respect of the domestic industry, thus making it impossible to investigate a possible wrongdoing by the United States. As such, this is also a breach of Article 3.1 of the Agreement on Safeguards*;*

(f) The United States has violated its obligations under Article 2.1 of the Agreement on Safeguards by taking safeguard measures concerning the tin mill products without properly determining the existence of a sharp, sudden, recent and significant increase;

(g) The United States has also violated its obligations under Article 3.1 of the Agreement on Safeguards because the USITC failed to provide adequate and reasoned explanations of how the facts available to the USITC support the determination of a recent, sudden, sharp and significant increase in imports;

(h) The United States has failed to demonstrate in a reasoned and adequate manner the existence of a causal link between the alleged serious injury and increased imports. The United States has consequently acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards and, in addition, Articles 3.1 and 4.2(c) since there are no published reports that adequately sets forth findings and reasoned conclusions on all pertinent issues of fact nor a demonstration of the relevance of the factors examined;

(i) The findings and conclusions made by the President in respect of tin mill products, specifically as regards the treatment of the alleged "tie vote", being not supported by the USITC report or any other published report, also violates Articles 3.1 and 4.2(c) of the Agreement on Safeguards;

(j) The United States breached the principle of parallelism inherent in Articles 2.1 and 4.2(b) of the Agreement on Safeguards by failing to establish explicitly that imports from countries other than Israel, Jordan, Canada and Mexico alone satisfied the conditions set out in Articles 2.1 and 4 for the imposition of a safeguards measure;

(k) The US measures go beyond the "extent necessary" to prevent or remedy serious injury as required by Article 5.1 of the Agreement on Safeguards, and the measures also violate Articles 3.1 and 7.1 of the Agreement on Safeguards;

(l) The United States, by not making use of the latest import data available at the time the safeguard measure took effect when determining which developing countries should be excluded from the measures, violated Article 9.1 of the Agreement on Safeguards, and thus also Article I.1 of the GATT 1994.

4.9 Norway respectfully submits that the Panel should find that the United States violated its WTO commitments on all the above accounts, and consequently conclude that the safeguard measures imposed by the United States on certain steel products are inconsistent with the Agreement on Safeguards and GATT 1994.

4.10 Consequently, the Panel should suggest to the DSB that the United States be requested to bring its measure into conformity with its obligations under the Agreement on Safeguards and the GATT 1994.

4.11 Norway, furthermore, suggests that the Panel make use of the power vested in it under the Dispute Settlement Understanding, Article 19.1, and suggest the appropriate way in which the United States may fulfil its obligations. In the present case, given the gross violations committed in respect of all the steps in a safeguards investigation, Norway respectfully submits that the Panel should suggest that the measure be immediately withdrawn.

G. NEW ZEALAND

4.12 New Zealand requests the Panel to find that:

(a) The United States has failed to demonstrate the existence of "unforeseen developments" as required by GATT Article XIX:1(a);

(b) The United States has failed to define the "domestic industry that produces like or directly competitive products" in accordance with the provisions of Articles 2.1 and 4.1(c) of the Agreement on Safeguards;

(c) The United States has failed to comply with the requirement of Article 2.1 of the Agreement on Safeguards that there be an increase in imports before a safeguard measure is imposed;

(d) The United States has failed to demonstrate the existence of "serious injury" being suffered by the domestic industry, as required by Articles 2.1 and 4 of the Agreement on Safeguards;

(e) The United States has failed to demonstrate the existence of the causal link between the alleged increased imports and the alleged serious injury or threat thereof, as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards. Furthermore, the United States attributed to imports, injury caused by other factors, contrary to Article 4.2(b) of the Agreement on Safeguards;

(f) The United States has failed to ensure parallelism between the products for which an increase in imports within the meaning of Article 2.1 of the Agreement on Safeguards was found or claimed, and the products in respect of which the safeguard measures were imposed, contrary to the principles inherent in Articles 2.1, 2.2, 4.2 and 5.1 of the Agreement on Safeguards;

(g) The United States has failed to apply its safeguard measures only to the extent necessary to prevent or remedy serious injury as required by Article 5.1 of the Agreement on Safeguards;

(h) The United States has failed to provide findings and reasoned conclusions on all pertinent issues of fact and law as required by Article 3.1 of the Agreement on Safeguards.

4.13 Accordingly, New Zealand respectfully requests the Panel to recommend to the DSB that the United States bring its treatment of imports of steel products into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

H. BRAZIL

4.14 Brazil requests the Panel to find:

(a) That the determination of a single flat-rolled carbon steel "like" product and a single domestic industry producing that "like" product is contrary to United States obligations under Articles 2.1 and 4.2(c) of the Agreement on Safeguards.

(b) That the United States imposition of safeguard measures on flat-rolled carbon steel was inconsistent with the requirement of an increase in imports as a pre-condition to the imposition of such measures under Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

(c) That the United States failed to establish the required causal link between imports and injury to the domestic industry in the importing country as required by Article 4.2(b) of the Agreement on Safeguards.

(d) That the United States again failed to distinguish between injury caused by imports and injury caused by other factors as required by Article 4.2(b) of the Agreement on Safeguards and ignored the specific findings on this issue in three previous panel and Appellate Body proceedings.

(e) That the United States again failed to meet the parallelism requirement of Articles 2.1 and 2.2 of the Agreement on Safeguards and ignored the specific prior findings of panels and Appellate Body on this issue.

(f) That the United States measures, even if justified, were more restrictive than necessary to address the injury from increased imports, contrary to the requirements of Articles 3.1 and 5.1 of the Agreement on Safeguards.

(g) That the United States imposed safeguard measures on tin mill products without a finding of injury and causation as required by Article 2 of the Agreement on Safeguards.

(h) That the imposition of safeguard measures on tin mill products was also inconsistent with the increased imports requirement of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 and the requirement to establish a causal link between imports and injury of Article 4.2(b) of the Agreement on Safeguards and to distinguish between injury from imports and injury from other factors.

4.15 Brazil further requests that the Panel make the following recommendations:

(a) That the United States bring its law and practice on increased imports and causation into conformity with the findings of this panel, prior panels, and the Appellate Body.

(b) That the United States immediately terminate safeguard measures on flat-rolled carbon steel products and tin mill products.

(c) That the United States immediately bring its law and practice on the treatment of NAFTA countries into conformity with the parallelism requirements found applicable by this panel, prior panels, and the Appellate Body.

(d) That the Panel make it clear to the DSB the extent to which the inconsistencies in United States actions with its WTO obligations are inconsistencies which have been addressed in one or more prior panel and Appellate Body reports; and that it make clear to the DSB the extent to which the United States actions were blatantly and obviously inconsistent with United States obligations based on the text of the relevant agreements and prior Appellate Body findings.

V. ORGANIZATIONAL MEETING – REQUEST FOR PRELIMINARY RULINGS

5.1 On 29 July 2002, pursuant to Article 12.3 of the DSU, the Panel met with the parties to establish the timetable for these proceedings and to address other organizational matters relating to the panel process.

5.2 During that meeting, the parties raised a series of objections to, and made comments on, the draft timetable that had been proposed and the rules of procedures that the Panel had sent to the parties in advance of the meeting.

5.3 On 31 July 2002, the Panel sent a letter to all parties containing a series of preliminary rulings on organizational matters which are set out below:

> "Following the organizational meeting of the Panel that was held with parties on 29 July 2002, and after careful consideration of the arguments presented by the parties in relation to various aspects of the proposed timetable and working procedures, we would like to inform the parties of the following:
>
> Timetable
>
> The Panel notes at the outset that this case is likely to impose a heavy burden on parties in terms of their obligations to make submissions as set out in the timetable for the proceedings, a copy of which is attached. As is noted at the end of the timetable, the Panel would like to emphasize that the calendar may be changed during the panel process. The Panel would also like to assure parties that it will do its utmost, within reason, to accommodate the parties' concerns and requests in relation to the deadlines set out in the timetable. Some of the requests that have been made by the parties in this respect are already reflected in the attached timetable.
>
> Working procedures
>
> With respect to the request by the United States to require production of non-confidential versions of written submissions within 14 days following the filing of the written submissions, the Panel notes that Article 18.2 of the DSU, upon which paragraph 3 of the Working Procedures is based, does not impose any deadlines with respect to the production of non-confidential summaries. The Panel recalls that, although the production of a non-confidential summary is mandatory upon request by any WTO Member, it is also WTO practice for panels to leave parties to agree on the date for production of such summaries, if any deadline is to apply. Accordingly, the Panel urges the parties to agree as early as possible on deadlines for production of

such non-confidential summaries so as to ensure that appropriate information relating to the present dispute is disclosed to the public.

In relation to the requirement contained in paragraph 5 of the Working Procedures to submit executive summaries, on the basis of discussions with the parties, the Panel has decided to allow the United States to submit executive summaries that should not exceed 30 pages. The first 15 pages should deal with the common claims raised by the complainants. The additional 15 pages would allow the United States to deal with specific claims made individually by one or more of the complainants but which are not common to all the complainants.

The United States has also requested the replacement of the reference to "rebuttal submissions" in paragraph 11 of the Working Procedures with the word "rebuttals". In support of this proposal, the United States makes the argument that the word "submission" is ordinarily taken to mean written submissions. Hence, the reference to "rebuttal submissions" in paragraph 11 would restrict the application of the qualification in that paragraph to rebuttals that have been made in writing and would not extend to rebuttals made orally. The complainants argue in response that the suggested amendment would allow, for example, new arguments and evidence to be adduced orally at the Panel's second substantive meeting.

We recall the comments made by the Appellate Body in the case *Argentina – Textiles and Apparel*[121] relating to what parties may argue and submit in preparation for and during the second substantive meeting:

> It is true that the Working Procedures "do not prohibit" submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. … Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.

We have, therefore, drafted paragraph 11 to ensure due process and to ensure that new evidence is not adduced at a late stage in the panel process, while simultaneously ensuring that all parties and the Panel are fully informed of all relevant evidence.

With regard to the time by which submissions must be filed with the WTO Dispute Settlement Registrar as provided for in paragraph 17(b) of the Working Procedures, the Panel has decided to require parties to file their written submissions with the Registrar by 5:30 p.m. on the deadlines established by the Panel, except in relations to deadlines falling on a Friday in which case the submissions should be filed by 5:00 p.m. In exceptional circumstances when it is not possible to comply with these time deadlines, the parties may agree upon an alternative arrangement with the Secretary to the Panel (Ms Dariel De Sousa).

[121] WT/DS56/AB/R, para. 79.

The Panel will therefore proceed according to the attached Working Procedures and Timetable. Finally, the Panel would like to remind parties that this communication, constituting part of the panel process, is confidential."

VI. THE PANEL'S WORKING PROCEDURES

6.1 The working procedures adopted by the Panel for the present disputes are set out below:

"1. In its proceedings the Panel shall follow the relevant provisions of the DSU. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted.

5. Within seven days following the date for filing a submission, each of the parties and third parties is invited to provide the Panel with an executive summary of their submissions. The executive summaries will be used only for the purpose of assisting the Panel in drafting a concise factual and arguments section of the Panel report to the Members. They shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. The executive summary to be provided by each party should not exceed 15 pages in length and shall summarise the content of the written submissions. In relation to the executive summaries to be provided by the United States, it is allowed an additional 15 pages to address issues that have been raised in the submissions of one or more of the other parties that are specific to those parties and which are not common to the other parties. The summary to be provided by each third party shall summarize their written submissions, as applicable, and should not exceed 5 pages in length.

6. At its first substantive meeting with the parties, the Panel shall ask the Complaining Parties to present their cases. Subsequently, and still at the same meeting, the United States will be asked to present its point of view. The parties will then be allowed an opportunity for final statements, with the Complaining Parties presenting their statements first.

7. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of this session.

8. Formal rebuttals shall be made at a second substantive meeting of the Panel. The United States shall have the right to take the floor first, to be followed by the Complaining Parties. The parties shall submit, prior to that meeting, written rebuttals and executive summaries to the Panel.

9. The Panel may at any time put questions to the parties and to the third parties and ask them for explanations either in the course of a meeting or in writing. Answers to questions shall be submitted in writing by the date(s) specified by the Panel. Answers to questions after the first meeting shall be submitted in writing, at a date to be determined by the Panel.

10. A party shall submit any request for a preliminary ruling not later than its first submission to the Panel. If the Complaining Parties request such a ruling, the United States shall submit its response to the request in its first submission. If the United States requests such a ruling, the Complaining Parties shall submit their responses to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause.

11. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party(ies) shall be accorded a period of time for comment, as appropriate.

12. The parties to the dispute have the right to determine the composition of their own delegations. The parties shall have the responsibility for all members of their delegations and shall ensure that all members of the delegation act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings.

13. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the parties to the dispute a written version of their oral statements, preferably at the end of the meeting, and in any event not later than the day following the meeting. Parties and third parties are encouraged to provide the Panel and other participants in the meeting with a provisional written version of their oral statements at the time the oral statement is presented.

14. In the interest of full transparency, the presentations, rebuttals and statements shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, shall be made available to the other party or parties.

15. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by parties, parties shall sequentially number their exhibits throughout the course of the

dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6.

16. Following issuance of the interim report, the parties shall have one week to submit written requests to review precise aspects of the interim report – unless the Panel decides otherwise at the second substantive meeting of the parties and/or to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at that time. Following receipt of any written requests for review, if no further meeting with the Panel is requested, the parties shall have the opportunity, within 2 weeks, to submit written comments on the other party's written requests for review. Such comments shall be strictly limited to responding to the other party's or parties' written request for review.

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

a. Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission on third parties. Each third party shall serve its submissions on the parties and other third parties. Parties and third parties shall confirm, at the time a submission is provided to the Panel, that copies have been served as required.

b. The parties and the third parties shall provide their written submissions to the Dispute Settlement Registrar by 5:30 p.m. on the deadlines established by the Panel and by 5:00 p.m. if the deadline falls on a Friday. If, due to exceptional circumstances, it is not possible for submissions to be provided to the Registrar by the times stipulated, parties should agree otherwise with the Secretary to the Panel, Ms Dariel De Sousa. The parties and the third parties shall provide the Panel with 10 paper copies of their written submissions. All these copies must be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (Office 3154).

c. Ten copies of all submissions (oral and written), exhibits and other documents relating to this dispute must be submitted to the Panel through the WTO Secretariat when the original documents are filed with the Secretariat.

d. At the time they provide paper copies of their submissions, the parties and third parties shall also provide the Panel with an electronic copy of the submissions on a diskette or as an e-mail attachment, in a format compatible with the Secretariat's software (e-mail to the Dispute Settlement Registrar at DSregistry@wto.org, with a copy to the Secretary to the Panel, Dariel De Sousa at dariel.desousa@wto.org)."

VII. ARGUMENTS OF THE PARTIES

7.1 The following sections summarize the arguments made by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil and the United States. These parties all presented their arguments in different ways. In order to avoid repetition and for the convenience of the Panel, the complainants, at the first and second substantive meetings, divided the oral presentation of the different aspects of this case amongst themselves. Accordingly, some arguments are attributed to the complainants generally while the detail of individual complainants' arguments is set out in their

submissions and answers to questions. Further, the list of complainants to which other arguments are attributed is not necessarily exhaustive.

A. CONDITION OF THE US STEEL INDUSTRY

1. The complainants' assessment of the US domestic steel industry

(a) Main characteristics of the US steel industry

7.2 Brazil argues that the United States' steel industry is marked by contradictions and contrasts in performance and prospects. Brazil notes that, in the year 2000, there were 78 steel producers in the United States with raw steel capacity, as well as a lesser number of steel processors with no raw steel making capacity of their own.[122] Japan, New Zealand and Brazil note that, in that same year, the United States industry produced 112 million tons of raw steel, the industry's highest level over the past 10 years and a 27% increase over 1991.[123] Japan and Brazil further note that a 9% dip in capacity between 1991 and 1994 was completely erased by over 20 million tons of new capacity brought on line between 1994 and 2000, representing an increase of over 18%.[124] Japan and New Zealand submit that this increase made the United States the third-largest steel-producing nation in the world.[125] Brazil continues that imports of CCFRS products, including slab, hot-rolled, cold-rolled and coated products, where the United States' industry capacity was most heavily invested, peaked in 1998 and declined in 1999 and 2000.[126]

7.3 Brazil argues that, yet, the performance of the United States' steel industry declined, even with the retreat of imports[127], revealing an industry that is weak, fragmented, and saddled with substantial inefficient and/or antiquated capacity well in excess of demand. More importantly, a closer look at industry data shows an industry split between two primary segments and nearing the end of a fundamental shift in production technology and market power. These two industry segments are best defined according to their production processes and input, i.e., the integrated segment and the minimill segment.[128] The complainants explain that integrated producers – of which there were 13 in 2000 – smelt iron ore using coke in a blast furnace to produce molten iron, which is subsequently poured into either an open-hearth furnace or a basic oxygen furnace. The hot metal is processed into steel when oxygen is blown into the metal bath. Minimill producers – of which there were 65 in 2000 – produce molten steel by melting scrap or scrap substitutes (e.g. direct-reduced iron, hot-briquetted iron and iron carbide) in an electric arc furnace, thereby missing the initial smelting stage.[129]

(b) History of the US steel industry

7.4 According to the European Communities, to properly understand the current situation of the United States integrated steel producers, one must return to the post-World War II period.[130]

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[122] Brazil's first written submission, para. 57.

[123] Japan's first written submission, para. 54; New Zealand's first written submission, para.2.17; Brazil's first written submission, para. 57.

[124] Japan's first written submission, para. 54; Brazil's first written submission, para. 57.

[125] Japan's first written submission, para. 54; New Zealand's first written submission, para. 2.17, quoting USITC Report, Vol. II, OVERVIEW–25.

[126] Brazil's first written submission, para. 57.

[127] USITC Report, Vol. II at OVERVIEW 25 (Exhibit CC-6) at FLAT 16-21(Exhibit CC-6).

[128] Brazil's first written submission, paras. 58-59.

[129] USITC Report Vol. II at OVERVIEW 7-8, 9-10 (Exhibit CC-6).

[130] European Communities' first written submission, para. 33.

7.5 The European Communities submits that the United States' steel industry was one of the few, if not the only, substantial steel industry left intact following World War II. In the post-war construction boom, demand for steel rocketed and the industry expanded capacity. Rather than convert to Basic Oxygen Furnaces (BOF) technology, the United States steel industry simply expanded its relatively less efficient Open Hearth Furnaces, which had been in service since the late 19th century. In the mid-to-late 1950s, the steel industries labour relations deteriorated. During this period, the steel worker's unions threatened to strike unless major pay increases were agreed to. This culminated in the 116 day strike in 1959 in which all steel capacity in the United States was closed, and led to higher then inflation pay increases throughout the 1960's.[131]

7.6 The European Communities submits that the 1960s also saw the re-emergence of other countries as major exporters. Japanese and European companies, using the most recent BOF technology, started exporting to the United States, benefiting from their advanced technology to offer better prices.[132]

7.7 According to the European Communities, the response of the integrated United States producers was immediate and effective: import protection. Using the threat of the imposition of quantitative restrictions, the United States Government negotiated VRAs with the major exporters to the United States market.[133] These came into force in 1969, and remained in place until 1974.[134] Korea further submits that the United States historically protected its market through a variety of mechanisms, including a myriad of anti-dumping and countervailing duty orders against various steel products from numerous countries.[135] The European Communities submits that a pattern was born. Rather than innovate and compete (made more difficult by difficult labour relations), the United States steel industry sought import protection.[136]

7.8 Korea argues that by 2000, there were 138 anti-dumping and countervailing duty orders or suspension agreements in place against various steel products from various countries.[137] Finished steel products subject to anti-dumping and countervailing duties orders, safeguard actions, or pending investigations by the United States in year 2000 accounted for 39% of total imports of finished steel from all countries.[138]

(c) Evolution of the US steel industry

7.9 According to the European Communities, in the 1970s and 1980s, integrated mills could take comfort from the fact that technology constrained minimills to the low-quality product end of the market.[139] The first minimills began producing the least sophisticated kinds of long products (such as concrete reinforcing bars) in the 1960s. In the 1970s, minimills diversified into more sophisticated long products (wire rods and structural shapes), coming to dominate the long products market by the

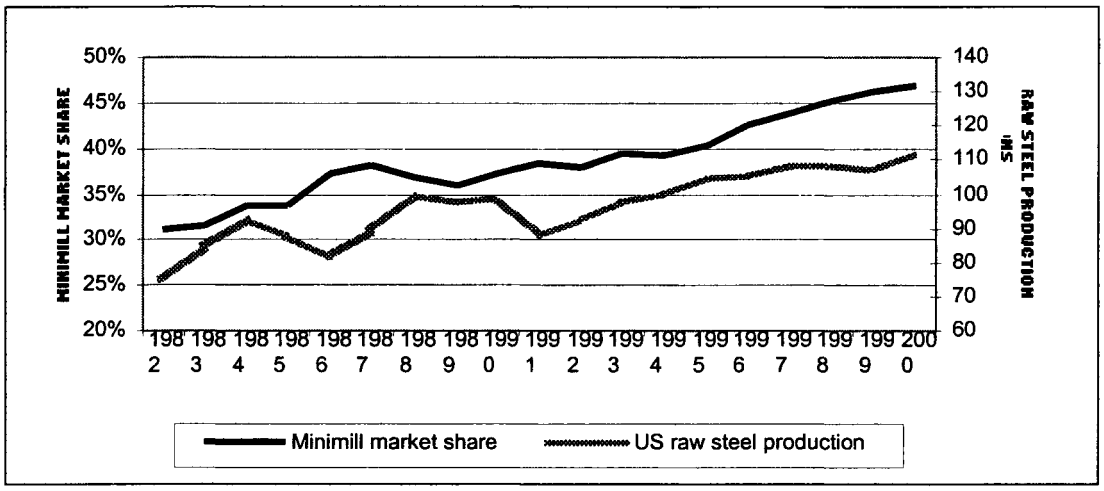
[131] European Communities' first written submission, para. 33.
[132] European Communities' first written submission, para. 34.
[133] European Communities' first written submission, para. 35.
[134] European Communities' first written submission, para. 35.
[135] Korea's first written submission, para. 9.
[136] European Communities' first written submission, para. 35.
[137] USITC Report, Vol. II, Table OVERVIEW-1, p. OVERVIEW-3-6 (Exhibit CC-6).
[138] Respondents' Joint Prehearing Framework Brief, Inv. No. TA-201-73 (11 September 2001) ("Respondents' Joint Framework Brief"), Exhibit 3 (Exhibit CC-50).
[139] Tornell, "Rational Atrophy: the United States steel industry", p. 14, Exhibit CC-61.

1990s. The European Communities submits that the USITC found that the minimill share of United States raw steel production increased substantially during the 1990s.[140] [141]

7.10 The European Communities further submits that advances in technology have meant that minimills can now produce high quality cold-rolled, plate and coated steel in direct competition with integrated producers.[142] By 1998, domestic minimills had a total production capacity of 49 million tonnes, including 2 millions tonnes of cold-rolled steel capacity, 17 million tonnes of new hot-rolled steel capacity and 4 million tonnes of new plate capacity.[143] This capacity came on line just as the price of scrap (the essential raw material for minimills) dropped by 40% following the Asian financial crisis.[144] [145]

7.11 Similarly, Brazil notes that in the last decade, the United States' industry has witnessed major increases of more than 50% in the amount of raw steel produced by minimill producers. Meanwhile, the amount of raw steel produced by integrated mills remained relatively constant over the same period.[146] Brazil argues that data reported by the USITC indicate that minimill producers constituted 47% of all raw steel production in 2000, up from 38.4% in 1991. Increases in United States' raw steel production were commensurate with increases in United States' minimill share of that production. Japan and Brazil refer to the following figures:[147]

Chart 1: United States Minimill Share of United States Raw Steel Production[148]



[140] USITC Report, Vol. II, p. OVERVIEW-26, Figure OVERVIEW-9. The precise data have not been provided, so the figures used are estimates based on the USITC's table.

[141] European Communities' first written submission, para. 37

[142] USITC Report, Vol. I, p. 50.

[143] Barringer, "Paying the Price for Big Steel", p. 252, Exhibit CC-61.

[144] Barringer, "Paying the Price for Big Steel", p. 6, Exhibit CC-61.

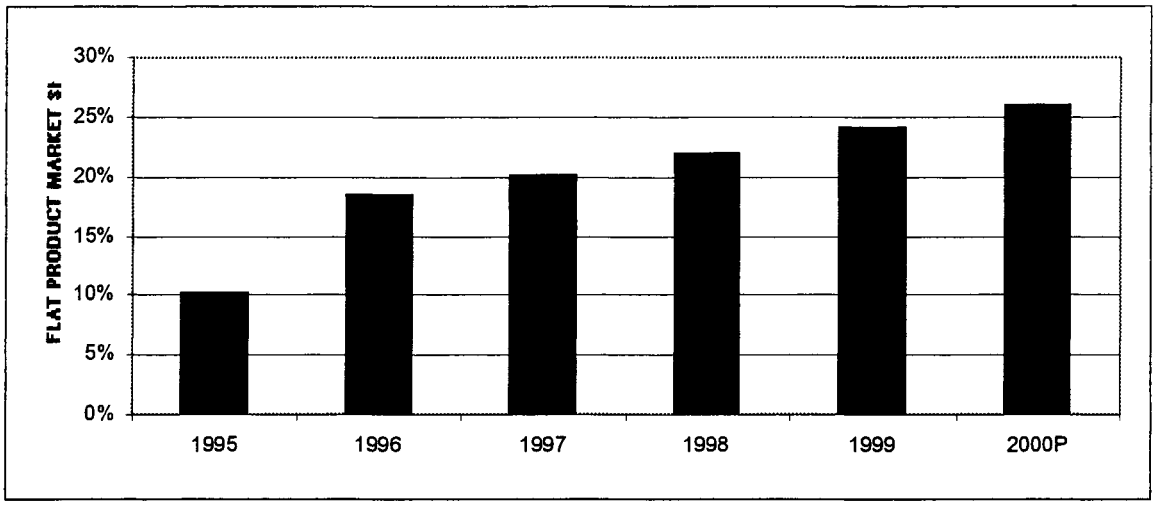
[145] European Communities' first written submission, para. 38.

[146] USITC Report Vol. II at OVERVIEW 20 (Exhibit CC-6).

[147] Japan's first written submission, para. 59; Brazil's first written submission, para. 60.

[148] USITC Report Vol. II at OVERVIEW 25-26, Figure OVERVIEW 9, citing AISI, "Annual Statistical Report", 2000 (Exhibit CC-6). The USITC chart listed production between 1991 and 2000. Additional data from 1990 ed. of the "Annual Statistical Report", provided in this chart (Exhibit CC-62).

Chart 2: United States Minimill Share of United States Flat Product Production[149]



7.12 Japan and Brazil note that, according to the USITC, this minimill expansion was the result of "heavy investment in new, greenfield electric arc furnace plants and in capacity increases in existing plants".[150] The USITC record reveals no comparable investment made by integrated mills. Rather, the record reflects an integrated industry mainly shutting down raw steel capacity in the face of rising maintenance and environmental costs, and minimill competition, while squeezing as much production as possible out of fewer and fewer steel facilities.[151] [152]

7.13 Japan and Brazil further argue that well before the initiation of the United States' safeguards action, steady expansion in United States' minimill capacity had left minimills in complete control of domestic long product production. With long products effectively eliminated from the integrated industry product line, integrated producers turned to the only remaining product line where they enjoyed any advantage over their minimill competitors – CCFRS. Japan and Brazil submit that, however, the CCFRS advantage was short-lived. By the late 1980s, electric arc furnace technology coupled with thin-slab casting provided minimills with an entrée into the integrated segment's last mainstay.[153] [154]

7.14 Japan and Brazil continue that with the adoption of thin-slab casting, United States minimills would soon produce hot-rolled flat products. Production would later extend to higher value-added products including cold-rolled and coated sheet, all at the expense of integrated producers. In fact, the USITC's period of investigation captured the most prolific period of minimill expansion. Japan and Brazil illustrate by noting that Nucor installed the first thin-slab minimill capable of producing flat products in 1989, with an initial capacity of just 1 million tons.[155] Other mills would follow, with

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[149] Donald F. Barnett, "Double Ought-Naught", Presentation at World Steel Dynamics / American Metal Market Steel Survival Strategies XV, June 19-21, 2000 at Table 3, cited in Joint Prehearing Brief of Respondents: Product Group G01, Slab, September 11, 2001 at 18, Figure 1 (Exhibit CC-51).

[150] USITC Report Vol.II. at OVERVIEW-20 (Exhibit CC-6).

[151] For instance, Joint Prehearing Brief of Respondents: Product Group, G01, Slab Steel, 11 September 2001 at 31-41, 60-65 and Exhibits 3, 5, and 6 (Exhibit CC-51).

[152] Japan's first written submission, para. 60; Brazil's first written submission, para. 61.

[153] USITC Report Vol. II at OVERVIEW 20 (Exhibit CC-6).

[154] Japan's first written submission, para. 57; Brazil's first written submission, para. 62.

[155] Charles Yost, "Thin-Slab Casting / Flat Rolling: New Technology To Benefit United States Steel Industry", Industry Trade and Technology Review, USITC Pub. 3004 (October 1996) at 27 (Exhibit CC-66), cited in Respondents' Joint Prehearing Framework Brief, Sept. 11, 2001 at 57. This USITC Report provided a

minimill share of United States' flat product production increasing from just 10% in 1995 to 26% by 2000.[156] [157]

(d) Relative competitiveness of integrated producers and minimills

7.15 According to the European Communities and New Zealand, the USITC Report fails to emphasize that differences in inputs and production methods have had a significant impact on the competitiveness of minimills over integrated producers. New Zealand submits that in 1998, minimills enjoyed an 18.4% cost advantage over integrated firms producing sheet steel. By 2000, this cost advantage had increased to 21.8%.[158] Consequently, minimills were able to undercut integrated producers in the market and gained in market share.[159]

7.16 Japan and Brazil add that although the respondent submissions painstakingly documented and established the reasons for this fundamental shift and expansion in minimill production, they were largely ignored by the USITC. Japan and Brazil also point out that in an article covering the proliferation of thin-slab minimills published as early as 1996, the USITC reported findings by industry experts that between 3 and 6 million tons of integrated capacity would have to close because of the escalating costs of running such plants.[160] Japan and Brazil submit that, simply put, minimills enjoyed and continue to enjoy substantial cost advantages over integrated mills for myriad reasons.[161] [162] [163]

7.17 The European Communities and New Zealand submit that there are a number of differences in production inputs that enable minimills to produce steel at lower cost. First, the price of scrap tends to be cheaper than iron ore and coal. In 1998, a lowering of the domestic price of scrap due to a falling off of exports from the United States meant that minimills' scrap costs fell by 40%.[164] [165]

7.18 The European Communities and New Zealand also submit that since minimills miss out the stage where iron ore is smelted in a blast furnace, they are less labour intensive than integrated production. On average, minimills use 0.44 hours per ton of steel produced whereas integrated

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detailed analysis of on thin-slab casting in 1996 covering Nucor's commercial initiation of the technology in 1990, adoption by others, and the competitive effects of thin-slab technology.

[156] Donald F. Barnett, "Double Ought-Naught", Presentation at World Steel Dynamics / American Metal Market Steel Survival Strategies XV, June 19-21, 2000 at Table 3, cited in Joint Prehearing Brief of Respondents: Product Group G01, Slab, September 11, 2001 at 18, Figure 1 (Exhibit CC-51).

[157] Japan's first written submission, para. 58, Brazil's first written submission, para. 63.

[158] Crandall, p. 2 (Exhibit CC-61).

[159] European Communities' first written submission, para. 39; New Zealand's first written submission, para. 2.20.

[160] Charles Yost, "Thin-Slab Casting / Flat Rolling: New Technology To Benefit United States Steel Industry", Industry Trade and Technology Review, USITC Pub. 3004 (October 1996) at 31, n. 16 (Exhibit CC-66).

[161] Joint Prehearing Brief of Respondents: Product Group, G01, Slab Steel, Sept. 11, 2001 at 31-41 (Exhibit CC-51). Indeed, it was the testimony of executives from Nucor Steel, the largest minimill CCFRS producer, that it was their duty to shareholders to exploit this advantage. Hearing Transcript (Injury) at 1014 (Exhibit CC-58).

[162] Joint Prehearing Brief of Respondents: Product Group G01, Slab, Sept. 11, 2001 at 31-38 (Exhibit CC-51).

[163] Japan's first written submission, para. 62; Brazil's first written submission, para. 65.

[164] Barringer and Pierce, Executive Summary, p. 6 (Exhibit CC-61).

[165] European Communities' first written submission, para. 40; New Zealand's first written submission, para. 2.21

producers use 2.86 hours for each ton.[166] Nucor's first thin-slab minimill producing flat products had labour productivity of more than four times that of the most efficient integrated plants.[167] [168]

7.19 In addition, New Zealand submits that missing out the blast furnace stage means that minimills also require less energy. This means that the profitability of minimills is less affected by energy price rises.[169]

7.20 According to the European Communities and New Zealand, minimills tend to be smaller than the plants of integrated producers allowing them to benefit from economies of scale. The basic oxygen furnaces used by integrated producers must produce three million tons of steel per year to be economically viable whereas minimills can be viable at less than one million tons per year.[170] Thus, in periods of lower demand, minimills are more likely to continue to be profitable. Their smaller size allows minimills to locate nearer to their markets and to scrap sources lowering transport costs for both inputs and products.[171] By contrast, integrated producers traditionally locate near sources of iron ore and coal, or a deep-water port.[172]

7.21 New Zealand further submits that minimills can be built more cheaply and more quickly than integrated mills. They require less capital than is needed for new integrated facilities, and can be completed in two years or less.[173] In fact, the cost of constructing a hot-rolling mill of US$4-5 billion per integrated mill can be compared with the cost of US$400-500 million per minimill.[174] It is not surprising therefore that no new integrated production facilities have been built in the United States since the late 1970s.[175]

7.22 According to New Zealand, labour costs have also had an impact on the relative competitiveness of minimills and integrated producers. In the post-war period, integrated producers suffered from poor industrial relations, with strikes being threatened yearly. For many years, wages were negotiated between the United Steelworkers of America and the major integrated steel producers for the entire industry. This is reflected in the premium of the steelworkers wage relative to the manufacturing average. Between 1997 and 2001 alone, total compensation rose 9% from US$34.78 to US$37.91 per hour.[176] By comparison, the manufacturing average was US$24.30 per hour.[177] By contrast, minimills tend to have separate contracts with lower wages.[178] [179] Japan and Brazil agree that labour costs and productivity were superior among mills, with leading United States minimills needing as little as 0.33 man hours to produce a ton of steel compared to 4.1 man hours or even more

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[166] Barringer and Pierce, p. 256 (Exhibit CC-61).
[167] Tornell, p. 14 (Exhibit CC-61).
[168] European Communities' first written submission, para. 41; New Zealand's first written submission, para. 2.22.
[169] New Zealand's first written submission, para. 2.22.
[170] Tornell, p. 14 (Exhibit CC-61).
[171] Tornell, p. 14 (Exhibit CC-61).
[172] European Communities' first written submission, para. 42; New Zealand's first written submission, para. 2.23.
[173] Crandall, p. 11 (Exhibit CC-61).
[174] Barringer and Pierce, p. 255 (Exhibit CC-61).
[175] New Zealand's first written submission, para. 2.24.
[176] Hufbauer and Goodrich, p. 1 (Exhibit CC-61).
[177] Hufbauer and Goodrich, p. 1 (Exhibit CC-61).
[178] Hall, Christopher "Steel Phoenix: The Fall and Rise of the United States Steel Industry" (New York, 1997), p. 46 (Exhibit CC-61).
[179] European Communities' first written submission, para. 43; New Zealand's first written submission, para. 2.25

at some integrated mills. Many United States integrated producers were also found to be operating small, inefficient blast furnaces incapable of achieving economies of scale in the current competitive environment. Maintenance and repair costs for integrated producers dwarf those of minimills. Finally, minimills enjoyed much lower market entry costs, equating to only US$200 per annual ton of greenfield production capacity compared to US$1,000 per annual ton for integrated mills according to the USITC's own findings.[180] [181]

7.23 According to New Zealand, integrated producers also face "legacy costs". In the past, accounting rules allowed integrated steel companies to provide generous retirement and health benefits without having to deduct the future costs from current profits. In exchange for these benefits, unions accepted smaller hourly raises. However, retired steelworkers began to outnumber employees. Legacy costs in 2001 were estimated to be between US$30 and US$65 per ton of steel produced by integrated mills and totalling across the industry between US$1.7 and US$3.6 billion.[182] [183]

7.24 However, Japan and Brazil note that not all integrated mills resigned themselves to these severe competitive handicaps. At the opening of the USITC's period of investigation, some integrated mills had already made or were in the process of making tough restructuring decisions in order to compete more effectively. This led to the adoption of new business models to reduce production costs and/or vacate markets dominated by minimill producers.[184]

7.25 Japan and Brazil further posit that, ultimately, for a number of integrated mills, the only real long term solution is consolidation leading to a rationalization of capacity. Industry executives repeatedly cited the need for such consolidation during the remedy phase of the USITC's investigation. Yet this approach also presents problems for the industry. Brazil reiterates that high legacy costs, particularly post-employment health care and insurance benefits, discourage potential merger and acquisition moves. The USITC itself noted the huge liabilities and uncertainty involved.[185] No rational company would want to merge with or acquire an integrated mill with such liabilities, if doing so meant assuming these liabilities.[186]

(e) Impact of competition between minimills and integrated producers

7.26 New Zealand argues that since modern minimill products are now of a quality similar to the products made by integrated producers, purchasing decisions tend to be increasingly dominated by price.[187] Minimills are far more able to compete on price and remain profitable than are integrated producers and, as a result, have been able to increase their market share.[188]

7.27 New Zealand submits that, in fact, minimills have entirely pushed integrated producers out of the markets for lower-quality steel products such as concrete rebar, wire rod and H-beams. Between

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[180] See Joint Prehearing Brief of Respondents: Product Group G01, Slab, 11 September 2001, at 31-38 (Exhibit CC-51).

[181] Japan's first written submission, para. 63; Brazil's first written submission, para. 66.

[182] Hufbauer, Gary Clyde and Goodrich, Ben, "Steel: Big Problems, Better Solutions" (International Economics Policy Briefs No. 01-9. July 2001, p. 12 (http://www.iie.com/policy briefs/news01-9.htm) (Exhibit CC-61).

[183] European Communities' first written submission, para.44; New Zealand's first written submission, para. 2.26.

[184] Japan's first written submission, para 64; Brazil's first written submission, para. 67.

[185] USITC Report Vol. II at Overview 34-35 (Exhibit CC-6).

[186] Japan's first written submission, para. 67; Brazil's first written submission, para. 70.

[187] USITC Report, Vol II, Table FLAT-64 at FLAT-56.

[188] New Zealand's first written submission, para. 2.27.

1970 and 1989, demand for steel in the United States declined 22% yet minimills increased their share of steel production from 15% in 1970 to 37% in 1989.[189] Production on a large scale of high-quality steel products by minimills began during the period of investigation.[190] By 1998, domestic minimills had a total production capacity of 49 million tons, including two million tons of cold-rolled steel capacity, 17 million tons of new hot-rolled steel capacity and four million tons of new plate capacity.[191] The minimill share of domestic raw steel production reached 47.5% in 2001 and is continuing to rise.[192] [193]

7.28 According to Japan, New Zealand and Brazil, entering the USITC's period of investigation in 1996, the United States steel industry was facing an inevitable collision between new minimill capacity and older, less efficient, integrated capacity. Confronted with competition from expanding low-cost minimills, the integrated mills continued a long-standing practice of sacrificing profitability for size and tonnage.[194] The result was a substantial net addition to overall capacity well in excess of the market's ability to absorb the surplus.[195] In this regard, Japan and Brazil make reference to the following table:[196]

Table 1: Extent of Excess Capacity

Product	Change in 1996-2000 Domestic Capacity	Change in 1996-2000 Apparent Consumption	Additional Capacity in Excess of Growth in Demand
Flat-slabs	8,141,789	3,075,527	5,066,262
Flat-plate	3,160,108	-699,713	3,859,821
Flat-hot-rolled	9,759,734	6,591,707	3,168,027
Flat-cold-rolled	5,626,340	3,584,555	2,041,785
Flat-coated	5,549,240	3,229,450	2,319,790

7.29 Japan and Brazil contend that even the USITC is prepared to acknowledge a "significant incentive to maximize the use of steel making assets, which can affect producer's pricing behavior".[197] Yet the problems inherent in the capacity and demand trends within the industry over the period of investigation did not immediately arise, despite rising import levels. Surging United States consumption, stronger prices and high capacity utilization from 1996 through the first half of 1998 provided a short-term buffer. As demand flattened in late 1998 and 1999, however, domestic capacity continued to increase and the disparities between new minimill and old integrated capacity became increasingly apparent and market disruptive. The outcome was predictable. Marginal integrated

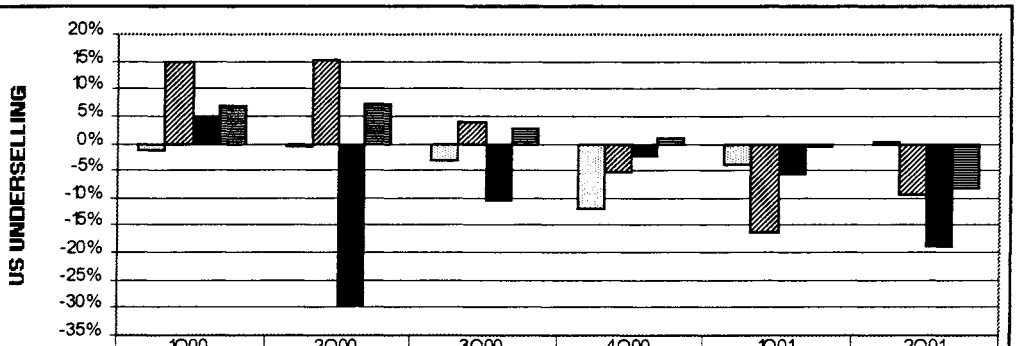
[189] Tornell, p. 4 (Exhibit CC-61).
[190] USITC Report Vol. I, p. 50 (Exhibit CC-61).
[191] Barringer and Pierce, p. 252 (Exhibit CC-61).
[192] Steel Manufacturers Association website: http://www.steelnet.org (Exhibit CC-61).
[193] New Zealand's first written submission, para. 2.28.
[194] Japanese Respondents' Prehearing Remedy Brief; General Issues (Flat-Rolled Products), 29 October 2001 at 16-19 (citing various industry experts on the capacity phenomenon) (Exhibit CC-56).
[195] Japan's first written submission, para. 68; New Zealand's first written submission, para. 2.29; Brazil's first written submission, para. 71.
[196] Japan's first written submission, para. 68; Brazil's first written submission, para. 71.
[197] USITC Report Vol. I at 63 (Exhibit CC-6).

firms attempting to maintain inefficient capacity fought more aggressively and desperately for sales, cutting prices to maintain volume and generate cash flow.[198]

7.30 In New Zealand's view, from mid-2000, the long-term struggle for market share between minimills and integrated producers was temporarily overshadowed by a substantial fall off in demand for steel in the United States. This had an impact on both types of producers. The fall in demand for steel reflected the general slow-down in the United States economy at the time. With the United States economy moving into recession in 2001, output of important steel-using sectors such as the automotive and fabricated metal products sectors contracted. These negative demand developments resulted in a 15% decline in apparent consumption of certain flat steel products during the first six months of 2001 compared with the comparable period in 2000.[199] As a consequence of lower demand, the domestic price of CCFRS products declined by 13%.[200] [201]

7.31 Brazil contends further that although the USITC still found that imports, not increased domestic capacity, led pricing downward[202], the data simply do not support the USITC's assessment. For example, as illustrated in Chart 3 below, the product-specific pricing data for the largest tonnage of plate, hot-rolled, cold-rolled and coated products all show the domestic industry underselling imports in most cases by the end of 2000 and the first two quarters of 2001. The USITC data seemingly reveals an industry sensitive to import declines rather than import increases. Domestic price underselling was at its greatest when imports were at their lowest. Brazil notes that what is missing from this equation is the presence of tremendous United States capacity overhang and its impact on the market.[203]

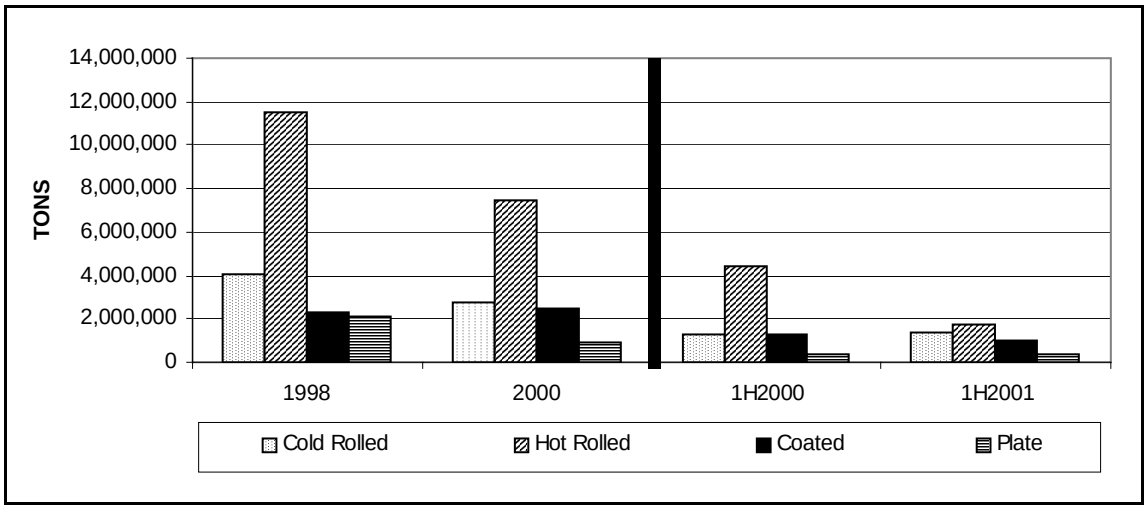
Chart 3: Underselling by United States Industry[204]



	1Q00	2Q00	3Q00	4Q00	1Q01	2Q01
Cold Rolled (Product 4B)	-1.40%	-0.40%	-3.00%	-12.00%	-3.80%	0.20%
Hot Rolled (Product 3A)	14.70%	15.40%	3.70%	-5.20%	-16.40%	-9.20%
Coated (Product 6B)	5.10%	-29.60%	-10.50%	-2.30%	-5.50%	-18.70%
Plate	6.70%	7.00%	2.80%	0.90%	-0.70%	-8.10%

[198] Japan's first written submission, para. 69; Brazil's first written submission, para.72.
[199] USITC Report, Vol. II, Table FLAT-51 to 54 and 56.
[200] USITC Report, Vol. I, p. 61.
[201] New Zealand's first written submission, para. 2.30.
[202] USITC Report Vol. I at 63-64 (Exhibit CC-6).
[203] Brazil's first written submission, para. 74.
[204] USITC Report Vol. II at FLAT 64-68, non-NAFTA pricing (Exhibit CC-6).

Chart 4: United States Imports of Flat Products[205]



7.32 New Zealand notes that, by the close of 2000, the domestic industry price collapse was exacerbated with substantial integrated capacity finally falling into bankruptcy. Some 11 million tons of additional CCFRS steel capacity entered Chapter 11.[206] Freed from their debt burdens, these mills plunged deeper into the pricing battle with minimills in the pursuit of cash flow. New Zealand submits that, again, with no decline in domestic capacity in sight, underselling increased and prices fell.[207]

7.33 New Zealand argues that a final respite for the domestic industry was not to be realized until the major impediment retarding the industry's recovery was removed: inefficient domestic raw steel capacity. In December 2001, LTV Steel finally ceased all operations after producing for a full year under Chapter 11. With the closure of LTV's 8 million tons of capacity, the market immediately responded. In 2002 prices for cold rolled steel, for example, improved from US$310 per ton in January to US$320 in February and US$370 in March.[208] [209] [210]

(f) Conclusions

7.34 The European Communities, Switzerland and New Zealand conclude that the state of the United States' steel industry reflects the transition of the industry to modern, more efficient production techniques. They submit that due to savings on inputs, energy, labour and transport costs, new efficient minimills are able to undercut integrated producers on price while providing a product of equal quality. The increase in capacity growth in the United States market is perhaps the most significant factor that emerges, and far outstrips any increase in imports. The excess capacity

[205] Ibid., at FLAT 9-11, 13 (Exhibit CC-6) and ANNEX A.
[206] USITC Report, Vol. II at OVERVIEW 40-41.
[207] New Zealand's first written submission, para. 2.31.
[208] Purchasing Magazine, "Transaction Pricing Service", First Quarter 2002 (Cold Rolled Steel) (Exhibit CC-65).
[209] Jennifer Scott Cimperman, Rivals See Steel Sector Better Off Minus LTV, The Plain Dealer (Feb. 15, 2002) (Exhibit CC-64).
[210] New Zealand's first written submission, para. 2.32.

exacerbates price depression caused by intra-industry competition and falling demand as a result of the 2001 recession in the United States.[211]

7.35 Japan and Brazil also conclude that the United States industry is an industry in transition. One part of the industry, the low-cost minimills, is rapidly increasing capacity and capturing market share. In the face of this competition, some integrated mills have successfully adopted models which allow them to remain competitive, including concentrating resources in higher value-added products that minimills cannot produce. Other integrated mills, however, have maintained capacity and attempted to compete with the minimills, often because of the high legacy costs associated with shutting down facilities. This has fuelled intra-industry competition and put downward pressure on prices.[212]

2. The United States' assessment of its domestic steel industry

7.36 In response to the complainants' assessment of the United States' steel industry, the United States submits that, by the fall of 2001, the United States' steel industry was in a severe crisis caused by record levels of low-priced imports that began in 1998.[213]

7.37 The United States submits that, from December 1997 through to October 2001, 25 steel producers in the United States filed for protection under Chapter 11 of the United States bankruptcy law. These firms accounted for 30% of United States' crude steelmaking capacity.[214] These bankruptcies accelerated job losses in the industry and total employment in the sector fell to the lowest levels in decades.[215]

7.38 The United States argues that even steel producers that avoided bankruptcy experienced declining profits and other indicators of financial performance as they lost market share to low-priced imports. Per unit costs for both integrated and minimill producers increased as overall production volume and capacity utilization declined. The overall performance of the domestic industry deteriorated to the extent that it was no longer able to meet existing financial obligations or fund the investments that were necessary for it to compete with imports.[216]

7.39 According to the United States, prior to the Asian crisis, the United States industry had performed comparatively well and had been undergoing a continuous process of restructuring. In the decade prior to 1998 the industry had invested billions of dollars in the upgrading of existing facilities and the construction of new efficient capacity, while permanently closing inefficient facilities. As a result of these investments, by 2000, more than 97% of steel produced in the United States used the continuous-cast method of production, as opposed to only 76% in 1991. Labor productivity increased as total employment in the steel industry declined by 18.5% between 1989 and 1999.[217] Overall, the investments and restructuring efforts made during these years increased United States firms' competitiveness by improving quality and productivity and lowering costs.[218] [219]

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[211] European Communities' first written submission, para. 75; New Zealand's first written submission, para. 2.36.
[212] Japan's first written submission, para. 73; Brazil's first written submission, para. 77.
[213] United States' first written submission, para. 16.
[214] USITC Report pp. OVERVIEW-11 and OVERVIEW-25.
[215] United States' first written submission, para. 17.
[216] United States' first written submission, para. 18.
[217] USITC Report, p. OVERVIEW-29.
[218] USITC Report, p. OVERVIEW-20.
[219] United States' first written submission, para. 19.

7.40 The United States submits that the magnitude of the crisis can be seen by examining the record of the investigation of the CCFRS industry. In 1996 and 1997 the domestic CCFRS industry earned reasonable operating profits and made substantial capital investments in a growing domestic market. However, domestic prices began to fall markedly beginning in 1998, and were at much lower levels in 1999 and 2000 than earlier in the period investigated by the USITC. At the same time, domestic capacity utilization rates also fell significantly. As a result, industry profits turned to substantial annual operating losses.[220] [221]

7.41 The United States argues that the injury suffered by the domestic industries was unquestionably serious. With respect to the CCFRS industry, for example, capacity utilization fell by 10 percentage points in the period of investigation[222]; the AUV of commercial shipments fell almost US$100 per short ton[223]; operating income dropped from 6.1% in 1997 to an operating loss of 11.5% by the first half of 2001[224]; and capital expenditures fell by 35% from 1996 to 2000.[225] Industry giants like Bethlehem Steel Corporation declared bankruptcy, and LTV Corporation, one of the largest steelmakers in the United States, was forced out of business altogether. Similarly, with respect to the domestic industry producing hot-rolled bar, net commercial sales fell by 1.1 million per short ton during the period of investigation[226]; average unit sales values fell by over US$60 per short ton[227]; operating income went from US$213.4 million in 1997 to a loss of US$89.0 million in the first half of 2001[228]; and three hot-rolled bar production facilities were completely shut down. Similar examples could be repeated for every industry for which the USITC made an affirmative determination.[229]

7.42 The United States further contends that perhaps the most extraordinary fact about these developments is that they occurred at a time of generally very strong demand. The USITC found, for example, that "[b]y any measure, the period of investigation saw significant growth in United States demand for certain carbon flat-rolled steel".[230] Similarly, "[t]he record indicates strong demand [for hot-rolled bar] during the period examined, with apparent United States consumption of hot-rolled bar increasing during every full year but one of the period".[231] To give yet another example, the USITC found that United States' apparent consumption of rebar increased 48.1% from 1996 to 2000.[232] Thus, rather than suffering unprecedented injury, domestic steelmakers generally would have been expected to perform well during the relevant period.[233]

7.43 The United States asserts that the fact that they did not is clearly attributable to imports. With regard to CCFRS products, for example, imports increased 37.5% from 1996 to 1998, and remained at historically high levels in 1999 and 2000[234]; the AUV of these imports was consistently US$60 per short ton to US$110 per short ton below that of the domestic like product[235]; and import prices fell to

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[220] USITC Report, pp. C-2 to C-7.
[221] United States' first written submission, para. 20.
[222] Steel, Inv. No. TA-201-73, USITC Pub. 3479, p. 51 (December 2001) ("USITC Report").
[223] USITC Report, p. 53.
[224] USITC Report, p. 53.
[225] USITC Report, p. 54.
[226] USITC Report, p. 93.
[227] USITC Report, p. 93.
[228] USITC Report, p. 94.
[229] United States' second written submission, para. 11.
[230] USITC Report, p. 56.
[231] USITC Report, p. 95.
[232] USITC Report, p. 112.
[233] United States' second written submission, para. 12.
[234] USITC Report, p. 50.
[235] USITC Report, p. 61.

extraordinary lows after 1998 – i.e., during the exact period in which the domestic industry suffered serious injury. In general, the years 1998 – 2000 saw the highest levels of steel imports in history – imports which, for many products, were sold at prices that were literally unsustainable and that were demonstrably ruinous to domestic industries.[236]

B. LEGAL AND ANALYTICAL FRAMEWORK

1. Standard of interpretation

7.44 The European Communities, Korea, China, Switzerland and Norway recall the Appellate Body's holding that "when construing the prerequisites for taking [safeguard] actions, their extraordinary nature must be taken into account".[237] The Appellate Body clarified that safeguard measures may only be resorted to "in an extraordinary emergency situation".[238] [239]

7.45 The United States submits that the interpretative approach of a panel in assessing claims under the Agreement on Safeguards and Article XIX of the GATT 1994 is the same as in a dispute arising under the other covered agreements. According to the United States, Article 3.2 of the DSU requires the Panel to interpret the Agreement on Safeguards and Article XIX "in accordance with customary rules of interpretation of public international law". Within this framework, the "fundamental rule of treaty interpretation" is "that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty".[240] As the Appellate Body has recognized, these standards apply even if a provision is characterized as an "exception":[241]

> "[M]erely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."[242]

7.46 However, in the United States' view, the complainants propose that a special standard of interpretation applies to the provisions of the Agreement on Safeguards that "when construing the prerequisites for taking [safeguard] actions, their extraordinary nature must be taken into account".[243] The United States submits that, in some instances, they characterize this standard as requiring a "strict" or "narrow" construction of the terms of the Agreement on Safeguards.[244] To support their approach to construction of the Agreement, the complainants cite the Appellate Body's statement in *US – Line Pipe* that:

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[236] United States' second written submission, para. 13.

[237] Appellate Body Report, *US – Line Pipe*, para. 81. *See* also Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.

[238] Appellate Body Report, *US – Line Pipe*, para. 82.

[239] European Communities' first written submission, paras. 197-198; Korea's first written submission, para. 27; China's first written submission, paras. 148-149; Switzerland's first written submission, paras. 183-184; Norway's first written submission, para. 188.

[240] Appellate Body Report, *US – Line Pipe*, para. 244.

[241] United States' first written submission, paras. 44-47.

[242] Appellate Body Report, *EC – Hormones*, para. 104.

[243] European Communities' first written submission, para. 86, quoting *US – Line Pipe*, para. 81.

[244] Japan's first written submission, para. 84; China's first written submission, para. 47; Norway's first written submission, para. 47.

> "[I]t is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard measures 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."[245]

7.47 The United States submits that, as an initial point, the complainants' reading of this passage ascribes to the *US – Line Pipe* report precisely the approach to treaty interpretation that the Appellate Body condemned in *EC – Hormones* – basing the rigour of interpretation of a covered agreement on whether it pertains to an "extraordinary" measure. The Appellate Body's report in *US – Line Pipe* nowhere says that it is contradicting the approach correctly articulated in *EC – Hormones* and should not be read as departing from that approach. Indeed, using the classifications of the Appellate Body, a tariff would be an example of a measure that applies to "fair" trade, but there has never been any indication that a tariff should be viewed as an "extraordinary" measure requiring a different interpretative approach for those provisions dealing with tariffs. The United States submits that, in addition, the complainants' interpretation is based on a provision taken out of context. They fail to mention that after making the statements that complainants have cited, the Appellate Body went on to recognize that there were counterbalancing considerations in interpreting the Agreement on Safeguards:

> "Nevertheless, part of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member makes it necessary to protect a domestic industry temporarily.
>
> There is, therefore, a natural tension between on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief. . . . The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards.*"[246]

7.48 Thus, according to the United States, the Appellate Body recognized that the "extraordinary nature" of the remedy is not the sole, or even the predominant consideration under the Agreement on Safeguards. The object and purpose of the Agreement is to provide an effective remedy to a domestic industry facing the situation described in the Agreement.[247] The United States submits that to the extent that the "extraordinary nature" of the remedy is relevant, the procedural and substantive

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[245] Appellate Body Report, *US – Line Pipe*, para. 81.

[246] Appellate Body Report, *US – Line Pipe*, paras. 82-83.

[247] The Appellate Body has recognized this as the objective of the Agreement on Safeguards since its earliest reports. For example, in *Argentina – Footwear (EC)*, para. 94, it found:

> The object and purpose of Article XIX is, quite simply, to allow a Member to readjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to the product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

standard of the agreements already take all concerns into account. The United States submits that, thus, the complainants are wrong and the Panel need not take special account of the "extraordinary nature" of a safeguard remedy, as the text of the Agreement on Safeguards itself addresses that issue.[248]

7.49 The European Communities objects to the United States statement that "the panel need not take special account of the 'extraordinary nature of the safeguard remedy'[249]". This statement directly contradicts the statement of the Appellate Body that: "when construing the prerequisites for taking such [safeguard] action, their extraordinary nature must be taken into account".[250] The fact that the burden on the United States to justify its safeguard measures may appear to be very high, does not justify an indulgent approach by the Panel. The United States has chosen to impose general safeguard measures against a vast range of complex products in circumstances where the problems of the United States domestic industries do not seem at all due to increased imports. It is hardly surprising that the task of justifying such measures appears exceedingly difficult.[251]

7.50 Korea responds that the United States' position in the instant case, including the determinations of the USITC, is fundamentally based on an erroneous interpretation of the object and purpose of the Agreement on Safeguards. Safeguard measures are extraordinary and temporary measures permitted in emergency situations against fairly traded imports. The Agreement on Safeguards explicitly provides that it is intended to re-establish multilateral control over safeguards. Therefore, the purpose of the Agreement on Safeguards is to provide a framework within which safeguard measures can be applied if extraordinary circumstances are demonstrated. Korea submits that the Agreement certainly was not intended to give a free reign to protectionist impulses. The substantive provisions of the Agreement on Safeguards employ wording which highlights the exceptional nature of the safeguards measures such as "only if" (Article 2.1), "only following" (Article 3.1), "shall not be made unless" (Article 4.2(b)), and "only to the extent necessary" (Article 5.1). In *US – Line Pipe*, the Appellate Body quoted extensively from its previous analysis in *Argentina – Footwear (EC)* concerning the "extraordinary nature" of safeguard measures and emphasizing that "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account".[252] It is only after re-affirming the extraordinary nature of the safeguard measures that the Appellate Body acknowledges that if, in fact, such an emergency situation exists, the Agreement on Safeguards provides the opportunity for Members to resort to effective remedies to protect domestic industries. Korea submits that, thus, the selective quotation of the Appellate Body's decision in *US – Line Pipe*[253] confirms that the United States has not grasped the "natural tension" which is guiding the Appellate Body's reasoning in the multitude of findings against the United States in safeguards investigations. The United States quotes the Appellate Body's language, "*raison d'être* of Article XIX of the GATT 1994 and the Agreement on Safeguards…", from *US – Line Pipe*, when the actual language of the Appellate Body was "part of *raison d'être* of Article XIX of the GATT 1994 and the Agreement on Safeguards …" Korea submits that the United States seems to have deliberately omitted the phrase "part of" to wrongfully assert that the whole and only purpose of the Agreement on Safeguards is to protect the domestic industry. Indeed, by quoting the Appellate Body out of context, the United States ignores the "natural tension" between "defining the appropriate and legitimate scope of the right to apply safeguard measures and ... ensuring that safeguard measures are

[248] United States' first written submission, paras. 48-52.
[249] United States' first written submission, para. 52.
[250] Appellate Body Report, *US – Lamb*.
[251] European Communities' second written submission, paras. 35-37.
[252] Appellate Body Report, *US – Line Pipe*, para. 81, quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.
[253] Appellate Body Report, *US – Line Pipe*, para. 83.

not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief".[254] The means by which "the legitimate scope" of safeguard measures is defined and the means by which "measures are not applied against 'fair trade' beyond what is necessary"[255] is the same: strict adherence to the provisions of the Agreement on Safeguards including those provisions which require a finding of like product, increased imports, serious injury, and causation. It is apparent that an overly broad definition of any of the terms of the Agreement on Safeguards, would lead directly to upsetting that calculated balance of the Agreement. Korea submits that the United States is attempting to interpret the provisions of the Agreement on Safeguards in a manner consistent with US law. Korea argues that this is the reverse of the correct analysis. The USITC's reasoning regarding like product had nothing to do with its interpretation of the purpose of the Agreement on Safeguards.[256]

7.51 The United States responds that the complainants have advanced interpretations of the Agreement on Safeguards and Article XIX of the GATT 1994 that would effectively render these agreements unworkable. According to the United States, both are part of the carefully negotiated balance of concessions that produced the WTO Agreement. The interpretations advanced by the complainants would upset this balance. They would undermine Members' confidence in the WTO rules-based system and could, consequently, make Members less willing to undertake new obligations or grant new concessions. The United States submits that the Panel should decline the complainants' invitation to write the Agreement on Safeguards out of existence, and instead interpret the text as instructed in the DSU, giving the terms their ordinary meaning, in their context and in light of the object and purpose of the Agreement.[257]

7.52 The United States submits that from the inception of the GATT in 1947, the availability of safeguard relief (incorporated in Article XIX) was considered to be a critical component of the international system of rules-based trade. One of the primary motives for the inclusion of a safeguard provision was the conviction that the existence of a "safety valve" would facilitate trade concessions.[258] The negotiating history of the Agreement on Safeguards shows that it was not intended to change this objective. According to the United States, rather, the negotiators sought to stop the proliferation of the so-called "grey area measures" and to encourage WTO Members to instead employ open, transparent and established procedures in considering temporary import relief. The United States argues that, thus, the Agreement on Safeguards reflects a carefully balanced bargain – a bargain that the parties relied upon in establishing and becoming Members of the WTO. The United States submits that the Agreement on Safeguards must be interpreted and applied based on the ordinary meaning of its terms, in their context and in light of the object and purpose of the Agreement, namely to permit temporary safeguard measures in appropriate circumstances, and to encourage the use of this mechanism rather than the non-transparent measures that had previously proliferated.[259]

2. Standard of review

7.53 The European Communities, Norway and Switzerland submit[260] that under the Agreement on Safeguards, domestic authorities have a duty to demonstrate, at the time they take safeguard measures,

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[254] Appellate Body Report, *US – Line Pipe*, para. 83.
[255] Appellate Body Report, *US – Line Pipe*, para. 83.
[256] Korea's second written submission, paras. 1-9.
[257] United States' second written submission, paras. 1-2.
[258] K. Dam, *The GATT: Law and International Economic Organization* 99 (1970) (Exhibit US-87).
[259] United States' second written submission, paras. 3-9.
[260] The legal issues raised in this section are also addressed by the parties in several of the sections related to specific claims.

and through a reasoned and adequate explanation (that is, in their report or equivalent), that the legal conditions for the adoption of such measures are met. They submit that domestic authorities are under a duty to evaluate all facts before them or that should have been before them in accordance with the WTO safeguards regime.[261] This broad obligation of the domestic authorities is paralleled by the review that panels are called upon to exercise on safeguard measures. The Appellate Body held that a panel reviewing safeguard measures shall verify whether the domestic authorities "had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination".[262] [263]

7.54 With regard to the proper method of analysis that the Panel should follow, Japan and New Zealand recall that the Agreement on Safeguards is silent as to the appropriate standard of review. However, the standard set forth in Article 11 of the DSU always applies. Article 11 provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[264]

7.55 The European Communities, Japan, Switzerland, Norway and New Zealand recall that, although panels are not expected to carry out a *de novo* review of the evidence or to substitute their own conclusions for those of the competent authorities, the Appellate Body emphasized that panels may not simply *accept* the conclusions of that authority:

> "[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 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."[265] [266]

7.56 Japan submits that it is confident that the Panel will conduct all the appropriate enquiries and evaluations to discharge its duty of making an "objective assessment of the facts" within the meaning of Article 11 of the DSU. According to Japan, upon doing so, the Panel will discover myriad violations of obligations covered by the Agreement on Safeguards and GATT 1994.[267] New Zealand asserts that it is the task of the Panel to examine that data and reasoning and the explanations offered by the USITC. From that examination, New Zealand submits that it will be clear that the United States has failed to comply with its obligations under GATT 1994 and the Agreement on Safeguards.[268] China states that it fully agrees with the arguments made by other co-complainants

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[261] Panel Report, *Korea – Dairy*, paras. 7.30-31, 7.54.

[262] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

[263] European Communities' first written submission, paras. 109-110; Norway's first written submission, paras. 95-96; Switzerland's first written submission, paras. 97-98.

[264] Japan's first written submission, para. 75; New Zealand's 's first written submission, para. 4.3.

[265] Appellate Body Report, *US – Lamb*, para. 106. This was most recently confirmed in the Appellate Body Report, *US – Cotton Yarn*, paras. 72-74.

[266] European Communities' first written submission, para. 111; Japan's first written submission, para. 76; Switzerland's first written submission, paras. 99; Norway's first written submission, para. 97; New Zealand's first written submission, para. 4.4.

[267] Japan's first written submission, para. 77.

[268] New Zealand's first written submission, para. 4.5.

with regard to the key aspects that panels are called upon to analyse in reviewing a safeguard measure.[269]

7.57 In the light of the foregoing, the European Communities, Norway and Switzerland consider that this Panel can find that the US determinations before it are inconsistent with the Agreement on Safeguards (and that the US measures are without legal basis)[270] on the following fundamental grounds:

(a) they are based on a methodology that does not comply with the standards set forth by the Agreement on Safeguards.

(b) the facts relied upon to support the conclusions do not, in light of the complexities inherent in the data, meet the substantive standards of the Agreement on Safeguards; or, the competent authorities do not provide a reasoned and adequate explanation of how they met those substantive standards. The latter flaw arises either because the USITC's record does not provide all the information necessary to show that the conditions for imposing the safeguards were met, or because the facts included in the USITC Report simply do not justify the conclusions drawn by the USITC.

7.58 The United States argues that there is no special interpretive approach applicable to claims arising under the Agreement on Safeguards. Just as in any other dispute, Article 11 of the DSU instructs 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 ... ." The United States submits that the standard of review to be applied in safeguards cases is well-established. In *Korea – Dairy* and *Argentina – Footwear (EC)*, the panels specifically rejected the notion that panels may review *de novo* the determination made by the domestic investigating authority.[271] Rather, as articulated by the panel in *Argentina – Footwear (EC)*:[272]

> "[O]ur review will be limited to an objective assessment, pursuant to Article 11 of the DSU, 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 Argentina's obligations under the Safeguards Agreement."[273]

7.59 The United States asserts that the complainants' arguments reflect a misunderstanding of the standard of review. A great deal of their argumentation simply presents another view of the facts, rather than showing that the findings made by the USITC or the decision by the United States to apply a safeguard measure was in any way inconsistent with the Agreement on Safeguards or Article XIX. The United States submits that such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.[274]

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[269] China's first written submission, para. 81.
[270] Appellate Body Report, *US – Lamb*, para. 73.
[271] *Korea – Dairy*, para. 7.30; *Argentina – Footwear (EC)*, para. 8.117.
[272] United States' first written submission, para. 44
[273] Panel Report, *Argentina – Footwear (EC)*, para. 8.124.
[274] United States' first written submission, paras. 44-47.

3. Burden of proof

7.60 New Zealand submits that the basic rule regarding burden of proof is that "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof".[275] Thus, as the Panel pointed out in *Korea – Dairy*, "it is for the claimant to establish a prima facie case of violation of the Agreement on Safeguards and then it is for the respondent to refute that case".[276] New Zealand accordingly believes that, in adopting safeguard measures against certain carbon flat-rolled steel products, the United States failed to discharge its obligations under GATT 1994 and the Agreement on Safeguards.[277]

7.61 The United States contends that it fully complied with its obligations under the WTO Agreement in applying the steel safeguard measures. The United States submits that under the WTO Agreement, the complainants bear the burden of proof to demonstrate an inconsistency. Unless they meet that burden with regard to a particular safeguard measure, there would be no basis for finding that measure to be inconsistent with the WTO Agreement.[278] According to the United States, none of the complainants have met their burden to establish a prima facie case with respect to the claims contained in its panel request. They each rely in large measure on unfounded assertions advanced without supporting evidence or legal grounding. In *US – Wool Shirts and Blouses*, the Appellate Body noted that "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim".[279] Addressing the same question in the context of a safeguard measure, the *Korea – Dairy* Panel found that "[a]s a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process".[280] The *Korea – Dairy* Panel also noted that it fell to the European Communities, as the complainant, to submit a prima facie case of violation of the Agreement on Safeguards.[281] That panel concluded further that once the European Communities made its prima facie case, it was for Korea (the responding party in that dispute) to present its own evidence and arguments showing that it had complied with the requirements of the Agreement on Safeguards at the time of its determination.[282] The *Korea – Dairy* Panel then concluded that "[a]t the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions on whether the European Communities claims are well-founded".[283] [284]

7.62 In response, the complainants state that they do not contest that they have the burden of making a prima facie case that the United States' safeguard measures are inconsistent with the standards of the Agreement on Safeguards. However, they argue that the real question is: what are the requirements of the Agreement on Safeguards and what needs to be shown to establish that they

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[275] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[276] Panel Report, *Korea – Dairy*, para 7.24.

[277] New Zealand's first written submission, paras. 4.1-4.2.

[278] Panel Report, *US – Cotton Yarn*, para. 7.23, "In this line, we consider that Pakistan, the complaining party, bears the burden of proof for establishing a prima facie case that the subject transitional safeguard measure is in violation of Article 6."

[279] *US – Wool Shirts and Blouses*, para. IV.

[280] Panel Report, *Korea – Dairy*, para. 7.24.

[281] Panel Report, *Korea – Dairy*, para. 7.24. As the Appellate Body has noted, a prima facie case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." *EC – Hormones*, para. 104.

[282] Panel Report, *Korea – Dairy*, para. 7.24.

[283] Panel Report, *Korea – Dairy*, para. 7.24.

[284] United States' first written submission, paras. 41-43.

have not been respected?[285] According to the European Communities, in discussing what it means to make a prima facie case, it is necessary to take into account that the arguments of the complainants can be distinguished into a number of categories that require different kinds of proof or demonstration: first, there are methodological arguments – that the United States did not follow an approach compatible with the Agreement on Safeguards and thus could not have reached sound conclusions; second, that a number of findings are mistaken; and third, that a number of findings are not supported by a reasoned and adequate explanation.[286]

7.63 In relation to the first category, the European Communities recalls that the complainants are not attacking the methodologies used by the USITC *per se* but are simply pointing out that the methods of analysis and reasoning used by the USITC in making its various findings and determinations are in many cases not apt to ensure that the conditions of the Agreement on Safeguards are satisfied. Accordingly, the corresponding findings and determinations are flawed or at least not supported by a reasoned and adequate explanation. In these cases, it is not necessary to examine what would be the outcome of an investigation that used a correct methodology. That would require conducting a "*de novo* interpretation of the record". In relation to the second category of cases, the European Communities submits that it is clear that a prima facie factual demonstration is required that the finding is incorrect. This can be based on evidence in the USITC Report and other documents that form part of the report or its supplements, or on information that the USITC should have obtained but did not.[287] The third category of arguments, like the first, simply requires a logical demonstration that the determinations do not satisfy the requirement of a reasoned and adequate explanation. The European Communities submits that this may include invoking an alternative explanation that the USITC has not considered or has wrongly rejected. Another means of demonstrating that the USITC has not provided a reasoned and adequate explanation is to point out that the report does not contain the information needed to support the findings that the USITC claimed to make. In this connection, the European Communities also points out that the United States has sought in a number of instances to refute the arguments of the complainants by relying on information that was not included in the Report. The European Communities submits that since the obligation was to provide a reasoned and adequate explanation in the report, the presentation of new evidence by the United States cannot be accepted but, in fact, simply serves to demonstrate that the evidence was wrongly omitted from the report.[288]

4. Methodologies

7.64 The complainants submit that general methodological flaws permeate many parts of the USITC Report throughout all product categories. The European Communities, Norway and Switzerland state that they confine themselves to such methodological flaws while pointing to some of the most glaring mistakes in the individual determinations relating to some of the products.[289]

7.65 The United States submits that the complainants have not demonstrated that any methodology of the USITC is inconsistent with the Agreement on Safeguards. In reaching its determinations regarding serious injury and threat of serious injury, the USITC applied a number of long-standing methodologies for organizing and analysing the information before it. The USITC analysis of each of

[285] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, para. 1.
[286] European Communities' second written submission, para. 29.
[287] Panel Report, *Korea – Dairy*, paras. 7.30, 7.31 and 7.54.
[288] European Communities' second written submission, paras. 30-33.
[289] European Communities' first written submission, paras. 112-113; Norway's first written submission, paras. 98-99; Switzerland's first written submission, para. 100.

the like products under investigation was neutral, unbiased, and not chosen to achieve a particular result. In the context of these methodologies, the USITC made findings of fact and determinations that satisfied both the domestic legal requirements and US obligations under the Agreement on Safeguards and GATT 1994. The Panel in *US – Line Pipe* recognized that an examination of the WTO consistency of methodologies used in reaching a serious injury determination will differ from an examination of factual issues.[290] In that dispute, the panel evaluated both sets of issues in upholding the USITC's conclusions as to increased imports. With regard to the methodologies, the panel performed:

> "[A]n objective assessment ... 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 USITC support the determination made with respect to increased imports."[291]

7.66 The United States submits that, significantly, the Panel inquired whether the methodology permitted results consistent with the terms of the Agreement on Safeguards, not whether it mandated or invariably produced such results. The panel then upheld the USITC's practice of considering five full calendar years of data and two comparable interim periods because:

> "[F]irst, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the USITC *allows* it to focus on the recent imports; and third, the period selected by the USITC is sufficiently long to *allow* conclusions to be drawn regarding the existence of increased imports."[292]

7.67 The Panel then continued on "to review the USITC's findings on absolute and relative import increases *in light of that methodology*".[293] The United States submits that this approach reflects that a methodology is one step in a competent authority's analytical process. A consistent methodology can help the competent authorities to organize or analyse the facts of the case, and ensure that the results are neutral and unbiased. However, use of a methodology is just one way of implementing the obligations contained in the Agreement on Safeguards or domestic law, and one that is not required by the Agreement. Thus, a Member is free to use methodologies as part of its analysis or to try to find methodologies that will ensure compliance in every case.[294]

7.68 In response to the United States' assertion that the complainants have not demonstrated that any methodology of the USITC is inconsistent with the Agreement on Safeguards, China makes the following clarification: rather than claiming that the USITC applied a methodology that is inconsistent with the Agreement on Safeguards, China's claim is based on the fact that, in order to make its different findings, the United States authorities applied methodologies that could not lead to determinations consistent with the Agreement on Safeguards as well as other provisions of the WTO Agreement. Therefore, the application of these methodologies led to determinations that were necessarily flawed and could not meet the requirements of the Agreement on Safeguards.[295]

7.69 The United States finally submits that the complainants challenge several of the methodologies employed by the USITC on the grounds that they do not "comply with" the standards

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[290] Panel Report, *US – Line Pipe*, para. 7.192.
[291] Panel Report, *US – Line Pipe*, para. 7.194.
[292] Panel Report, *US – Line Pipe*, para. 7.201 (emphasis added).
[293] Panel Report, *US – Line Pipe*, para. 7.205 (emphasis in original).
[294] United States' first written submission, paras. 53-56.
[295] China's second written submission, paras. 4-5.

set out in the Agreement on Safeguards or Article XIX of GATT 1994.[296] The United States submits the methodologies, as such, do not bear the burden of complying with WTO obligations. The relevant inquiry for purposes of the Agreement on Safeguards is whether the competent authorities have conducted an investigation and made a determination that satisfies a Member's WTO obligations. Methodologies are a tool that can assist in the investigation but, according to the United States, complainants have not indicated any reference in the Agreement on Safeguards to methodologies nor to obligations that apply specifically to methodologies. In this regard, past panels and the Appellate Body considering United States' safeguard measures have consistently recognized that the findings of the USITC can comply with the obligations under the Agreement even if the methodology, taken alone, does not incorporate every single one of the relevant criteria.[297] The United States adds that the Panel should disregard arguments by the complainants that certain practices and methodologies applied by the USITC are, as a general rule, inconsistent with WTO rules. The United States submits that the complainants have not challenged these practices – nor could they.[298]

7.70 The complainants agree with the United States that there is no special standard of review for safeguard measures in the sense that Article 11 of the DSU applies.[299] However, despite this statement, the United States is in fact arguing for a special standard of review. It does this in the first instance by bandying in a misleading manner the emotive expression "*de novo*". For the complainants, it is clear that the Panel should not attempt to conduct a *de novo* investigation – that is it should not seek to determine whether the application of safeguard measures for the benefit of the United States' steel industry was warranted, as if it were itself an investigating authority. Rather, the Panel should only examine whether the United States correctly applied the Agreement on Safeguards when it imposed such measures. The basic obligation of the United States under the Agreement on Safeguards was to conduct a proper investigation and to fully justify and explain what it had done. To this end Article 3.1 of the Agreement on Safeguards requires that "the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". The Appellate Body has clarified that domestic authorities have a duty to demonstrate, at the time they take a safeguard measure, through a reasoned and adequate explanation, that the legal conditions for the adoption of such measure are met. The Appellate Body held that a panel reviewing a safeguard measure shall verify whether the domestic authorities had examined all the relevant facts and had provided a reasoned and adequate explanation of how the facts established during the investigation support the determinations that have been made.[300] This is a substantive obligation and whether it has been respected or not has to be determined by a panel applying the standard review set out in Article 11 of the DSU – that is an objective assessment of the matter before it, including an objective assessment of the facts of the case. The United States, however, misuses the expression "*de novo*" when it states that panels may not review "*de novo*" determinations[301] and must not "make its own *de novo* interpretation of the record".[302] It is a *de novo investigation* that the Panel must not make. The Panel would, however, be failing in its obligation under Article 11 of the DSU if it did not review (*de novo* or otherwise) whether the US had complied with the Agreement on Safeguards and in particular whether the competent authority had carried out all necessary analyses, had set out "reasoned conclusions reached on all pertinent issues of law and fact" and thus had provided a reasoned and adequate explanation of how the facts of the investigation support its determinations.

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[296] European Communities' first written submission, paras. 112 and 464; Norway's first written submission, paras. 98-99; Switzerland's first written submission, para. 100.

[297] United States' first written submission, para. 57.

[298] United States' first oral statement, para. 18.

[299] *See*, on this point, the discussion in section VII.B.2 above.

[300] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

[301] United States' first written submission, para. 44.

[302] United States' first written submission, para. 45

Since the Panel is not to conduct a *de novo* investigation, it can only examine, on the basis of the investigation report it has before it, what the United States has investigated and how it has come to its conclusions (or "determinations" as they are called). That is, it must review whether the competent authority asked the right questions and carried out an appropriate analysis. That is, say the complainants, what they mean when they say that the Panel should examine whether the "methodologies" used by the United States were correct.[303]

7.71 The complainants further submit that by arguing that the methodology used does not matter, and that it needs to be proved that the conclusion of a safeguard investigation is incorrect, the United States is in fact asking the Panel to examine what would be the outcome of the investigation if a correct methodology and analysis had been applied. This would require the Panel to conduct a *de novo* investigation, which is precisely what the complainants agree the Panel should not do. All the Panel can do is review whether the investigating authority has examined all the facts and has provided a reasoned and adequate explanation for its determinations (and that this explanation makes sense). If the report explains that a wrong methodology has been applied – that is a methodology that does not ensure that the conditions of the Agreement on Safeguards are satisfied – then there can be no such reasoned and adequate explanation. Thus, a methodology that does not comply with the Agreement on Safeguards (for example, that only some of the injury factors will be considered) will be in violation of the Agreement on Safeguards. Equally, the application of an incompatible methodology will lead to the measure at issue being incompatible with the Agreement on Safeguards. The complainants submit that if it is determined that a correct methodology has been applied, however, the Panel still needs to progress to the next step – examining whether the facts actually support the determinations made.[304]

7.72 The complainants, therefore, submit that the Panel is not asked to examine the accuracy of the data included in the USITC Report. The essential issues raised in this proceeding are that: (i) the USITC Report is not complete, i.e., it does not contain all the information necessary to show that the conditions for imposing the safeguard measures were met; and (ii) the facts included in the USITC Report do not justify the conclusions drawn by the USITC.[305]

7.73 The United States recalls that the complainants in this dispute have challenged the application of the United States' safeguards law with regard to ten specific steel products. No claim has been made that any aspect of the United States' safeguards law or practice is on its face inconsistent with WTO obligations. As the application of the United States' safeguards law took the form of ten separate safeguards measures, each of these measures, therefore, must be considered separately by the Panel to determine whether each was applied consistently with WTO rules. Accordingly, the complainants bear the burden of proof to establish a prima facie case that each of these ten measures is inconsistent with the United States' WTO obligations. This requires a presentation of how, given the unique set of facts pertaining to each of the ten products, the United States' safeguard measures were in fact inconsistent with US WTO obligations. It is not enough for complainants to challenge the general methodologies used by the USITC in investigating the impact of increased imports on each of the ten domestic industries identified. Article 2.1 of the Agreement on Safeguards requires a fact-based determination as to each of the conditions for imposing a safeguards measure. Methodologies provide a framework for analysing the facts of a given case. They are not a substitute

[303] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 3-10.

[304] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 13-16.

[305] European Communities' first oral statement "Standard and Scope of Review" on behalf of the complainants, para. 27.

for that analysis, and cannot by themselves guarantee compliance with WTO obligations. Thus, regardless of the general methodologies employed, the complainants must demonstrate separately with respect to each measure how the facts cited by the USITC with respect to that product and industry do not satisfy the conditions set forth in Article 2.1.[306]

7.74 Moreover, the United States submits that, to the extent the Panel finds it useful to explore the particular methodologies employed by the USITC in each of the ten safeguards investigations at issue, the proper inquiry is whether a methodology permits results consistent with the terms of the Agreement on Safeguards. This is clear from the approach taken by the Panel in *US – Line Pipe*[307] and is directly at odds with the position taken by the European Communities that the critical question was whether the methodologies employed by the USITC "ensure that the conditions set out in the Agreement on Safeguards and the GATT are satisfied".[308] Thus, the *US – Line Pipe* Panel recognized that, so long as a methodology permits an analysis of the facts consistent with the terms of the Agreement on Safeguards, the methodology is permissible. Regardless of the conclusion as to the methodology, a panel must then consider whether the complainant has demonstrated that the factual findings resulting from the application of the methodology are inconsistent with the obligations provided for in the Agreement on Safeguards. Under the European Communities' approach a methodology that allowed the competent authorities to comply with WTO rules, but could also be applied in a manner that did not comply, would be a *per se* breach. Thus, even if an injury determination complied fully with the Agreement on Safeguards, it would have to be rejected by a panel simply because it employed methodologies that in a hypothetical case could produce a result contrary to the Agreement. Thus, while the European Communities challenged the USITC determinations and resulting safeguard measures, its arguments on methodology would require the Panel to disregard what the USITC and the United States' Government actually did. In addition, the European Communities standard would hold "methodologies" to a stricter standard of WTO consistency than the legislation under which those methodologies are applied. Under the DSU, legislation as such may be found inconsistent with WTO rules only if it mandates a Member to take action inconsistent with those rules. In contrast, legislation that grants a Member discretion either to comply or not comply with WTO rules is not as such WTO-inconsistent.[309] This would be an absurd result, as it would allow Members to challenge the discretionary methodologies arising out of discretionary legislation on their face when they are not permitted to so challenge the underlying legislation. Therefore, it is incumbent upon the Panel to separately evaluate each unique set of facts pertaining to each of the ten safeguard measures in question. For example, even if the Panel were to determine that a methodology used by the USITC might permit a conclusion that is inconsistent with a provision of the Agreement on Safeguards, the Panel would still have to determine whether each of the USITC's determinations for each of the ten products that was based on that methodology was in fact inconsistent with the Agreement on Safeguards. Anything less would be fundamentally unfair to Members seeking to avail themselves of their rights under Article XIX.[310]

7.75 According to the United States, the complainants only rarely deal with the facts of each of the ten safeguard measures at issue, and instead complain that various methodologies used by the USITC are inconsistent with the Agreement on Safeguards. A review of the arguments presented demonstrates that the complainants have not met their burden of proof to establish that the

[306] United States' second written submission, paras. 14-16.
[307] Panel Report, *US – Line Pipe*, para. 7.194.
[308] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, para. 12.
[309] Appellate Body Report, *US – 1916 Act*, para. 88; Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.22-6.33.
[310] United States' second written submission, paras. 17-23.

methodologies applied by the USITC did not permit a reasoned analysis, much less that they actually resulted in factual determinations inconsistent with the Agreement on Safeguards.[311]

7.76 The complainants respond that the Appellate Body has confirmed recently in its report in *US – Countervailing Measures on Certain EC Products* that it is possible for methodologies – or methods as it prefers to call them – to be held to be *per se* or "as such" inconsistent with WTO obligations.[312] However, the complainants have not chosen in this case to request any findings relating to United States' safeguards law or general practice. All parties agree that this dispute relates to ten safeguard measures imposed by the United States on various bundles of steel products. That the complainants are not attacking the methodologies of the USITC *per se* means that they are simply attacking the methods of analysis actually used in this case – not necessarily the methodologies that the USITC traditionally uses. The United States would have the Panel hold that it can apply whatever method of analysis it pleases in a safeguard investigation and the burden is on the complainants to "demonstrate separately with respect to each measure how the facts cited by the USITC with respect to that product and industry do not satisfy the conditions set forth in Article 2.1".[313] This would require the Panel itself to apply the Agreement on Safeguards to the various facts scattered about the USITC Report in order to establish whether or not safeguard measures would be justified for each of the products (or rather product bundles) on which the United States has imposed them. In other words, the United States is asking the panel to conduct a *de novo* review. This is not the Panel's task, on the contrary, if methods of analysis have been applied that do not ensure that the conditions set out in the Agreement on Safeguards and the GATT are satisfied, it must hold the resulting safeguard measures to be inconsistent with those agreements. The complainants disagree with the proposition that "the proper enquiry is whether a methodology permits results consistent with the terms of the safeguard agreement"[314] which means that a panel must accept the use of a methodology that may – by accident – allow a finding to be made that could be considered to be that which would result from a correct application of the Agreement on Safeguards. WTO Members may only impose safeguard measures if all the conditions set out in the Agreement on Safeguards and the GATT 1994 are met and competent authorities must conduct an adequate investigation to ensure – and demonstrate – that these conditions are met. An investigation will only be adequate if the competent authority addresses the right questions and examines the correct conditions. A panel reviewing a safeguard measure must judge whether the determinations are correct by examining the explanation contained in the report. Where this reveals that the competent authority has misunderstood the conditions for applying safeguard measures or has not addressed the right questions, it will be impossible for the panel to be sure that the conditions are satisfied. That is what the complainants mean when they say that the methodology does not ensure a correct conclusion. In such a case, the complainants submit, a panel must find a violation. Indeed, the very fact that it is not possible to be sure that the result is consistent means that there is not a reasoned and adequate explanation. The support the United States seeks in an analogy with the distinction between discretionary and mandatory measures – a theory according to which a discretionary measure of a WTO Member cannot be held *per se* inconsistent with the WTO Agreement if it also permits action consistent with WTO obligations – is misguided.[315] The complainants are not making *per se* claims against United States' safeguards law or general practice. It is indeed not clear that the USITC is required to apply the contested methodologies in all cases. However, the methodologies have been applied in the present case and therefore the conclusions drawn are either insufficient to satisfy the conditions of the Agreement on Safeguards or the

[311] United States' second written submission, para. 24.
[312] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 86 and 162.
[313] United States' second written submission, para. 16.
[314] United States' second written submission, para. 17.
[315] United States' second written submission, para. 21.

application of these methodologies means that there is no reasoned and adequate explanation as to why the conditions of the Agreement on Safeguards are fulfilled.[316]

5. Duty to explain – substantive versus procedural obligations

7.77 The United States submits that Article 3.1, third sentence, and Article 4.2(c) of the Agreement on Safeguards require a report reflecting the investigation by the competent authorities, and do not impose an "open-ended and unlimited duty" to explain. Article 3.1, third sentence, and Article 4.2(c) describe the obligation of the competent authorities to publish a report on the investigation. Together, they require that the competent authorities provide "their findings and reasoned conclusions reached on all pertinent issues of fact and law", along with "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". These requirements focus on the competent authorities and their investigation. The competent authorities must publish their findings and reasoned conclusions – not those that the Panel or one of the complainants might have made. The United States submits that the competent authorities must demonstrate the relevance of the factors examined – not those that the Panel or the complainants would have examined and that this analysis must appear in the report. If the report, as in the case of the USITC Report, contains narrative views and separate data tables, both must be considered in evaluating whether the report has satisfied the obligations.[317]

7.78 The United States notes that several of the complainants argue that the omission of a fact, a citation, or an argument renders the USITC Report inconsistent with Article 3.1 or Article 4.2(c).[318] However, Articles 3.1 and 4.2(c) do not impose a burden of investigative or explanatory perfection that no competent authority could meet. The United States argues that, for example, if an error or omission does not cast doubt on a particular conclusion, that conclusion is still "reasoned" and, thus, consistent with Article 3.1. Similarly, if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1. The United States notes in this regard that the Appellate Body has found that Article 3.1 requires a "reasoned and *adequate* explanation".[319] The Appellate Body reached a similar conclusion in *US – Lamb*, in which it recalled its description of the proper causation analysis in *US – Wheat Gluten* and stated:

> "[T]hese three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal 'tests' mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities."[320]

7.79 The United States points out that, in their submissions on specific legal claims, several of the complainants argue that the USITC did not address alternative explanations of the facts.[321] They point to the Appellate Body's statement that:

> "[A] panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the

[316] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 4-14.
[317] United States' first written submission, paras. 58-62.
[318] European Communities' first written submission, para. 256.
[319] Appellate Body Report, *US – Line Pipe*, para. 216 (emphasis added).
[320] Appellate Body Report, *US – Lamb*, para. 178.
[321] European Communities' first written submission, para. 256.

> competent authorities' explanation does not seem adequate in the light of that alternative explanation.[322]

However, according to the United States, they have disregarded that this consideration applies only if there is an alternative explanation that is "plausible" and the competent authorities' explanation is inadequate in light of that alternative view. As the party asserting the affirmative of a claim, complainants bear the burden of proof to demonstrate that their particular alternative explanations are both "plausible" and demonstrate that the USITC explanation is inadequate".[323] [324]

7.80 The complainants disagree with the United States' contention that it cannot be expected to have an "open-ended and unlimited" obligation to explain and cannot be expected to examine all "plausible explanations". The complainants submit that the United States chose to open a safeguard investigation into an enormous range of complex industrial products. The difficulty of the enterprise on which it embarked cannot excuse a failure to comply with the Agreement on Safeguards. They argue that in order to show that the United States has failed to consider all alternative plausible explanations, the complainants have the burden of proving that these alternative plausible explanations exist.[325] The complainants submit that they have done this. They argue that the fact that the USITC may not have thought of them, and did not consider them, does not save the United States' safeguard measures from being found inconsistent with its WTO obligations.[326]

7.81 The complainants also assert that the United States was under an obligation to publish a report setting out its determinations and its reasoned and adequate explanation. Therefore, it cannot now attempt to rely on information outside the USITC Report to justify its measure. They argue that, nonetheless, the United States seeks to do so on numerous occasions. The complainants submit that if it needs to rely on information from outside of the USITC Report, then surely that proves that the USITC Report did not contain a reasoned and adequate explanation. They argue that the fact that some of this information may have been confidential does not excuse a failure to provide an adequate and reasoned explanation. The complainants note that the Appellate Body has held that a competent authority does not meet the substantive standards of Article 2.1 and 4.2(a) if it does not provide an adequate and reasoned explanation of its findings. Article 3.1 obliges a competent authority to publish a report. The reasoned and adequate explanation must, therefore, be public. The complainants argue that it was possible to provide this explanation by indexing data or by using some other non-confidential format and that the United States is wrong to claim that it did not need to do so.[327] [328]

7.82 The complainants submit further that the Appellate Body has made clear that competent authorities are in fact under a duty to evaluate all facts before them or that should have been before them in accordance with the Agreement on Safeguards.[329] Indeed, the Appellate Body has found that because competent authorities "are themselves obliged, in some circumstances, to go beyond the arguments of the interested parties in reaching their own determinations, so too, we believe, panels are not limited to the arguments submitted by the interested parties to the competent authorities in

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[322] Appellate Body Report, *US – Lamb*, para. 106.
[323] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 17.
[324] United States' first written submission, paras. 58-62.
[325] United States' first written submission, para. 62.
[326] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 17-18.
[327] United States' first written submission, para. 1325.
[328] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 20-22.
[329] Panel Report, *Korea – Dairy*, paras. 7.30, 7.31 and 7.54.

reviewing those determinations".[330] The complainants submit that the only limit is evidence that was not in existence at the time the domestic authorities made their decision.[331] [332]

7.83 According to the United States, the complainants confuse substantive and procedural obligations imposed by the Agreement on Safeguards by improperly concluding that a failure to explain a determination adequately is sufficient to establish a prima facie case of inconsistency with a substantive obligation. For example, in response to a question posed by the United States, several complainants assert that the failure to explain a like product determination adequately would establish a prima facie case of inconsistency with Article 2.1.[333] This argument fundamentally misstates the burden imposed on complainants under the DSU. Article 2.1 is a substantive provision. It establishes the substantive conditions that must be met prior to the imposition of a safeguard measure: imports in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Article 2.1 does not impose an obligation to explain why one product is deemed to be like another. The obligation to explain the competent authorities' determinations, including the obligation to explain the like product determination, is set forth separately in Article 3.1. While a prima facie case that the competent authorities have failed to explain some aspect of a safeguards determination adequately may support a claimed inconsistency with Article 3.1, it would not support a separate claimed inconsistency with Article 2.1. A procedural violation does not automatically establish a substantive violation. Each claim must be separately proven on its own merits. Thus, to the extent that the complainants rely on a prima facie case of a failure to explain a determination as the basis for their allegation of a substantive violation under Article 2.1, the complainants cannot be considered to have met their burden of proof with respect to the alleged substantive violation.[334]

7.84 According to the complainants, the Appellate Body has made clear that a competent authority must give reasoned and adequate explanations for all its findings and determinations. For the complainants it is obvious that these findings must make sense – and not be counterintuitive.[335] The United States is wrong to argue that the failure to provide a reasoned and adequate explanation cannot be a basis for even a prima facie case of violation of Article 2.1.[336] The Appellate Body has explained in *US – Lamb* that:

> "[A] panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations."[337]

7.85 Although the Appellate Body was referring to Article 4.2 when it made that remark, the complainants submit that the same principle applies to the conditions in Article 2 of the Agreement on

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[330] Appellate Body Report, *US – Lamb*, para. 114.

[331] Appellate Body Report, *US – Cotton Yarn*, para. 77.

[332] European Communities' first oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 20-22.

[333] European Communities', Korea's and Norway's written reply to United States' question No. 1 at the first substantive meeting.

[334] United States' second written submission, paras. 33-35.

[335] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 2.

[336] United States' second written submission, paras. 33 to 35.

[337] Appellate Body Report, *US – Lamb*, para. 141.

Safeguards, which sets out the basic conditions for the application of safeguard measures. The requirements of Article 2.1, such as the identification of an imported product and increased imports, are preconditions for the application of the requirements of Article 4.2 and so the former must, therefore, also contain the substantive requirement of a reasoned and adequate explanation. This conclusion is supported by the fact that the Appellate Body has held in *US – Lamb* that there is also an obligation to demonstrate in the report of the competent authorities the existence of unforeseen developments.[338] Just as a failure to establish unforeseen developments in the report would "sever the 'logical connection'" between this circumstance and the other conditions, so also will a failure properly to identify the imported products in the report sever the "logical connection" with the remaining requirements of the Agreement on Safeguards.[339] This result is also dictated by the object and purpose of the Agreement on Safeguards, which is essentially to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX "Emergency Action on Imports of Particular Products", to re-establish multilateral control over safeguards". Multilateral control over safeguard measures cannot be ensured on the basis of the "trust the competent authority" approach of the United States. A panel cannot conduct a *de novo* investigation; all it can do is to assess whether the measure is justified – that is, whether it is fully and adequately reasoned. If there is no obligation to provide a reasoned and adequate explanation for each finding, there is no basis on which a panel can make such a finding. Thus the obligation to provide a reasoned and adequate explanation is a fundamental principle underlying the whole of the Agreement on Safeguards. If it is not provided in the report of the competent authority, it must be provided in another way. [340]

7.86 The European Communities adds that there is both a procedural requirement for the competent authorities to publish a report and a substantive obligation to provide a reasoned and adequate explanation in the report demonstrating that the conditions for the imposition of a safeguard measure are satisfied. It is not sufficient in meeting the substantive obligation to demonstrate that these conditions are met before a dispute settlement panel.[341] The reasons are that, first, Article 2.1 of the Agreement on Safeguards provides that "[a] Member may apply a safeguard measure to a product only if that Member has determined, *pursuant to the provisions set out below* …" The "provisions set out below" include of course Article 3.1 and this makes respect of this provision a substantive obligation. Second, it is inherent in the notion of "determination" that there be full consideration of all the facts and arguments and a reasoned and adequate explanation of how all the requirements for imposing the measure have been met.[342]

7.87 Japan considers that if a reasoned and adequate explanation is missing, it would lead to both a violation of Article 3.1 (procedural) and Article 2.1 (substantive). Providing such an explanation is part of the Member's obligation in order to acquire the right to apply a safeguard measure. Article 2.1 of the Agreement on Safeguards provides that "[a] Member may apply a safeguards measure only if that Member has determined, *pursuant to the provisions set out below*," (emphasis added), and the "provisions set out below" includes Article 3.1. A plain textual reading of the Agreement would therefore not support the United States' contention. The Appellate Body supports this view. In paragraph 236 of its report in *US – Line Pipe*, the Appellate Body stated: "[c]ompliance with Article 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient justification for a measure, and as we will explain, should also provide a benchmark against which the permissible extent of the measures should be determined." The

[338] Ibid., para. 75.
[339] Ibid., para. 72.
[340] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, paras. 20-26.
[341] Appellate Body Report, *US – Lamb*, para. 141.
[342] European Communities' written reply to Panel question No. 1 at the second substantive meeting.

Appellate Body has also suggested in the context of the parallelism issue that part of complying with substantive provisions of the Agreement is the need to provide "a reasoned and adequate explanation that establishes explicitly" that imports have "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."[343] [344]

7.88 Korea disagrees with the United States' artificial distinction that a failure to adequately explain a determination has no relationship to a substantive violation. As the Appellate Body stated in *US – Lamb*, the fulfilment of the three conditions for safeguard relief set out in Article 2.1 of the Agreement on Safeguards (and Article XIX.1.a of the GATT 1994) must be published in the report of the competent authorities as required by Article 3.1.[345] Failure to do so would result in a violation of Article 3.1. In that same decision, the Appellate Body treated the failure of the USITC to adequately consider and explain how the facts supported its determination on pricing trends in its threat of injury analysis as a substantive violation of Article 4.2(a).[346] Korea also disagrees with the United States' suggestion that complainants "confuse" substantial and procedural obligations by basing their case solely on the failure to explain the decision.[347] The failure of the United States to adequately explain its reasoning follows from and is independent of the other substantive errors committed by the United States (e.g., the lumping together of disparate flat-rolled and pipe products into single like products; the failure to properly analyse the increased imports requirement; the failure to separate out other causes of injury and attributing injury caused by those other factors to imports; and the failure to limit the measure to the extent necessary).[348]

7.89 Norway argues that the failure to explain a determination adequately is normally a clear sign that the substantive obligation in the other relevant Articles has been violated. As such, the failure to explain adequately under Article 3.1 confirms the establishment of a prima facie case of violation of the other substantive obligation. With the associated failure to explain the determination adequately, the United States must be considered to have failed to rebut the prima facie case established by the complainants.[349] The United States would seem to be arguing that it can uphold its measures, even though it violated Article 3.1, if it can convince the Panel that the requirements of Articles 2.1, 4 and 5 are nevertheless fulfilled. This is not the case. The publication of a report in accordance with Article 3.1 is a *sine qua non* for the imposition of safeguards. Giving such explanations is part of a Member's obligations that must be satisfied in order to acquire the right to apply a safeguard.

7.90 New Zealand also disagrees with the assertion made by the United States. Article 2.1 of the Agreement on Safeguards contains the substantive obligation that a safeguard measure can only be applied where a Member has "determined, pursuant to the provisions set out below" in the Agreement, that the conditions justifying a safeguard measure have been met. The Appellate Body in *US – Lamb* has said that in examining a claim under Article 4.2, for example, a panel must review whether the competent authority has, "as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations".[350]

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[343] Appellate Body Report, *US – Line Pipe*, para 188.
[344] Japan's written reply to Panel question No. 1 at the second substantive meeting.
[345] Appellate Body Report, *US – Lamb*, paras. 72 and 76.
[346] Appellate Body Report, *US – Lamb*, para. 141; *see* also para. 103 and paras. 60-61.
[347] United States' second written submission, para. 33 and footnote. 41.
[348] Korea's written reply to Panel question No. 1 at the second substantive meeting.
[349] Norway's written reply to Panel question No. 1 at the second substantive meeting.
[350] New Zealand's written reply to Panel question No. 1 at the second substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 141 (emphasis in the original). See also para. 103.

7.91 According to Brazil, the only reason for the requirement in Article 3.1 that the competent authorities set forth their "findings and reasoned conclusions" is to enable Members and, in the case of dispute settlement, panels and the Appellate Body to evaluate whether the Member imposing safeguard measures has met its substantive obligations. As stated by the Appellate Body in *Argentina – Footwear (EC)*, the purpose of a panel is to determine whether "authorities … considered all of the relevant facts and … adequately explained how the facts supported the determinations that were made".[351] The authorities, in effect, must provide justification for the measure in the form of "a reasoned and adequate explanation". The absence of a reasoned and adequate explanation in the form of findings and reasoned conclusions constitutes a violation of Article 3.1. However, the imposition of safeguard measures without adequately explaining how the facts supported the determinations consistent with the requirements of the Agreement on Safeguards, is a substantive violation because the competent authorities have imposed safeguard measures without adequately justifying the action. The substantive violation can be based on the total absence of a justification, an inadequate justification, or a justification not supported by objective evidence.[352]

7.92 The United States responds that the text of Article 2.1 of the Agreement on Safeguards in no way suggests the complainants' interpretation. Moreover, the Appellate Body standard on which they rely was grounded in specific language in Article 4.2(a) that does not appear in Article 2.1. Therefore, the complainants are wrong to assert that the absence of the "findings and reasoned conclusions" required under Article 3.1 would also establish a prima facie inconsistency with the substantive obligation that the product in question is being imported in such increased quantities and under such conditions as to cause serious injury. Article 2 is entitled "Conditions." Its first paragraph requires that the measure be taken "pursuant to the provisions set out below." It then lays out the substantive requirements for application of a safeguard measure, while its second paragraph requires application of such measures without regard to the source of the imports. None of these substantive provisions requires a Member to provide an explanation of how the facts of the case satisfy these obligations. The reference to "provisions set out below" merely reiterates the obligation to comply with those provisions. It does not suggest that failure to comply with them somehow constitutes a breach of the other elements of Article 2.1. In the European Communities' view, the Article 4.2 "substantive" obligation to explain, which it seeks to import into Article 2.1, arises from the Appellate Body's statement in *US – Lamb* quoted by the European Communities.[353] However, the European Communities omitted from its quotation that the Appellate Body's statement starts: "[w]e have already said that, in examining a claim under Article 4.2 of the Agreement on Safeguards, a panel's application of the appropriate standard of review …". This emphasizes that the Appellate Body's reasoning applies to a panel's analysis of compliance with Article 4.2. Nothing in the passage suggests that it applies to other provisions of the Agreement. Second, the text of Article 4.2 demonstrates that the obligation to explain arises under subparagraph (c), which requires the competent authorities to publish "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." The term "factors" clearly refers back to the "relevant *factors* of an objective and quantifiable nature having a bearing on the situation of that industry" under Article 4.2(a). Thus, the Appellate Body's conclusion as to the explanatory requirements "under Article 4.2" as a whole reflects the explicit requirements of subparagraph (c). It does not suggest that the substantive obligations under paragraph (a) somehow give rise to an autonomous requirement to explain. Indeed, to interpret Article 2.1 or 4.2(a) by itself to impose such a requirement would render Articles 3.1 and 4.2(c) redundant, in direct contravention of the principle of effectiveness in treaty interpretation.[354] The terms of the Agreement on Safeguards themselves

[351] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[352] Brazil's written reply to Panel question No. 1 at the second substantive meeting.
[353] *See* paragraph 7.84 above.
[354] Appellate Body Report, *Argentina – Footwear (EC)*, para. 88, footnote 76.

establish how Members achieve the goals in the preamble. In the last sentence of Article 3.1 and in Article 4.2(c), these terms require the competent authorities to provide a report setting out their findings and reasoned conclusions on all pertinent issues of fact and law, along with a detailed analysis of the case. These provisions delineate a Member's obligations to explain its determination regarding serious injury – there is no need to impute such an obligation into other provisions of the Agreement.[355]

7.93 The United States stresses that it has never disputed that the competent authorities must provide a reasoned and adequate explanation of their findings. They must, and if they fail to do so, a Member will have failed to comply with Article 3.1 or Article 4.2(c). However, such a failure to explain does not automatically entail a conclusion that the resulting measure is itself inconsistent with other provisions of the Agreement on Safeguards, including the substantive obligations under Article 2.1. Indeed, a more robust explanation could well demonstrate the consistency of the measure with WTO rules.[356] The Appellate Body Report in *US – Countervailing Measures Concerning Certain EC Products* demonstrates the fallacy of the European Communities' view that a methodology is inconsistent with the covered agreements if it is "not apt to ensure that the conditions of the Agreement on Safeguards are satisfied."[357] The Appellate Body examined the "same person" methodology to determine whether it "*does not permit* the investigating authority to satisfy all the prerequisites stated in the *SCM Agreement*."[358] Thus, the question was not whether the methodology as such guaranteed consistency with WTO rules, but whether the framework of that methodology allowed an outcome consistent with the Agreement. In this dispute, the United States has shown that the methodologies employed by the USITC are not, as such, within the terms of reference of the Panel. Moreover, should the Panel decide to evaluate methodologies "as such", the United States has shown that each of the "contested methodologies" identified by complainants – the USITC's analyses of like product, increased imports, and causation[359] – as a general matter facilitated, and at the very least allowed, findings consistent with Article XIX and the Agreement on Safeguards. The determinations and the supporting views of the Commissioners demonstrate that they did so with regard to each of the ten imported steel products.[360]

6. Judicial economy

7.94 Korea submits that the Panel should reach all issues on which review is sought to assure a full resolution of the dispute. As Article 3.3 of the DSU stipulates, the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. For prompt settlement of the present dispute, it is essential for the Panel to make a finding on all the claims made by Korea and other co-complainants in the present proceedings. Korea argues that judicial economy, exercised loosely, would not lead to dispute

[355] United States' written reply to Panel question No. 1 at the second substantive meeting.

[356] Statements made by the Appellate Body in *US – Wheat Gluten*, support this view. The Appellate Body stated that "a claim under Article 4.2(a) might not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate." Appellate Body Report, *US – Wheat Gluten*, para. 103, footnote 61. Thus, the Appellate Body recognized that a Member might comply with a particular obligation even if it did not provide a reasoned and adequate explanation of *how* it did so.

[357] European Communities' second written submission, para. 30.

[358] Appellate Body Report, *US – Countervailing Measures Concerning Certain EC Products*, para. 147 (emphasis added).

[359] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 15.

[360] United States' written reply to Panel question No. 1 at the second substantive meeting.

resolution but to dispute prolongation. The Appellate Body in *US – Lamb* reached all claims regarding threat of serious injury despite finding a flaw in the like product determination of the United States.[361] Similarly, in *US – Line Pipe*, the panel reached the challenges to the safeguard measure even though the serious injury investigation was found not to be in compliance with the Agreement on Safeguards.[362] Korea submits that, in particular, it is important for the Panel to make findings both for the investigation conducted by the USITC and the safeguard measure imposed by the President of the United States. As the Appellate Body held in *US – Line Pipe*, there are two separate and distinct inquiries in a safeguard case: "*first*, is there a right to apply a safeguard measure? And, *second*, if so, has that right been exercised … within the limits set out in the treaty?"[363] Korea notes that both are being challenged in this Panel appeal.[364]

7.95 Japan notes that none of the claims it has pursued in this case are dependent on any other claims. They all stand on their own. Nonetheless, if the Panel agrees with Japan that the grouping by the United States of slab, plate, hot-rolled, cold rolled, and corrosion resistant into a single like product is inconsistent with WTO obligations, then it is necessarily also true that each of the other elements of the US decision to impose safeguards on these flat-rolled products is also inconsistent with WTO obligations. That being said, Japan encourages the Panel to address each of the other claims that have been made in this case, so as to prevent the United States from repeating in the future the same methodological mistakes it made in this case (many of which have already been identified as problematic by the Appellate Body in previous cases).[365]

C. UNFORESEEN DEVELOPMENTS

1. Introduction

7.96 The European Communities, China, Switzerland, Norway and New Zealand claim that the USITC Report was issued without examining the issue of unforeseen developments.[366] They submit that the USITC's Second Supplementary Report, should it be acceptable, did not provide adequate reasoning for a series of reasons. They claim that the United States' demonstration in support of its safeguard measures suffers from a lack of adequate demonstration of "unforeseen developments". More particularly, New Zealand, argues that the USITC has failed to demonstrate the existence of unforeseen developments as a matter of fact; the developments that it relies on have not resulted in increased imports into the United States or they are not related to the relevant tariff concession; no reasoned conclusions were provided; and no opportunity was provided to third parties to present evidence and their views on the issue of unforeseen developments.[367] For all of these reasons, they claim that the United States has failed to comply with the provisions of both Article 3.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

7.97 In response, the United States claims that consistent with its obligations under GATT 1994 Article XIX and Article 3.1 of the Agreement on Safeguards, the USITC identified the unforeseen developments that resulted in the ten steel products being imported in such increased quantities and under such conditions as to cause serious injury or the threat thereof to the domestic industries

[361] Appellate Body Report, *US – Lamb*, para. 121.
[362] Panel Report, *US – Line Pipe*, paras. 7.15 and 8.1.
[363] Appellate Body Report, *US – Line Pipe*, para. 84 (emphasis in original).
[364] Korea's first written submission, paras. 16-18.
[365] Japan's second written submission, para. 3.
[366] European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11; Switzerland's first written submission, paras. 109-110.
[367] New Zealand's first written submission, para. 4.29.

producing like products.[368] The USITC's demonstration of unforeseen developments showed the sequential relationship implied by Article XIX between trade concessions, unforeseen developments, and imports in such quantities and under such conditions as to cause serious injury. The conditions which caused injury were a result of unforeseen developments.[369]

7.98 For the United States, each of the events cited by the USITC is an unforeseen development under Article XIX. The financial crises that engulfed South East Asia were unforeseen by economists right up to the time the crises began. The financial crises that hit the countries which were republics in the former USSR were also unforeseen. According to the United States, the crises had an unforeseen, radical, and lasting effect on the level of exports from those countries.[370] The continued strength of the US market at a time when most other markets were contracting, along with the persistent appreciation of the US dollar, were also unforeseen developments which made the US market an especially attractive one for imports displaced from other markets as a result of the financial crises in South East Asia and the former USSR republics.[371] The United States submits that each of these developments was unforeseen, as was the simultaneous occurrence or confluence of such events.[372]

2. The requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards

(a) Introduction

7.99 The complainants argue that safeguard measures constitute "emergency action" and are only to be imposed when the alleged increase in imports arises out of unforeseen developments.[373] They contend that safeguard measures must be justified by "unforeseen developments" and unforeseen developments must be demonstrated as a matter of fact[374], before the safeguard measure is applied.[375] Otherwise, third parties will not have an opportunity to present evidence and their views, as required by Article 3.1 of the Agreement on Safeguards.[376] They also argue that the demonstration of unforeseen developments must be made in the same report of the competent authorities.[377] Moreover, unforeseen developments must have "led to" or be the "result of" a product being imported in such increased quantities and under such conditions as to cause, or threaten to cause, serious injury to domestic producers.[378] The competent authorities, in this case the USITC, have a duty to demonstrate through a reasoned and adequate explanation that these legal conditions for adoption of such measures

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[368] United States' first written submission, para. 925.
[369] United States' first oral statement, para. 71.
[370] United States' first oral statement, para. 72.
[371] United States' first written submission, paras. 972-976.
[372] United States' first oral statement, para. 72.
[373] European Communities' first written submission, para. 116; Switzerland's first written submission, para. 105; Norway's first written submission, para. 104; China's first written submission, para. 83; New Zealand's first written submission, para. 4.6.
[374] Appellate Body Report, *US – Lamb*, para. 106; Appellate Body Report, *US – Cotton Yarn*, paras. 72-74.
[375] Appellate Body Report, *US – Lamb*, para. 72.
[376] Switzerland does not make a claim pursuant to Article 3.1 of the Agreement on Safeguards.
[377] Switzerland's first oral statement on behalf of the complainants, para. 6; see also European Communities', China's and Switzerland's written replies to Panel question No. 15 at the first substantive meeting and Norway's second written submission, para. 21.
[378] European Communities' first written submission, paras. 120 and 176-178; China's first written submission, paras. 84 and 123-125; Norway's first written submission, paras. 108 and 164-166; New Zealand's first written submission, para. 4.29; Switzerland's first written submission, paras. 106-108 and 163.

are met. The European Communities, Norway and New Zealand add that the requirement of "unforeseen developments" is coupled with another condition, namely, that the importation also be due to "the effect of the obligations incurred by a contracting party under this Agreement".[379]

7.100 In the United States' opinion, Article XIX requirements are different from the requirements under Articles 2 and 4 of the Agreement on Safeguards. This was recognized by the Appellate Body, which described unforeseen developments as a "*circumstance* which must be demonstrated as a matter of fact", as opposed to the "independent *conditions* for the application of a safeguard measure". According to the United States, the term "unforeseen developments" covers any change that is unexpected. The quantities of imports or the conditions must be "as a result of" unforeseen developments, but need not be caused by these developments. Moreover, Article XIX indicates that there should be a sequential relationship of trade concessions, followed by unforeseen developments and then serious injury, but it does not require that the unforeseen developments be contemporaneous with the imports, or immediately precede the imports.[380] Finally, the United States is of the opinion that neither the Agreement on Safeguards nor Article XIX requires that unforeseen developments be limited to, or even directly related to, the particular products or products under investigation.[381]

(b) Legal standard

7.101 For all of the complainants, the legal standard that is used to determine what constitutes an unforeseen development is, at least in part, subjective. In the opinion of the European Communities and China, the standard is probably relatively subjective in the sense that it need not be proven that the unforeseen development was impossible to predict. However, expectations of States are the expectations of those who govern them and their opinions and actions are public knowledge. Accordingly, the unexpectedness of a development is something that can be demonstrated.[382] Norway agrees that the standard is not entirely objective, as it depends on the particularities of each case. Norway adds, however, that it is not the subjective beliefs of the negotiators of the concession that is relevant, rather that the situation demonstrates certain generally accepted elements of unexpectedness, as seen from a "bonus pater familias". Therefore, the unexpectedness of a development is something that can be demonstrated.[383] New Zealand points to the *US – Fur Felt Hats* case, which stated that unforeseen developments are "developments occurring after the negotiations of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[384] In New Zealand's opinion, the standard can be seen as having a subjective element. At the same time, in order to ensure that the requirement is not rendered inutile, it must be susceptible to demonstration on an objective basis. This requires the investigating authority to explain (by way of an adequate and reasoned conclusion) why a particular development was "unforeseen". Accordingly, a mere assertion that a development was "unforeseen" will not be sufficient to meet the standard.[385] Finally, Switzerland argues that there are no objective standards of what is unforeseen, and that it depends on the particular case.[386]

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[379] European Communities' first written submission, para. 121, Norway's first written submission, paras. 109; New Zealand's first written submission, para. 4.22.

[380] United States' first written submission, paras. 925, 926, 932 and 935.

[381] United States' first oral statement, para. 70.

[382] European Communities' and China's written reply to Panel question No. 13 at the first substantive meeting.

[383] Norway's written reply to Panel question No. 13 at the first substantive meeting.

[384] *US – Fur Felt Hats*, para. 9.

[385] New Zealand's written reply to Panel question No. 13 at the first substantive meeting.

[386] Switzerland's written reply to Panel question No. 13 at the first substantive meeting.

7.102 The United States argues that the Appellate Body has construed "unforeseen" as synonymous with "unexpected" rather than with "unforeseeable".[387] The Panel in *US – Lamb* found the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* to be important. For that panel, the former term implies a lesser threshold than the latter one. The appropriate focus is on what was actually "foreseen" rather than theoretically "foreseeable".[388] For the United States, the term "unforeseen developments" covers any change that the negotiators of the Contracting Party did not foresee when they undertook obligations or tariff concessions with regard to that product subject to the measure.[389]

(c) What amounts to "unforeseen developments"?

7.103 According to the European Communities, China, Switzerland, and Norway the USITC's explanation relies on the following chain of circumstances. The Asian and Russian crises led to reduction of consumption in selected steel products in selected countries at certain times; the United States economy and steel consumption remained robust, or increased; the United States dollar appreciated against selected other currencies; so that as currency depreciations and economic contractions disrupted other markets, the share of steel imports to the United States market allegedly increased. The complainants contend that none of these events constituted unforeseen developments, nor did any combination of them.[390]

7.104 The United States argues that each of the events cited by the USITC is an unforeseen development under Article XIX. According to the United States, the USITC found that the unforeseen developments consisted not merely of continued growth in demand in the United States market for steel products, but rather the continued growth in that market while other markets contracted or stagnated, making the United States market an especially attractive one for steel products displaced from other markets.[391] The USITC found that it was the confluence and unusual persistence of these events, such as the continued growth in the United States economy while other economies stagnated or contracted, and persistent, widespread currency appreciation, that made these developments unforeseen.[392] The United States submits that the financial crises that engulfed South East Asia and the depth and length of the financial crises of the former USSR republics were unforeseen and had unforeseen, radical, and lasting effects on the level of steel exports from those countries. The continued strength of the US market at a time when most other markets were contracting and the persistent appreciation of the US dollar, were also unforeseen developments which made the US market especially attractive for imports displaced from other markets as a result of the financial crises in South East Asia and the former USSR republics. Each of these developments was unforeseen, as was simultaneous occurrence of such events.[393]

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[387] United States' first written submission, para. 927, citing Appellate Body Report, *Korea – Dairy*, para. 84.

[388] United States' written reply to Panel question No. 13 at the first substantive meeting, citing Panel Report, *US – Lamb*, para. 7.22.

[389] United States' first written submission, para. 926.

[390] European Communities' first written submission, para. 142; Switzerland's second written submission, paras. 26-37; Norway's first written submission, para. 130; China's first written submission, para. 88, citing the USITC Second Supplementary Report, Attachment I, pp. 3 to 4 (Exhibit CC-11).

[391] United States' first written submission, para. 971, citing USITC Second Supplementary Report, p.3.

[392] United States' first written submission, paras. 972 and 976, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[393] United States' first oral statement, para. 72.

(i) The Russian and Asian crises

7.105 The complainants argue that the developments mentioned by the United States were not "unforeseen" because they were not unexpected.[394] Unforeseen developments that result in increased imports from a non-WTO member cannot satisfy the requirements of Article XIX. Where an unforeseen development relates to a non-WTO country, any resulting increased imports from the country cannot be said to have resulted from a tariff concession or other WTO obligation.[395] The United States was free to restrict the exports of steel products from most of the steel-producing former USSR republics into the United States, and indeed, the United States did take measures not regulated by the WTO Agreement to deal with the problems caused by the Russian crisis.[396]

7.106 In the opinion of the European Communities and Norway, unforeseen developments must be coupled with effects due to the obligations incurred by a contracting party under the GATT 1994. This comes from the language of Article XIX:1(a), which provides that increased imports must be "a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions".[397] New Zealand adds that the concept of "unforeseen developments" is devoid of any meaning if it is considered in isolation from the relevant tariff concessions that in the absence of safeguard action would permit increased imports to enter at bound rates.[398]

7.107 The complainants agree that if the Russian crisis had resulted in increased imports into the United States from other WTO Members then there would indeed be "relevant tariff concessions" to consider. However, the USITC did not proceed on this basis, nor did it make such a demonstration.[399] The USITC argues solely that decreased consumption in the former Soviet Union led to increased imports into the United States from the former USSR republics, a premise that has no relevance under GATT 1994 Article XIX:1(a).[400]

7.108 The United States argues, on the other hand, that the Russian crisis is relevant because of both the increase in direct imports from Russia and the displacement of third-country shipments into the United States market.[401] According to the United States, the USITC's demonstration of unforeseen developments showed the sequential relationship between trade concessions, unforeseen developments and imports. In its opinion, there is no requirement that the finding of "unforeseen developments" be "coupled with" the effect of the obligations, including tariff concessions, incurred under GATT 1994.[402] WTO panels and the Appellate Body have interpreted "unforeseen developments" without reference to the "effect of the obligations" provision.[403] Moreover,

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[394] Switzerland's first oral statement, delivered on behalf of all complainants, para. 15.

[395] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 8 at the first substantive meeting.

[396] Switzerland's first oral statement on behalf of the complainants, para. 18; European Communities' written reply to Panel question 8 at the first substantive meeting.

[397] European Communities' first written submission, para. 144; Norway's first written submission, para. 132.

[398] New Zealand's first written submission, para. 4.22.

[399] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question 6 at the first substantive meeting.

[400] New Zealand's first written submission, para. 4.24.

[401] United States' written reply to Panel question No. 6 at the first substantive meeting.

[402] United States' first oral statement, para. 70.

[403] United States' first written submission, para. 946, citing Panel Report, *US – Lamb* paras. 7.4-7.45; Appellate Body Report, *US – Line Pipe*, paras. 7.293-7.300; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

Article XIX:1(a) imposes no requirement that an unforeseen development originate in the economy of a WTO member, and factually, the USITC did not limit itself to an increase in imports from non-WTO members.[404]

7.109 Finally, the European Communities argues that even if the Asian and Russian crises had had an effect on imports for some of the products concerned, this happened between 1997 and 1999. This is seen in the first instance in the period covered by the data referred to in the Second Supplementary Report of the USITC and secondly by the import peaks on which the USITC relies as "increased imports", which also date from this period. Thus, even if the Asian and Russian crises did cause or contribute to the import peaks around 1998, the effects of these alleged unforeseen developments had disappeared by the time the safeguard investigation was conducted. The USITC Report nowhere attempts to demonstrate that the alleged unforeseen developments of 1996 and 1997 were continuing to have an effect in 2001 or indeed could be presumed to continue to have an effect during the period of application of the safeguard measures. On the contrary the data on increased imports shows marked peaks in 1997 to 1998 and return to normality thereafter and demonstrates that the alleged unforeseen developments were not having any relevant effect on imports during the period of investigation.[405]

7.110 For the United States, it is not necessary that unforeseen developments continue to have an effect up until the recent past. It adds that in the course of the steel investigation, producers and exporters from various complainants admitted as much, stating that "[t]here can be a reasonable time lag in between the unforeseen development and the increase in imports leading to serious injury ... the time it takes for market participants to react to certain forces may be much longer. Beyond the simple supply and demand forces at play, various business cycles may influence business decisions and either exacerbate or dampen the change in trade flows".[406] In fact, there is no requirement that unforeseen developments be "recent". As long as they occurred after the relevant tariff concession and resulted in increased imports, that is sufficient to meet Article XIX requirements.[407]

(ii) The Strength of the US economy and the appreciation of the US dollar

7.111 The European Communities, China, Switzerland and Norway submit that the "robustness" of the United States market cannot be considered an "unforeseen development" by the United States, because United States economic policy was likely conducted with this objective.[408] The European Communities states that the argument that a successful economic development, in accordance with its policy, is "unforeseen" is preposterous.[409] The complainants argue that, besides, the growth of the United States' economy started in 1990, well before the Uruguay Round, so it must have been foreseen.[410] Most fundamentally as regards the US dollar appreciation, a change in the value of a currency such as the US dollar cannot be accepted as an unforeseen development.[411]

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[404] United States' first written submission, paras. 941-942.

[405] European Communities' second written submission, paras. 72-74.

[406] Joint Respondents' Posthearing Brief: Flat-Rolled Products, Oct. 1, 2001, Vol. II at p.23 (Exhibit US-74).

[407] United States' written reply to Panel question No. 14 at the first substantive meeting.

[408] European Communities' first written submission, para. 150; Switzerland's first written submission, para. 136; Norway's first written submission, para. 138; China's first written submission, para. 100.

[409] European Communities' first written submission, para. 150.

[410] Switzerland's first oral statement, delivered by on behalf of all complainants, para. 19.

[411] European Communities' first written submission, para. 152; Switzerland's first written submission, para. 138; Norway's first written submission, para. 140; China's first written submission, para. 101.

7.112 According to the European Communities, China and Norway, exchange-rate developments are foreseeable in two main senses. First, it is foreseeable that the exchange rate between two currencies that are not fixed will change over time. Second, it is foreseeable that the exchange rate of a currency of a country with a robust economy and low inflation (such as the United States in the 1990s) will rise over time compared with the currency of a country with a weak economy and high inflation rate (such as Russia).[412] For them, the value of the dollar in relation to other currencies has regularly changed by significant amounts since the collapse of the Bretton Woods system of fixed exchange rates in 1971. Such changes can no longer be considered to be "unforeseen" but it must, on the contrary, be considered to be quite expected that the dollar would not remain stable vis-à-vis other currencies.[413]

7.113 The United States responds that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel demand in the United States market as other markets declined, to produce the increased volume of imports.[414] In its opinion, nothing in Article XIX prevents the continued strength of a market or the persistent appreciation of a currency while other markets contracted or stagnated and currencies depreciated from constituting an unforeseen development. The period under investigation saw persistent and widespread appreciation of the US dollar against virtually all other major currencies.[415] The United States argues that the fact that exchange rates change over time could be described as foreseeable, but not necessarily foreseen. Particular exchange rate developments, such as an unusually rapid or severe change in rates, are not likely to have been foreseen at the time of a particular concession. It argues that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were in fact foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round.[416]

7.114 In counter-response, the European Communities, Norway and Switzerland, challenge the notion that such favourable developments are capable of being considered unforeseen developments when this term is considered in its context of Article XIX. Unforeseen developments within the meaning of Article XIX are unfavourable developments or shocks to the system that are susceptible to lead to adverse consequences. They submit that such is not the case of the "robustness" of the United States economy and the strength of the US dollar.[417]

7.115 The United States responds that in *US – Fur Felt Hats*, the unforeseen development was a shift in fashion to a different sort of hat. That shift in fashion was presumably unfavourable to the industries making the less-fashionable hats, but that shift could probably not be described as "unfavourable" in any broader sense. *US – Fur Felt Hats* supports the conclusion that an unforeseen development may be a development that could be described as neutral or even positive in general terms, but which results in a change in trade patterns that proves injurious to a particular industry.[418]

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[412] European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

[413] Switzerland's first oral statement, delivered on behalf of all complainants, para. 19.

[414] United States' written reply to Panel question No. 18 at the first substantive meeting.

[415] United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[416] United States' written reply to Panel question No. 10 at the first substantive meeting.

[417] European Communities' second written submission, para. 56; Norway's second written submission, para. 40; Switzerland's second written submission, para. 31.

[418] United States' second oral statement, para. 106.

(iii) Macroeconomic events

7.116 The European Communities, China, Switzerland, and Norway also argue that since the Russian and Asian crises were macroeconomic events, it is not evident that they specifically affected the steel products on which safeguard measures were imposed. These events could just as much constitute unforeseen developments to justify safeguard measures in almost any sector of the economy in any Member of the WTO.[419] The European Communities, China, Switzerland, Norway, and New Zealand do not exclude that a macroeconomic event could be relevant as an unforeseen development but they submit that this in no way obviates the need for an investigating authority to demonstrate that such events have resulted in increased imports.[420] Nevertheless, according to the European Communities, China and Norway, the ups and downs of the economic cycle (which are often referred to as crises) cannot be considered to be unexpected, even if the precise time at which they occur in a given country cannot be predicted.[421] According to Switzerland and New Zealand, whether a crisis was foreseen or not can only be determined on a case-by-case basis.[422] According to China, macroeconomic events may only constitute unforeseen developments when it is demonstrated that they have a direct relationship with the increasing level of importation of products in the country concerned.[423]

7.117 The United States believes that a macroeconomic event, like any other event, can constitute an unforeseen development, which can justify the imposition of safeguards relief in response.[424] The relevant test under Article XIX is not what is foreseeable but what is unforeseen, and while a class of events may be foreseeable, a particular crisis could be unforeseen for purposes of Article XIX.[425]

(d) "as a result of unforeseen developments"

(i) Logical connection to increased imports and conditions as to cause or threaten serious injury

7.118 The European Communities, China, Switzerland and Norway agree that there must be a "causal link" between the unforeseen "developments" and the increase in imports that allegedly causes or threatens to cause injury. For them, the term "as a result" clearly expresses this requirement.[426] They submit that according to the Appellate Body in *US – Lamb*, "the existence of unforeseen developments is a prerequisite that must be demonstrated … in order for a safeguards measure to apply".[427]

7.119 New Zealand recalls that in *Argentina – Footwear (EC)*, the Appellate Body stated that the "as a result of" language in Article XIX:1(a) underlines the need for a "logical connection" between

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[419] European Communities' first written submission, para. 147; Switzerland's first written submission, para. 133; Norway's first written submission, para. 135; China's first written submission, para. 99.

[420] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 4 at the first substantive meeting.

[421] Norway's, European Communities' and China's written replies to Panel question No. 9 at the first substantive meeting.

[422] Switzerland's and New Zealand's written replies to Panel question No. 9 at the first substantive meeting.

[423] China's second written submission, paras. 19.

[424] United States' first written submission, para. 939.

[425] United States' written reply to Panel questions Nos. 9 and 10 at the first substantive meeting.

[426] See the written replies of the European Communities, China, and Norway to Panel question No. 2 at the first substantive meeting.

[427] Switzerland's first oral statement on behalf of the complainants, para. 13; Switzerland's second written submission, para. 20.

such developments and the increased imports which a Member is seeking to address through safeguard action. It adds that it is important not to reduce the "unforeseen developments" requirement to an inutility in that all an investigating authority would need to do would be to point to supposed "unforeseen developments" without any attempt to relate these developments to the circumstances of increased imports that they considered justified safeguard action. The term "unforeseen developments" is effectively robbed of any meaning if considered in isolation from the issue of resulting "increased imports".[428] According to New Zealand, the demonstration of "unforeseen developments" requires that the investigating authority explain how these developments are linked to the "increased imports" it relies on for the imposition of a safeguard measure.[429]

7.120 In Norway's view, the reason why the Appellate Body made reference to a "logical connection" instead of a direct causal link is because it may not always be feasible to establish a direct correlation between the magnitude of the "unforeseen development" and the exact increase of imports or seriousness of the other conditions.[430] Norway is of the view that a logical connection is needed between unforeseen developments and all three conditions that need to be fulfilled for the imposition of a safeguard measure.[431]

7.121 The European Communities and China contend that the requirements for the imposition of safeguard measures can be considered as being situated in a "logical continuum". This logical continuum commences with a tariff concession (or the acceptance of another WTO obligation). The first crucial step is the arrival of an unforeseen development. This unforeseen development must result in the "such increased imports" and the "under such conditions" referred to in Article XIX of the GATT 1994 and Article 2.1 of the Agreement on Safeguards. The increased imports must, in turn, cause the serious injury in the sense of Article 4.1(a) of the Agreement on Safeguards – which are also expressed in a continuum of factors starting with increased imports and loss of market share and progressing through effects on sales, production and finally unemployment. They conclude that it is correct that there must be a link between the unforeseen developments and the serious injury but this is an indirect multi-stage link rather than a direct link of cause and effect.[432]

7.122 According to the European Communities and China, there should be a logical continuum between the unexpected events claimed to be the "unforeseen developments", their effects on increased imports and the condition under which this increase has occurred, for each of the specific products subject to the safeguard investigation. It might be the case that several distinct elements might be invoked to form the "unforeseen developments" (such as the Asian crisis, the former USSR crisis, the robustness of the United States economy and the strength of the US currency). In these circumstances, there would be no specific requirement to establish a link between the various elements claimed to constitute the "unforeseen developments". They submit that, however, there would be a requirement to establish a logical connection to demonstrate that each of these various elements have resulted in increased imports with respect to each of the specific products under investigation.[433] By way of example, China suggests that if a financial crisis occurs constituting an unforeseen development, it will only allow the imposition of safeguard measures on certain products A, B and C if these developments, separately and independently, result in increased imports for

[428] New Zealand's written reply to Panel question No. 2 at the first substantive meeting.
[429] New Zealand's written reply to Panel question No. 3 at the first substantive meeting.
[430] Norway's written reply to Panel question No. 2 at the first substantive meeting.
[431] Norway's written reply to Panel question No. 3 at the first substantive meeting.
[432] European Communities' and China's written replies to Panel question No. 3 at the first substantive meeting.
[433] European Communities' and China's written replies to Panel question No. 143 at the first substantive meeting.

product A, for product B and for product C.[434] Switzerland and Norway interpret the requirement as necessitating a determination that each individual development resulted in increased imports regarding each specific product.[435]

7.123 The United States responds that if more than one unforeseen development has caused increased imports, Article XIX does not require that there be any link between the various unforeseen developments, only that each of the unforeseen developments "result in" increased imports under such conditions as to cause injury to the domestic industry.[436]

7.124 As to the meaning of "as a result of", the United States argues that the ordinary meaning of "result" is the "effect, consequence, issue, or outcome of some action, process, or design".[437] Thus, the use of "as a result of" indicates that one thing is the "effect, consequence, issue, or outcome" of another. In the case of Article XIX:1, these words indicate that importation of a product in such quantities and under such conditions as to cause serious injury must be the effect, consequence, issue or outcome of unforeseen developments. A showing that a product is being imported in such quantities and under such conditions as to cause serious injury as a result of unforeseen developments by itself establishes a logical connection between the first and second clauses of Article XIX:1 (a). In other words, "as a result of" describes the link between unforeseen developments on the one hand and, on the other hand, imports in such quantities and under such conditions as to cause serious injury. There is no need for a further demonstration or explanation.[438]

7.125 For the United States, this approach conforms more closely to the text of Article XIX:1 and the reports of the Appellate Body than does the alternative view that "as a result of" indicates that there must be a "causal link" between unforeseen developments and the increase in imports. Article XIX:1 requires that serious injury be "caused" by imports in such increased quantities and under such conditions, but that these conditions be "as a result of" of unforeseen developments. The use of different terms for these relationships indicates that the drafters of the GATT 1994 intended that the relationships be different. However, the European Communities' interpretation would treat them as the same – "causal link" is the term used in Article 4.2(b) of the Agreement on Safeguards to describe the relationship between increased imports and serious injury.[439]

7.126 In addition, the United States argues that the Appellate Body has recognized that the first and second clauses of Article XIX:1 have different meanings. It characterized "as a result of unforeseen developments" as a "circumstance" that must be "demonstrated". In contrast, it characterized the requirement to establish that imports in such quantities and under such conditions as to cause serious injury, as "contain[ing] the three conditions for the application of safeguard measures".[440] The European Communities' view that there must be a "causal link" between unforeseen developments and imports in such quantities and under such conditions as to cause serious injury disregards the differences that the Appellate Body noted in the text.[441]

7.127 The United States is of the opinion that in this case, the "logical connection" between the unforeseen developments identified by the USITC and the injury-causing increased imports is clear.

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[434] China's written reply to Panel question No. 2 at the second substantive meeting.

[435] Switzerland's written reply to Panel question No. 143 at the first substantive meeting; Norway's and Switzerland's written replies to Panel question No. 2 at the second substantive meeting.

[436] United States' written reply to Panel question No. 143 at the first substantive meeting.

[437] The New Shorter Oxford English Dictionary, p. 2570.

[438] United States' written reply to Panel question No. 2 at the first substantive meeting.

[439] United States' written reply to Panel question No. 2 at the first substantive meeting.

[440] Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

[441] United States' written reply to Panel question No. 2 at the first substantive meeting.

The USITC determined that, after the beginning of the Asian and Russian financial crises, unusually large volumes of foreign steel production were displaced, and the US market – in which demand remained strong – became the destination for a significant portion of the displaced foreign production.[442]

7.128 The United States suggests that the interpretation offered by the Panel in *US – Lamb* should be followed:

> "The phrase concerning 'unforeseen developments' in Article XIX:1 is grammatically linked to both 'in such increased quantities' and 'under such conditions'. Rather than implying a two-step causation, we view this structure as meaning that while 'unforeseen developments' are distinct from increases in imports *per se*, it may be sufficient for a showing of the existence of this "factual circumstance" that 'unforeseen developments' have caused increased imports to enter "under such conditions" and to such an extent as to cause serious injury or threat thereof."[443]

7.129 This analysis recognizes that "in such increased quantities" and "under such conditions" are independent conditions, either or both of which may be the result of unforeseen developments. Thus, a competent authority could satisfy Article XIX by demonstrating that the unforeseen developments resulted in the injurious conditions rather than the increase in imports *per se*. [444]

7.130 In counter-response, New Zealand argues that although the United States has finally accepted with reluctance that an "unforeseen developments" requirement exists, it seeks to interpret it in a way that empties it of any meaning.[445] The United States oversimplifies the requirements of Article XIX:1(a) when it argues that any "unexpected event" can qualify as an "unforeseen development". Among other things, the Article requires that the unforeseen development, in combination with the negotiated tariff concession, result in an increase in imports of the product concerned.[446] The United States may be correct that the words "cause" or "causation" in relation to increased imports are not explicitly found in the first phrase of Article XIX:1(a), but its attempt to equate "as a result" with "a sequential relationship" is simply an attempt to deny the necessary logical connection that exists between unforeseen developments and the increase in imports.[447] Finally, New Zealand points out that even the USTR considered the term "as a result" to have substantive content, since its request to the USITC for further information asks it to identify the "unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof".[448]

7.131 Norway and Switzerland argue that the United States has misread the Panel's decision in *US – Lamb*, since the Panel there did not reject the fundamental link between unforeseen developments and the increased imports. In their opinion, the Panel merely rejected the argument that a demonstration of "unforeseen developments" would also require that increased imports had caused serious injury.[449] The logical connection that exists between unforeseen developments and increased imports is a close connection, as marked by the words "is being imported", in the present tense. Thus, the United States

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[442] United States' written reply to Panel question No. 2 at the first substantive meeting.
[443] United States' first written submission, para. 933, citing Panel Report, *US – Lamb*, para. 7.16.
[444] United States' first written submission, para. 933.
[445] New Zealand's second written submission, para. 3.2.
[446] New Zealand's second written submission, para. 3.6.
[447] New Zealand's second written submission, para. 3.8.
[448] New Zealand's second written submission, para. 3.9.
[449] Norway's second written submission, para. 28; Switzerland's second written submission, para. 20.

misinterprets Article XIX:1(a) when it states that there is no requirement that unforeseen developments immediately precede the imports or that they be recent.[450]

7.132 Likewise, China finds it hard to understand how the United States can argue that quantities of imports or the conditions must be "a result of" unforeseen developments, but need not be caused by those developments. In China's opinion, the term "as a result" also refers to the notion of causality. The grammatical distinction that the United States tries to make is totally artificial and does not find any support in the terms of Article XIX or in the case law.[451]

7.133 The United States argues that the complainants continue to misunderstand the United States' position on the degree of relation that must exist between unforeseen developments and increased imports. In the opinion of the United States, the complainants' quarrel is more properly with the drafters of Article XIX, who chose the phrase "as a result of", before proceeding to use "cause" to describe the relationship between increased imports and serious injury. In this context, those different words must have different meanings, and the United States' position is that the degree of relation between unforeseen developments and increased imports must necessarily be something different, and something less, than the "causal nexus" implied by the word "cause".[452]

(ii) Logical connection to concession

7.134 The European Communities, Switzerland and Norway argue that the requirement of "unforeseen developments" is coupled with another condition, namely, that the importation also be due to "the effect of the obligations incurred by a contracting party under this Agreement". This comes from the language of Article XIX:1(a), which provides that increased imports must be "a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions … ."[453] They, therefore, argue that unforeseen developments and the relevant tariff concessions must result in increased imports.[454]

7.135 Likewise, New Zealand argues that there has to be a relationship between the increased imports resulting from unforeseen developments and relevant tariff concessions. New Zealand cites the Appellate Body in *Argentina – Footwear (EC)*, where it stated that the phrase "as a result of unforeseen developments and of the obligations incurred by a Member" is linked grammatically to the verb phrase "is being imported".[455] Thus, according to New Zealand, the United States argument, that as a result of the Russian crisis increased imports from Russia entered the United States, is irrelevant. The United States has no GATT tariff or other obligations that obliged it to permit imports from Russia.[456] It also points to the Appellate Body's *Korea – Dairy* decision, which acknowledged that the specific purpose of the safeguard measure is to grant temporary relief in a situation where the combined effect of a tariff concession and a development not foreseen when that concession was granted is that serious injury is caused or threatened to the importing Member's domestic industry. As the Appellate Body stated in that decision, "the object and purpose of Article XIX is to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and

[450] Norway's second written submission, paras. 30 and 33.
[451] China's second written submission, paras. 11-17.
[452] United States' second oral statement, para. 107.
[453] European Communities' first written submission, para. 144; Norway's first written submission, para. 132; Switzerland's first written submission, para. 130.
[454] European Communities' written reply to Panel question No. 3 at the second substantive meeting; Norway's second written submission, para. 42; China argues that a logical connection must exist between the unforeseen developments and the relevant tariff concession, see China's second written submission, paras. 23.
[455] Appellate Body Report, *Argentina – Footwear (EC)*, para 92
[456] New Zealand's written reply to Panel question No. 3 at the second substantive meeting.

other exporting Members".[457] New Zealand concludes that for a Member to avail itself of a remedy designed to address unexpected effects of a tariff concession, where there is no tariff concession, is an abuse of that remedy. To accept that a Member may do so undermines the careful balance of rights and obligations expressed in Article XIX.[458]

7.136 In the opinion of the United States, there is no requirement that the finding of "unforeseen developments" be "coupled with" the effect of the obligations, including tariff concessions, incurred under GATT 1994.[459] It points out that WTO panels and the Appellate Body have interpreted "unforeseen developments" without reference to the "effect of the obligations" provision.[460] Article XIX:1(a) imposes no requirement that an unforeseen development originate in the economy of a WTO Member.[461]

7.137 The United States argues further that there is no linkage between consideration of the unforeseen developments and "the effect of the relevant obligations incurred by a contracting party under this Agreement, including tariff concessions".[462] It claims that the logical connection called for by the Appellate Body in *Argentina – Footwear (EC)* is not between tariff concessions and unforeseen developments, but between unforeseen developments and increased imports. Therefore, if a Member has shown that imports in such increased quantities and under such conditions as to cause serious injury are the "result of" unforeseen developments, Article XIX:1(a) does not require a separate finding of a "logical connection" between such imports and the tariff concession identified for the product.[463] The USITC identified a particular tariff concession in its discussion of unforeseen developments and identified the increase in imports expected at the time of the concession.[464]

7.138 For New Zealand, the United States' view that GATT 1994 Article XIX does not require that the imports resulting from unforeseen developments be linked to tariff concessions is surprising in view of what the United States itself has submitted: "The common-sense logic behind [GATT XIX] was that, in the absence of such a provision, trade negotiators may decline to make reciprocal trade concessions". The logic is that negotiators will be prepared to make trade concessions if they know that if the unexpected happens, concessions can be temporarily withdrawn. What they have in mind in such a reciprocal relationship is the possibility of the unexpected resulting in increased imports from the countries to which such concessions have been made, not from a non-WTO Member with whom they are free to deal as they wish. In short, it was not Russia that the WTO negotiators had in mind when they considered temporary relief from import surges; rather it was other WTO Members to whom tariff concessions were made.[465]

7.139 The United States responds that a more persuasive interpretation exists to settle the issue of whether Article XIX only covers imports from WTO Members. In its opinion, Article XIX certainly does not explicitly limit "increased quantities" of imports to imports from Member countries only.

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[457] New Zealand's second written submission, para. 3.19, citing Appellate Body Report, *Korea – Dairy*, paras. 86-87.

[458] New Zealand's second written submission, para. 3.19.

[459] United States' first oral statement, para. 70.

[460] United States' first written submission, para. 946, citing Panel Report, *US – Lamb*, paras. 7.4-7.45; Appellate Body Report, *US – Line Pipe*, paras. 7.293-7.300; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[461] United States' first written submission, para. 941.

[462] United States' second written submission, para. 177; United States' written reply to Panel question No. 3 at the second substantive meeting.

[463] United States' written reply to Panel question No. 3 at the second substantive meeting.

[464] USITC Second Supplementary Report, pp. 1-2.

[465] New Zealand's second oral statement, para. 6.

Article XIX:1(a) indicates that imports must have increased "as a result of unforeseen developments and of the effect of the obligations incurred ... under this Agreement". In considering the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions" the Appellate Body found that "this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions".[466] The Appellate Body went on to find that "unforeseen developments" and "obligations incurred" are "certain *circumstances* which must be demonstrated as a matter of fact". By describing "unforeseen developments" and "tariff concessions" as "circumstances", plural, rather than a single "circumstance", the Appellate Body indicates that these are separate, independent occurrences. The United States submits that despite the lengthy discussion of this provision, the Appellate Body never indicated that any particular linkage had to exist between the unforeseen developments and the tariff concessions. Nor did the Appellate Body indicate that each circumstance had to have an equal effect, or indeed any effect, on all imports. The Appellate Body has thus construed Article XIX:1(a) as requiring that both an unforeseen development and a trade concession be demonstrated as a matter of fact. The United States argues that the USITC demonstrated both unforeseen developments and tariff concessions; no more is required.[467]

(e) The timing of unforeseen developments

7.140 The complainants contend that the relevant moment to judge whether an event was unforeseen is when the concession was granted.[468] The tariff concessions at issue in this case are those included in the United States' Uruguay Round Tariff Schedule. Therefore, only developments occurring after the conclusion of the Uruguay Round qualify as unforeseen developments.[469] For the complainants, the entirety of the unforeseen development must normally have occurred after the concession, in the sense of Article XIX of the GATT 1994, has been made.[470] If the unforeseen development had started before the concession, it cannot be considered to be unforeseen. For them, there will normally be a close temporal connection between the unforeseen developments and the increased imports. Alleged delayed causal link would require a specific explanation.[471]

7.141 For the European Communities, China, Switzerland and Norway, given this close temporal connection requirement, the period of investigation must cover both the time of the unforeseen development and the resulting increase in imports etc., to demonstrate the causal link.[472] They submit that the analysis in the USITC Reports relates to the past in general, and totally disregards the temporal nexus that must exist between the "unforeseen developments" and the increase in imports. There was no consideration by the USITC of whether these "unforeseen developments", which relate to events taking place as far back as 1989-1991 (the break-down of the USSR) but also to events in 1997 (the advent of the Asian crisis), led to subsequent increases in imports of specific products

[466] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.
[467] United States' second written submission, paras. 175-177.
[468] *US – Fur Felt Hats*, para. 8.
[469] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 5 at the first substantive meeting.
[470] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 11 at the first substantive meeting.
[471] European Communities' first written submission, para. 133; Norway's first written submission, para. 121; China's first written submission, para. 90.
[472] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 12 at the first substantive meeting.

within the period of investigation (1996-2000) or will do so in the coming three years when the United States' measures will be in force.[473]

7.142 For the United States an unforeseen development must occur "after" the "relevant tariff concession" or, presumably, other obligation that was incurred by a Member under GATT 1994. It argues that a Member may conclude that an obligation or concession from the Tokyo Round, or before, is "relevant" to the analysis under the Agreement on Safeguards. In the *Steel* investigations, the USITC found that US Uruguay Round tariff concessions were the relevant concessions for its analysis of unforeseen developments and the developments identified by the USITC all occurred after the conclusion of the Uruguay Round. The United States argues that the South East Asian and former USSR crises were perhaps foreseeable in the general, hypothetical sense, but the timing extent, and ongoing effect on global steel trade were not foreseen by the United States until well after the conclusion of the Uruguay Round.[474] [475]

7.143 The complainants disagree with the United States' view that "unforeseen developments" can occur before the concession was made as long as its effects was known only thereafter.[476] For Norway, if the effects are only "long term" they will in any case not have the magnitude nor the emergency character nor the causal link required by the Agreement. The European Communities, China, Norway and New Zealand add that the basic requirement is that the increased imports (or at the least the conditions under which they occur) must result from the unforeseen development. For this to happen, there will normally be a close temporal connection between the unforeseen developments and the increased imports. The absence of such a close temporal connection would tend to raise questions as to whether the "increased imports" resulted from the "unforeseen developments" and an adequate explanation would need to be made to explain this.[477]

7.144 New Zealand argues that the Russian crisis was not unforeseen because it commenced in 1991, predating the bindings on steel products in 1995. It argues that the USITC acknowledges this and that the United States negotiators were fully aware when they agreed to tariff concessions on steel of the economic consequences of the Russian crisis. The facts show that the decrease in consumption and the increase in exports in respect of former Soviet countries was not new. They did not arise after the conclusion of the Uruguay Round, but had existed since 1991.[478]

7.145 The United States responds that Article XIX indicates that there should be a sequential relationship of trade concessions, followed by unforeseen developments and then serious injury, but it does not require that the unforeseen developments be contemporaneous with the imports, or immediately precede the imports.[479]

7.146 For the United States, Article XIX implies a sequencing of an obligation or tariff concession, followed by an unforeseen development, followed by imports in such increased quantities and under

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[473] European Communities' first written submission, para. 135; Switzerland's first written submission, para. 121; Norway's first written submission, para. 123; China's first written submission, para. 93.

[474] United States' first written submission, paras. 926-931.

[475] United States' written reply to Panel question No. 5 at the first substantive meeting.

[476] European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 12 at the first substantive meeting.

[477] European Communities', China's, New Zealand's and Norway's written reply to Panel question No. 12 at the first substantive meeting.

[478] New Zealand's first written submission, paras. 4.25-4.27, citing tables in USITC Report, Vol. II, OVERVIEW-4 and OVERVIEW-5, and USITC Second Supplementary Report, Attachment I, p.3 (Exhibit CC-11).

[479] United States' first written submission, para. 934.

such conditions as to cause serious injury.[480] In the United States' opinion, the ordinary meaning of "development" is "a result of developing; a change in a course of action or events or in conditions . . . an addition, an elaboration".[481] Thus, a development is best understood as a change of some kind, which is "unforeseen" if a Member's negotiators did not expect it to occur at the time they undertook the relevant obligation or concession.[482] Since *US – Fur Felt Hats* indicates that the "development" must occur after the obligation or concession, the United States concludes that the change in question should begin after that time. The working party in *US – Fur Felt Hats* reached a similar conclusion, finding that the "development" must occur after the relevant tariff concession (or, presumably, some other obligation). The United States refers to the Appellate Body's statement that an unforeseen development is one that was "unexpected"[483] and to the working party in *US – Fur Felt Hats*: "The term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[484]

7.147 For the United States, the *US – Fur Felt Hats* report provides a good example of how this analysis works. The *US – Fur Felt Hats* working party found that hat styles changed continually, and that the likelihood of change was entirely foreseeable. However, it found that the negotiators did not foresee the degree of a particular change or its effect on the competitive situation faced by the domestic industry, and that these represented an unforeseen development. Thus, the existence of a particular condition at the time of an obligation or tariff concession (the continual evolution of hat styles) does not prevent a change in that condition (a large and sustained shift in style) from being treated as an unforeseen development.[485]

7.148 Therefore, for the United States, the reference period for assessing unforeseen developments could be any period after the relevant tariff concession was made. In addition, Article XIX implies that the unforeseen developments begin prior to the increase in imports. Thus, the time when injury caused by increased imports occurred could begin after the period when the unforeseen developments occurred. This does not necessarily mean that a longer period of investigation would be required for the assessment of unforeseen developments than for injury, since the period examined in the investigation of serious injury needs to be "sufficiently long to allow conclusions to be drawn".[486] Therefore, any reference period used for the determination of increased imports and serious injury should include some period of time before the import surge began so that the increase in imports and the effects of that increase could be determined.[487]

7.149 According to the United States, in the course of the steel investigation, producers and exporters from various complainants admitted that "[t]here can be a reasonable time lag in between the unforeseen development and the increase in imports leading to serious injury... [T]he time it takes for market participants to react to certain forces may be much longer. Beyond the simple supply and demand forces at play, various business cycles may influence business decisions and either exacerbate

[480] United States' first written submission, para. 934.
[481] The New Shorter Oxford English Dictionary, p. 634.
[482] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.
[483] Appellate Body Report, *Korea – Dairy*, para. 84; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.
[484] United States' first written submission, para. 923, citing *US – Fur Felt Hats*, para. 9.
[485] United States' written reply to Panel question No. 11 at the first substantive meeting.
[486] Panel Report, *US – Line Pipe*, para. 7.200.
[487] United States' written reply to Panel question No. 12 at the first substantive meeting.

or dampen the change in trade flows".[488] The United States argues that there is no requirement that unforeseen developments be "recent". As long as they occurred after the relevant tariff concession and resulted in increased imports, that is sufficient to meet Article XIX requirements.[489]

7.150 In the present case, the United States claims that all the unforeseen developments took place after the Uruguay Round: the East Asian financial crisis began in mid-1997[490], and the particular financial disruptions and currency fluctuations cited by the USITC began in 1997, also after the Uruguay Round negotiations.[491] Thus, while the Soviet Union may have collapsed in 1989, with resulting dislocations in the successor states, these are not the developments that the USITC found to be unforeseen. Rather, the development in question was that those countries' condition changed after 1996 from the condition prevalent at the time of the Uruguay Round negotiations.[492]

7.151 The United States cites evidence presented by the USITC indicating that the developments it identified were in fact unforeseen. In its demonstration, the USITC cited evidence regarding the expectations of the negotiators of the Uruguay Round relating to the likely effects of that Round on imports of steel products.[493] The USITC also cited evidence indicating that the currency crises surprised even professional forecasters, who considered the matter at a much later time, and had more recent information available to them.[494] Thus, the USITC established that the developments were unforeseen.[495] [496]

7.152 The United States disagrees with the complainants' opinion that the unforeseen developments and the increased imports must occur very close in time, and the unforeseen developments should preferably still be occurring at the time injury occurs. It refers to the plain language of Article XIX, according to which it argues that "As a result of" certainly implies that the unforeseen developments occurred before the increase in imports, but implies nothing about the duration of the unforeseen developments.[497]

(f) Demonstration of "unforeseen developments"

(i) Competent authority's report

7.153 The European Communities, China, Switzerland, Norway and New Zealand argue that the Appellate Body has made clear in *US – Line Pipe* that unforeseen developments must be demonstrated by the competent authorities (in their report) before safeguard measures are applied. Moreover, according to the European Communities, China, Switzerland and Norway, the demonstration of unforeseen developments must feature in the same report by the competent authorities, as stipulated by the Appellate Body in *US – Lamb*.[498] Switzerland notes in this regard that

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[488] Joint Respondents' Posthearing Brief: Flat-Rolled Products, Oct. 1, 2001, Vol. II at p.23 (Exhibit US-74).

[489] United States' written reply to Panel question No. 14 at the first substantive meeting.

[490] United States' first written submission, para. 961.

[491] United States' first written submission, para. 968.

[492] United States' written reply to Panel question No. 11 at the first substantive meeting.

[493] USITC Second Supplementary Report, p. 2 and n.5.

[494] USITC Second Supplementary Report, p. 2 nn. 6-8.

[495] United States' second written submission, para. 170.

[496] For the complainants' position on this point, see paras. 7.177-7.179.

[497] United States' second oral statement, para. 108.

[498] Switzerland's first oral statement on behalf of the complainants, para. 6; see also Norway's second written submission, para. 21 and the written replies of the European Communities, China and Switzerland to the Panel question No. 15 at the first substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 72.

this report is where the competent authorities came to the determination that a safeguard measure was to be recommended. The USITC made its recommendations in the Report of December 2001. The Second Supplementary Report was issued on 4 February 2002, after the USITC recommended that safeguard measures be taken.[499]

7.154 Norway argues that a "determination" for the purposes of Article 2 and 4 of the Agreement on Safeguards, is the published conclusions of the investigations performed, whereby the competent authority of a Member State establishes that certain facts exist and that certain conditions (legal requirements) have been fulfilled that justify the imposition of the specific measure chosen under Article 5. Norway submits that, in the present case, the USITC did not make certain determinations in its original report, and subsequently issued two supplementary reports. In Norway's opinion, Article 3.1 requires that there be "a report", not "many reports" at different intervals. Norway submits that it, therefore, seems that the USITC's determinations with respect to Article 2, Article 4 and "unforeseen developments" may have taken place at different times, or not at all.[500]

7.155 Similarly, the European Communities, China, Norway, Switzerland and New Zealand suggest that there is no consideration of "unforeseen developments" in the USITC Report itself. The only mention of it is in a footnote in the separate report of one commissioner explaining that, although this is required in WTO law, it is not required by United States law.[501] Although the complainants admit that there is some discussion of the Asian and Russian crises in the USITC Report, no relation is made to with the requirement of unforeseen developments.[502]

7.156 The United States responds that the complainants are wrong as a matter of law. In its view, the only temporal requirement of Article XIX is that the findings of unforeseen developments must precede the application of the safeguard measure. It cites the Appellate Body in *US – Lamb* to uphold its view that Article XIX provides no express guidance on "when, where and how" a demonstration of unforeseen developments must be made. Instead, the Appellate Body found that it contained an implied requirement that the demonstration be made "before the safeguard measure is applied".[503]

7.157 According to the United States, the complainants are also wrong as a matter of fact. The determination, or legal conclusion as to whether products were being imported in such increased quantities and under such conditions as to cause serious injury, was made on 22 October 2001.[504] The USITC Report shows that the unforeseen developments discussed in the USITC Second Supplementary Report influenced its injury determinations. Prior to reaching its injury determinations, the USITC specifically sought information on and investigated the conditions it later identified as unforeseen developments and included information on those conditions in its report and in its injury views.[505]

7.158 The United States also responds that Article 3.1 of the Agreement on Safeguards contains certain substantive and procedural obligations regarding the content of the report and its publication, but it does not restrict the format of the report that contains the finding of unforeseen developments. The choice of whether to issue the components of an Article 3.1 report at the same time, or over a

[499] Switzerland's written reply to Panel question No. 15 at the first substantive meeting.
[500] Norway's written reply to Panel question No. 15 at the first substantive meeting.
[501] European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; China's second written submission, paras. 24-28; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11; Switzerland's first written submission, paras. 109-110.
[502] Switzerland's first oral statement on behalf of the complainants, para. 9.
[503] United States' first written submission, paras. 949-953.
[504] United States' written reply to Panel question No. 15 at the first substantive meeting.
[505] United States' first written submission, paras. 953-955.

period of time, is left to the discretion of individual Members.[506] The United States argues that the complainants have provided no basis to conclude that presenting the report of the competent authorities in stages is inconsistent with the Agreement on Safeguards.[507] Although Article 3.1 requires a certain content for the report and specifies that it be published promptly, it does not require a specific format. According to the United States, the *Chile – Price Band System*[508] Panel has already accepted a multi-stage document as constituting a report of the competent authorities for the purposes of Article 3.1. Thus, Members retain the discretion to decide whether to issue the report all at once or in components.[509] The United States contends that its Second Supplementary Report is properly considered part of the report required under Article 3.1.

7.159 According to the European Communities, Switzerland and Norway, the *Chile – Price Band System* decision is not relevant, since the complaining party in that case did not raise the argument of whether different minutes constituted the "same" report. Moreover, in that case, an attempt to demonstrate unforeseen developments was made within the same minutes in which the recommendation was made to take definitive safeguard measures. Switzerland adds that the situation in *Chile – Price Band System* differs from the case at hand where the recommendation to take definitive safeguard measures was made one and a half months before the Second Supplementary Report was submitted, which contained the justification on the requirement of unforeseen developments.[510] For China, the use of a multi-part document is not, in itself, an issue. Instead, the issue of importance is the incompatibility of the idea that unforeseen developments were allegedly discussed at length during the administrative meeting, but they were not the subject of comments in the USITC Report, and it was necessary to wait for supplementary explanation in a later report.[511]

7.160 The European Communities and Switzerland also point to the fact that the United States has identified 22 October 2001 as the date of determination to argue that the Second Supplementary Report does not form part of the USITC's determinations because it was not issued until February 2002. Second, the terms of the Second Supplementary Report also make clear that the USITC did not reconsider its previous determinations or even purport to confirm them.[512] The European Communities points out that the United States uses the word "finding" to describe the conclusions drawn in the Second Supplementary Report. In the European Communities' opinion, there is a significant difference between the terms "determination" and "finding". The term "determination" refers to a decision that is more final and complete than a "finding" (which may be only one step on the way to a determination). The term "determination" refers to the final settlement of the matter before the adjudicator and to the reasoning relied on to reach that conclusion. Thus, an adjudicator who has to take account of all pertinent information and consider whether a certain number of circumstances and conditions are met before making a determination must do this before the determination is made. In the view of the European Communities, this demonstrates a fatal flaw in the United States' position. The view that a "finding" on unforeseen developments can be made after the determination that the conditions for the application of safeguard measures are met severs the logical connection that the Appellate Body considered must exist.[513]

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[506] United States' first written submission, para. 952.
[507] United States' written reply to Panel question No. 15 at the first substantive meeting.
[508] Panel Report, *Chile – Price Band System*, para. 7.131.
[509] United States' written reply to Panel question No. 15 at the first substantive meeting.
[510] Switzerland's second oral statement, paras. 5-9; The written replies of Switzerland, Norway and the European Communities to Panel question No. 5 at the second substantive meeting.
[511] China's written reply to Panel question No. 5 at the second substantive meeting
[512] Switzerland's second written submission, paras. 8-12; European Communities' second written submission, paras. 40-44.
[513] European Communities' second written submission, paras. 45-47.

7.161 The United States responds that the complainants seem much disturbed that the US has described the USITC's demonstration of unforeseen developments as a "finding". In the United States' opinion, the complainants' quarrel is with the Appellate Body, not the United States or the USITC, since it was the Appellate Body that specifically found that competent authorities are to make "findings" or "reasoned conclusions" regarding unforeseen developments.[514] The United States argues that the European Communities continues to use the wrong terminology. In *US – Lamb*, the Appellate Body directed a competent authority to make "findings" or "reasoned conclusions" about the existence of unforeseen developments. The distinction between unforeseen developments, which are circumstances to be demonstrated, and increased imports, injury, and causation, which are conditions, was made by the Appellate Body.[515] Thus, there is no requirement to make a "determination" of a relationship between increased imports and unforeseen developments or tariff concessions. The United States submits that the USITC made the requisite findings related to unforeseen developments and tariff concessions in its Second Supplementary Report.[516]

7.162 The United States repeats its allegation that the complainants do not address the findings in *Chile – Price Band System*, in which the Panel accepted a multi-part document (minutes from individual meetings of Chile's Competition Committee) as the report of the competent authorities for the purposes of Article 3.1.[517]

(ii) The need for a reasoned and adequate explanation

Sufficiency and representativeness of data

7.163 The European Communities, Switzerland and Norway contend that the data on which the USITC relies relate to changes of consumption of steel products globally in selected countries and over selected periods and is unrepresentative and lacks objectivity. They submit that the USITC makes a number of unfounded assumptions such as that reductions in steel production did not keep pace with reductions in consumption and that, therefore, there was an increase in exports.[518] For example, the apparent consumption in the former USSR countries increased in 1999 and 2000. By 1995, the decrease in consumption resulting from the dissolution of the Soviet Union was not only foreseen; it had happened.[519] Had the United States demonstrated that the "Russian crisis" led to increased imports into the United States from other WTO Members, the Russian crisis could be relevant, but the USITC made no such demonstration.

7.164 According to the European Communities and Norway, the reference period for the increased imports (1996-2000) is entirely independent of the period investigated for the subsequently alleged unforeseen developments. There was no consideration by the USITC of whether the alleged "unforeseen developments", which relate to events taking place as far back as 1991 (the break down of the USSR), led to subsequent increases in imports of specific products within the period of

[514] United States' second oral statement, para. 105, citing Appellate Body Report, *US – Lamb*, para. 76.
[515] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.
[516] United States' written reply to Panel question No. 6 at the second substantive meeting.
[517] United States' second written submission, para. 169, citing Panel Report, *Chile – Price Band System*, para. 7.131.
[518] European Communities' first written submission, paras. 154-155; Switzerland's first written submission, paras. 140-141; Norway's first written submission, paras. 142-43.
[519] European Communities' first written submission, paras. 157-162; Switzerland's first written submission, paras. 144-148; Norway's first written submission, paras. 146-150; China's first written submission, paras. 111-113.

investigation (1996-2000) or will do so in the coming three years when the United States' measures will be in force.[520]

7.165 China compares the statements of the United States with the official statistics contained on the USITC website, which show that the relevant former USSR republics account for only 20% of the total imports of the concerned steel products in the United States. In its opinion, this portion cannot be regarded as representative in order to have an adequate reasoning to explain an alleged increase in imports.[521] All of the complainants also point out that exports from the former USSR republics increased greatly before the Uruguay Round (625.7%) than after it (28.7%).[522] All of the complainants point to the conclusion that the increase in exports for the former USSR republics between 1996 and 1999 was destined for countries other than the United States.[523]

7.166 The complainants also argue that the USITC provided no data on whether the exports of the countries affected by the Asian crisis increased, still less whether these exports were directed to the United States. The USITC seems to assume an increase in exports towards the United States from a decrease in steel consumption in these countries. However, the USITC Report shows an increasing trend in finished steel products consumption as of 1999. Thus, even on the basis of the United States' assumptions, the Asian crisis cannot be considered an unforeseen development that is now leading to increased imports into the United States.[524] New Zealand also points out that the International Iron and Steel website shows that, by 1999, the fall in consumption in steel in Indonesia, Korea, Malaysia, the Philippines and Thailand had turned around.[525] Moreover, statistics from the USITC's own website show that steel imports into the United States from the former USSR republics increased only 4.5%, not nearly the 22% claimed by the United States, over the period 1996 to 1999. Therefore, if declining consumption led to an increase in exports of steel from the former USSR republics, 95.5% of those exports must have gone elsewhere, and not to the United States.[526]

7.167 In the opinion of the United States, the USITC based its analysis on import data that firmly supported its finding that the Asian financial crises disturbed the worldwide market for steel. Imports of steel products from each of the Asian countries most seriously affected by the currency depreciations of 1997 and 1998 surged after the currency crises began and remained at high levels afterward. The data also demonstrates that the crises displaced steel production elsewhere, as demonstrated by the unprecedented increase in imports from areas outside South East Asia.[527]

7.168 The United States responds that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were, in fact, foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round. Information cited by the USITC indicated that these crises were, in fact, unforeseen, not only

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[520] European Communities' first written submission, paras. 132 and 135; Norway's second written submission, paras. 120 and 123.

[521] China's first written submission, paras. 102-106.

[522] European Communities' first written submission, para. 163; Switzerland's first written submission, para. 149; Norway's first written submission, para. 151; China's first written submission, para. 114; New Zealand's first written submission, para. 4.28.

[523] European Communities' first written submission, para. 167; Switzerland's first written submission, para. 154; Norway's first written submission, para. 156; China's first written submission, paras. 117.

[524] European Communities' first written submission, paras. 169-172; Switzerland's first written submission, paras. 156-159; Norway's first written submission, paras. 158-161; China's first written submission, paras. 119-122; New Zealand's first written submission, paras. 4.14-4.15.

[525] New Zealand's first written submission, para. 4.18.

[526] New Zealand's second written submission, para. 3.11.

[527] United States' first written submission, para. 963.

by negotiators, but also by professional economic forecasters right up until the time they began, and the severity of these crises was not fully appreciated even after events had begun to unfold. Economic forecasts prepared as late as October 1997 still projected "robust growth trends in most of the developing world", including most of Asia and Russia and other former USSR republics.[528]

7.169 The United States submits that economic data from that time period indicates that there was little reason to expect significant economic contraction in either South East Asia or the former USSR republics. Prior to the onset of these currency crises, the economies of South East Asia had experienced a period of consistent growth[529] and moderate inflation and had fairly disciplined macroeconomic policies.[530] Most of the former USSR republics had achieved positive growth rates in 1996 and in 1997.[531] Nonetheless, by late 1997, markets in these countries had been seriously destabilized, growth had contracted sharply, growth forecasts were downgraded, and steel production was being displaced into other markets, notably the United States.[532]

7.170 The United States argues that the USITC did not cite the dissolution of the Soviet Union as an unforeseen development, but rather the difficulties the former USSR republics encountered after dissolution. The USITC's investigation provided abundant evidence that the financial disruptions in the former USSR republics beginning in 1996 changed export and consumption patterns in the region. Although the decrease in apparent domestic consumption of steel products and the increase in exports began soon after the dissolution of the USSR, the severity of the imbalance between these trends sharpened after 1996. In 1996, the ratio of apparent domestic consumption of steel to exports for those countries was 1.37, meaning that for every ton of steel consumed, the countries exported 1.37 tons. By 1998, that ratio rose to 1.57 and in 1999 it remained high at 1.54. The region's reliance on exports increased significantly.[533] Imports into the United States market of flat-rolled products from Russia increased from 3.2 million short tons in 1997 to 5.1 million in 1998; from Kazakhstan, they increased from 22,588 short tons in 1997 to 149,265 in 1998; from Lithuania, they increased from 1,560 short tons in 1997 to 62,930 short tons in 1998.[534] Steel imports to the US market from 10 former USSR republics increased by 67.3% between 1997 and 1998 alone. Steel imports from Russia were subsequently limited by an agreement, but imports from the nine other former USSR republics remained high. Steel imports into the US market from those nine countries in 2000 were 145.4% higher than in 1996.[535]

7.171 The United States does not agree that the only data provided by the USITC to link the Asian and Russian crises with increased imports were consumption decreases in those regions. In its opinion, the USITC cited consumption data for the most severely affected countries in South East Asia, as well as production and consumption data for the former USSR republics. Elsewhere in the

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[528] United States' written reply to Panel question No. 10 at the first substantive meeting, citing Minimill Coalition (Long Products) Prehearing Brief, Exhibit 19 (World Economic Outlook, Oct. 1997, p. 1) (Exhibit US-74).

[529] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Oct. 1996, p. 26) (Exhibit US-74).

[530] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Dec. 1997, p. 3) (Exhibit US-74).

[531] Minimill Coalition (Long Products) Prehearing Brief at Exh. 19 (World Economic Outlook, Oct. 1997, p. 27), Exhibit US-15.

[532] United States' written reply to Panel question No. 10 at the first substantive meeting.

[533] United States' first written submission, para. 968, citing USITC Report, OVERVIEW-19, Tables OVERVIEW-4 and OVERVIEW-5.

[534] United States' first written submission, para. 969, citing USITC Dataweb tables (US-49).

[535] United States' first written submission, para. 972, citing USITC Dataweb tables (US-49) and INV-Y-180 (US-40).

USITC Report, the USITC cited tables which showed imports by country by product for the entire period of investigation.[536] All of these data support the USITC analysis. The United States claims that the complainants take issue with the conclusions drawn by the USITC from that data, but have brought forward no data to indicate that their alternative explanations – e.g., perhaps production declined, perhaps imports to the US did not increase – are in fact plausible. In light of their failure to put forward a plausible alternate explanation, complainants have failed to make a prima facie case that the USITC's demonstration of unforeseen developments was inconsistent with the Agreement on Safeguards.[537]

7.172 Regarding New Zealand's allegation that contraction in steel consumption was symptomatic of the dislocations in the respective steel industries in South East Asia and the former USSR republics as a result of the currency crises that beset those economies, the United States suggests that these significant changes in consumption indicated both an increased pressure to export domestic production that could not be consumed in the domestic market and foregone import consumption; those foregone imports were also displaced into the world steel market.[538] Referring to data used by the USITC in its Second Supplementary Report, the United States argues that the figures show that the degree of dislocation experienced by these economies was severe. Although consumption expanded somewhat after the sharp contraction experienced in 1998, consumption remained well below 1995-1997 levels.[539]

7.173 The United States notes that the complainants have taken issue with this interpretation, arguing that the steep declines in consumption might have been caused by disruptions in production, leaving no excess, unconsumed steel production to be exported into other markets. However, the complainants point to no evidence in the record indicating that any such disruptions occurred. Furthermore, the complainants' argument overlooks the fact that imports into those countries also were affected by the sharp contraction in consumption. Even if production in the affected countries had declined, leaving no excess for export – and there is no evidence in the record to indicate that this occurred – imports that otherwise would have been consumed in those countries still would have been displaced out into the world market.[540] Imports of steel products from Indonesia, Korea, Malaysia, the Philippines and Thailand jumped by 113.5% between 1997 and 1998 alone, and were still 132.8% higher in 2000 than in 1996.[541]

7.174 The United States argues that there was an increasing discrepancy between production and consumption in the former USSR republics. The domestic markets of the former USSR republics were unable to absorb significant portions of local production. In 1994, steel production was approximately 2.28 times greater than consumption; this ratio peaked in 1998, when steel production was more than 2.58 times greater than consumption. This indicates that these industries were under constant, and increasing, pressure to find export markets for this excess production. The pressure to find additional export markets was exacerbated by the Asian financial crises that began in 1997,

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[536] USITC Report, pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Delaney).

[537] United States' written reply to Panel question No. 7 at the second substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 106.

[538] United States' written reply to Panel question No. 16 at the first substantive meeting.

[539] United States' written reply to Panel question No. 16 at the first substantive meeting, citing USITC Report, Vol. II, OVERVIEW-7.

[540] United States' written reply to Panel question No. 16 at the first substantive meeting.

[541] United States' first written submission, para. 962.

insofar as Asia had been an important export market for steel produced in the former USSR. Furthermore, the Asian currency crises spilled over and placed greater pressure on the currencies of the former USSR republics and curtailed growth there as well.[542]

7.175 In counter-response, New Zealand argues that there is no onus on the complainants to demonstrate that the relationship which the United States assumes to exist between the Asian and Russian economic crises and the purported increase in steel imports does not, in fact, exist. Nor is it for the USTR lawyers to attempt to prove that the assumptions were correct after the fact. Rather, it was up to the USITC to demonstrate that this relationship existed, yet it provided no evidence in support.[543] Norway agrees that the displacement theory provided by the United States is nowhere substantiated in the USITC Report. Although the United States presents some figures on their imports from ex-USSR countries, it provides none on displacement and diversions via WTO Members.[544]

7.176 The European Communities also contests the United States' use of further data that is not on the record to respond to the inadequacies of the USITC's analysis. This is not only unacceptable, but the fact of having to rely on extraneous data demonstrates the inadequacy of the explanation provided by the USITC.[545]

The USITC's explanation

7.177 The European Communities and Switzerland argue that the USITC's analysis is based on scattered and incomplete facts and results in vague suggestions and speculation. Both "primary" unforeseen developments, severe currency dislocations in the former USSR and Asia, are assumed to have led to massive increases of exports, or reductions in steel imports, in these countries, which consequently increased amounts of steel on the world market and allegedly caused increased imports into the United States. The alleged effect is rather indirect. Indirect effects, being more complex, would require a fuller explanation. The USITC's explanation is, however, superficial in the extreme. Most of the "evidence" for the alleged increase in exports from these countries comes from data relating to the decline in consumption of steel products on these markets. However, a decline in consumption does not mean there was an increase in exports. Switzerland and the European Communities suggest that, just as domestic production of steel-consuming industries was disrupted, so also could the production of steel producers have been disrupted[546], and the European Communities notes that nowhere in the USITC's Second Supplementary Report are these alternative scenarios considered.[547]

7.178 The European Communities and Switzerland also argue that the complex confluence of events that allegedly resulted in increased imports of particular steel products was not self evident. Yet, there is no hint of an explanation of how this occurred in the USITC Report and the explanation of these alleged unforeseen developments in the Second Supplementary Report does not constitute a reasoned and adequate explanation.[548] The European Communities adds that the USITC expressed no

[542] United States' written reply to Panel question No. 16 at the first substantive meeting, citing Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Dec. 1997, pp. 20 and 30) (Exhibit US-74).

[543] New Zealand's second oral statement, para. 5.

[544] Norway's second written submission, para. 44.

[545] European Communities' second written submission, paras. 80-81.

[546] Switzerland's second written submission, paras. 23-25; European Communities' second written submission, paras. 67-68.

[547] European Communities' second written submission, para. 69.

[548] Switzerland's second written submission, para. 36; European Communities' second written submission, para. 59.

view on whether these developments were in fact "unforeseen developments", as demonstrated by the way it threw the responsibility back to the USTR. The USITC expressly stated that an assessment of the extent that WTO panel decisions have suggested that "unforeseen developments" relates to the expectations of negotiators of the relevant tariff concessions is "in many respects outside the purview of this agency, since multilateral trade negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies". Yet, neither the USTR nor other agencies made a determination either.[549]

7.179 According to the European Communities, the USITC's explanations are far too vague to be considered reasoned and adequate explanations. For example, the USITC explanation of the effect of the Russian financial crisis is contained in only one paragraph of the USITC's letter. It refers in footnotes to an account of less than a page and a half in the USITC Report that relates not to a financial crisis in 1996 but to dislocation resulting from the dissolution of the former Soviet Union in 1991. There is no mention in the USITC Report of the financial crisis or "difficulties" in Russia or the former Soviet Union referred to in the USITC's Second Supplementary Report. The tables in the USITC Report demonstrate severe disruption between 1991 and 1994 (a period on which we are told the USITC did not rely) but nothing remarkable between 1996 to 1999.[550] The information concerning the Asian financial crisis is not much more detailed or precise. There is less than a page on the subject in the USITC Report and the data relates to steel consumption in five countries in 1998.[551]

7.180 The United States disagrees with the complainants that the USITC did not establish a link between the unforeseen developments and the resulting increase in imports. The USITC noted the existence of export-oriented industries, currency crises, contraction in consumption in those countries experiencing the currency crises, and the resulting disruption in world steel markets caused by those contractions.[552] The USITC further noted the counter-cyclical status of the US market when these financial crises occurred, with US demand remaining strong while other markets contracted or stagnated, and the persistent appreciation of the US dollar, which made the US market an especially attractive one for displaced imports.[553] The United States submits that the complainants have yet to point to any evidence on the record of the investigation which contradicts the USITC's interpretation of events, let alone demonstrates that the USITC's interpretation was not reasonable.[554]

7.181 In the opinion of the United States, at some point, the complainants must do more than just claim the USITC's demonstration of unforeseen developments is unreasoned or inadequate; the complainants must make some showing that the demonstration is unreasoned or inadequate. The United States submits that the USITC identified a number of developments, showed that those events were unforeseen, and demonstrated that those events resulted in increased quantities of imports. The USITC's demonstration was both reasoned and adequate. The complainants have presented no evidence or argument that would undermine the USITC's analysis.[555]

7.182 The complainants also argue that although the United States imposed 11 different safeguard measures on a large number of products, the USITC's explanation of unforeseen developments relates

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[549] European Communities' second written submission, paras. 60-61.
[550] See Table OVERVIEW 4 on page OVERVIEW 19 of Volume II of the USITC Report.
[551] European Communities' second written submission, paras.70-71, citing Figure OVERVIEW 7 on page OVERVIEW 18 of Volume II of the USITC Report.
[552] USITC Second Supplementary Report, pp. 2-3.
[553] USITC Second Supplementary Report, pp. 3-4.
[554] United States' second written submission, para. 171.
[555] United States' second written submission, para. 178.

to steel production in general and relies on selected statistics for only certain selected products in certain selected countries over inconsistent periods. For them, a proper explanation of unforeseen developments would have been based on an examination of, and led to determinations on, unforeseen developments leading to increased imports in respect of each of the products, in accordance with Article XIX:1(a) of the GATT 1994, which refers to "any product". For the complainants, no link has been established between the unforeseen developments and each of the products on which safeguard measures are imposed. [556] New Zealand adds that the USITC's analysis with regard to the former Soviet Union is based only on data relating to the production of "crude steel"[557], and the USITC fails to explain the relationship of "crude steel" to the various product categories covered in its investigation. Similarly, the data relating to the Asian financial crisis relied on by the USITC relates to consumption of "finished steel products" only and can therefore not serve as a basis to impose safeguard measures on raw or semi-finished products.[558]

7.183 The complainants submit that there is no explanation the Asian crisis specifically affected the steel products on which safeguard measures were imposed any more than any other product. For the European Communities, the expression "such increased imports" as well as the general requirement that safeguard measures be emergency measures implies that there must be some special or extraordinary reason why the unforeseen development has an impact on the relevant sector or product. The European Communities, China and Norway add that the effects of unforeseen developments must be sufficiently specific to give rise to a sufficient causal link (or logical connection as it is sometimes called) with increased imports.[559] For New Zealand, a "logical connection" or linkage needs to be shown between the "unforeseen developments" and increased imports of the products to which the safeguard measure is applied. Thus, this is the level of specificity required for unforeseen development.[560] For the European Communities, China, Switzerland, Norway, and New Zealand, a specific effect on the product (or sector) concerned must be demonstrated and cannot simply be presumed. The robustness of the United States economy, for example, will have effects on many sectors of the economy and even cause increased imports of many products.[561] Nevertheless, the United States made no attempt whatsoever to relate the supposed "unforeseen developments" to increased imports of the specific products to which the measure applied.

7.184 The United States questions the complainants' reliance on the emergency nature of a safeguards action without defining the relationship between this emergency nature and the relationship that must exist between unforeseen developments and increased imports. It disagrees with the European Communities' sweeping assertion that "there must be some special or extraordinary reason why the unforeseen development has an impact on the relevant sector or product". In the opinion of the United States, nothing in Article XIX, the Agreement on Safeguards, or any Appellate Body or Panel report evaluating these texts indicates that the relationship between unforeseen developments and increased imports must be "special or extraordinary". Neither "special" nor "extraordinary" appears in the text of Article XIX or Article 2. Thus, Article XIX and the Agreement

[556] European Communities' first written submission, paras. 136-139; Switzerland's first written submission, para. 122-125; Norway's first written submission, paras. 124-127; China's first written submission, paras. 94-96, New Zealand's first written submission, para. 4.20.

[557] USITC Report, Vol II, Table OVERVIEW-3.

[558] New Zealand's first written submission, para. 4.21.

[559] The European Communities', China's and Norway's written replies to Panel question No. 7 at the first substantive meeting.

[560] New Zealand's written reply to Panel question No. 7 at the first substantive meeting.

[561] The European Communities', China's, Switzerland's, New Zealand's and Norway's written replies to Panel question No. 4 at the first substantive meeting.

on Safeguards plainly do not require proof of a "special" or "extraordinary" relation between an unforeseen development and the resulting increase in imports.[562]

7.185 Regarding the allegation that such unforeseen development had to be related specifically to the steel industry or to steel products, the United States argues that the only requirement under Article XIX:1(a) is that the imports in such increased quantities and under such conditions as to cause serious injury must be "as a result of" increased imports. The text does not require any degree of specificity. Thus, as long as the increased quantity of an imported product or the conditions under which it is imported are the result of an unforeseen development, it is irrelevant whether that development had other effects.[563] Article XIX does not require competent authorities to trace each unforeseen development, such as a massive economic crisis, to each specific increase in imports of a product or category. In this case, there was no need to trace the effects of each disturbance on each individual steel product.[564]

7.186 For the United States, the unforeseen developments do not have to be developments that affect only one economic sector. It argues that there is nothing in Article XIX that requires that unforeseen developments solely or primarily affect a single sector. For the United States, the implication of a rule – that unforeseen developments that affected multiple economic sectors might not be sufficient to meet the Article XIX standard – would be that Members would have greater flexibility to deal with narrow economic disruptions but limited or no authority to deal with truly dramatic economic events, such as the Asian financial crisis. This cannot be the case.[565]

7.187 The United States admits that, as a factual matter, the unforeseen developments identified by the USITC did result in a wide variety of steel products being imported into the US market in increased quantities and under such conditions as to cause serious injury to the relevant domestic industries. However, nothing in Article XIX requires that unforeseen developments only result in increased imports of one particular product. By this line of reasoning, the change in fashion cited in *US – Fur Felt Hats* might not have been an unforeseen event, since increased demand for a particular style of hat might have also increased demand for a particular style of glove or a particular shade of lipstick.[566]

7.188 As for the complainants' argument relating to crude steel and finished steel, the United States contends that complainants do not deny that all semi-finished and finished steel products begin as crude steel products, nor do they pretend that finished steel products are fashioned from something other than steel. According to the United States, their complaints also overlook the USITC's finding that imports of virtually all steel products increased in the wake of these unforeseen developments, even if the increases for some products were not deemed injurious. Moreover, the complainants also disregard the portion of the USITC's Report in which it distinguished the effects of those unforeseen developments on imports of certain products.[567]

7.189 In counter-response, Norway argues that the United States failed to substantiate the determination that unforeseen developments actually led to increases in imports for each and every product under investigation. The figures are not broken down in the USITC Reports (for each and every one of even the 10 product groups the measures are directed against), and there is no indication

[562] United States' second written submission, para. 173.
[563] United States' written reply to Panel question No. 7 at the first substantive meeting.
[564] United States' first written submission, para. 938.
[565] United States' written reply to Panel question No. 7 at the first substantive meeting.
[566] United States' written reply to Panel question No. 7 at the first substantive meeting.
[567] United States' second oral statement, para. 111.

anywhere in the reports or in the United States' submissions that e.g. the "Russian Crisis" led to increased imports of "tin mill products". Norway submits that, indeed, the countries of the former Soviet Union have only minimal exports of "tin mill products" to the United States – either directly or indirectly – as their exports are at the crude end of the scale.[568]

7.190 The European Communities argues that Article XIX of GATT 1994 requires that unforeseen developments result in increased imports of the product on which a safeguard measures is to be imposed and this applies to each of the ten (or arguably eleven) safeguard measures. Each safeguard measure, therefore, requires a demonstration that the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards are satisfied for the product (or even product bundle) covered by the relevant measure. The European Communities submits that, clearly, justifying that there are unforeseen developments leading to increased imports of one product does not mean that this requirement is met for all products.[569]

7.191 The United States disagrees with the complainants' assertion that a competent authority must demonstrate a specific effect from unforeseen developments on specific industries, a requirement that allegedly arises from "the expression 'such increased imports'". According to the United States, that phrase occurs in neither Article XIX nor Article 2 of the Agreement on Safeguards, so it is difficult to discern how the phrase could be used to justify a burden not stated in Article XIX or the Agreement on Safeguards.[570] As a practical matter, the United States points out that the USITC found that the cited unforeseen developments did not affect the import levels of all steel products in uniform ways. The USITC specifically noted that the surge in imports for some products occurred later in the period of investigation and found that the disruptions in the Asian markets and the markets of the former USSR republics might have played smaller roles in increasing imports of stainless and tool steel products.[571]

(iii) Opportunity for interested parties to present their views to the USITC

7.192 Since the discussion on unforeseen developments is located in a second or additional report, the European Communities, China, Norway and New Zealand argue that concerned parties should have been asked about it and should have been given the opportunity to comment on it. These interested parties include importers, exporters and producers.[572] Since this did not occur, third parties were not provided with an opportunity to present their views on the issue of unforeseen developments.[573] According to the European Communities, China and Norway, Article 3.1 of the Agreement on Safeguards contains a general obligation to allow interested parties to express their views and comment on the views and evidence of other parties concerning all pertinent issues of law and fact.[574]

7.193 In the opinion of the United States, the USITC Report itself shows that the unforeseen conditions demonstrated in the USITC Second Supplementary Report informed its injury

[568] Norway's second written submission, para. 35.
[569] European Communities' second written submission, paras. 50-51.
[570] United States' second written submission, para. 172.
[571] United States' second written submission, para. 174, citing USITC Second Supplementary Report, p. 4 n. 24.
[572] European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting and European Communities' first written submission, para. 178.
[573] European Communities' first written submission, para. 178; China's first written submission, para. 125; New Zealand's first written submission, para. 4.30; Norway's first written submission, para. 166.
[574] European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting.

determinations. The USITC specifically sought information on unforeseen developments in the course of its investigation, by including specific questions on its various questionnaires and directly requesting parties to address the issue in written submissions.[575] The USITC investigated the conditions, and the parties addressed them in briefs and in testimony at the USITC hearings. The USITC Report's overview section addressed each of the conditions.[576] The turmoil in financial markets was specifically noted as a condition affecting competition in the domestic market.[577] Accordingly, the allegation that third parties had no opportunity to present evidence and their views on the issue of unforeseen developments, in violation of Article 3.1 of the Agreement on Safeguards, is patently incorrect.[578] The USITC gave public notice of its institution of the steel investigation and it invited public comments and suggestions regarding the content of its questionnaires. The USITC accepted prehearing written submissions with no page limits, and several of those initial written submissions discussed unforeseen developments. The USITC's prehearing Staff Report included information on the Asian economic crisis, continuing post-dissolution difficulties in the former USSR republics, and the appreciation of the United States dollar. The USITC held a series of public hearings at which various Commissioners directly solicited comments from the parties on unforeseen developments.[579]

7.194 The European Communities questions the United States' assertion that it gave adequate opportunity to interested parties to comment on unforeseen developments, in accordance with Article 3.1 of the Agreement on Safeguards. According to the European Communities, the reference by the United States to questionnaires and to staff reports which interested parties could comment upon was not enough to substantiate this claim, since the United States could point only to a single USITC staff paper, which, upon examination, could not be said to give interested parties an opportunity to respond.[580]

7.195 According to the United States, the European Communities' position is incorrect in its apparent belief that Article 3.1 requires a competent authority to list explicitly the issues under consideration and request the interested parties to present their views on each issue. There is no basis for this claim in the text of the Agreement on Safeguards. According to the United States, indeed, the Appellate Body has defined a competent authority's obligation as limited to giving interested parties "an opportunity" to submit evidence and to comment on evidence presented by others.[581] The United States reiterates that the USITC far exceeded this requirement by providing multiple opportunities for parties to present evidence, argument, and comment, as well as actively seeking parties' input. It also argues that the European Communities' suggestion that a competent authority has a responsibility to

[575] United States' written reply to Panel question No. 1 at the first substantive meeting, citing Purchasers' Questionnaire at Question I-6 (US-43); Importers' Questionnaire at Question I-6 (US-42); Domestic Producers' Questionnaire at I-7 (US-41). Transcript, pp. 326-327 (Chairman Koplan) (US-44); 343 (Commissioner Hillman) (US-45); 1445 (Vice Chairman Okun) (US-46); and 2626 (Vice Chairman Okun) (US-47).

[576] USITC Report, pp. OVERVIEW-17-18 (Asian financial crisis), OVERVIEW-18-19 (former USSR countries), OVERVIEW-57-60 (exchange rates), OVERVIEW-25-27 (U.S. steel market). Continued demand growth was discussed in individual production sections.

[577] USITC Report, pp. 56-58. The moderate-to-high degree of substitutability, which facilitated the flow of steel imports from other markets into the United States market, was also discussed individual production sections. USITC Report, pp. 58 (CCFRS), 308 (tin mill), 96 (hot-rolled bar), 105 (cold-finished bar), 112 (rebar), 158 (certain welded pipe), 171 (FFTJ), 210 (stainless steel bar), 219 (stainless steel rod).

[578] United States' first written submission para. 954

[579] United States' written reply to Panel question No. 1 at the first substantive meeting.

[580] European Communities' second written submission, paras. 82-87.

[581] Appellate Body Report, *US – Wheat Gluten*, para. 54.

provide a draft of the authority's own views for comment by the interested parties, is an obligation that cannot be extrapolated from Article XIX or the Agreement on Safeguards.[582]

(iv) The timing of the explanation of "unforeseen developments"

7.196 The complainants also argue that since unforeseen development must be demonstrated as a fact before a safeguard measure is imposed, the published report of the competent authorities must contain a "finding" or "reasoned conclusion" on the "unforeseen developments". The USITC Report did not address "unforeseen developments". Instead, on 9 February 2002, the USITC submitted a Second Supplementary Report, based on a USTR request that it identify the unforeseen developments for each affirmative determination.[583] For the European Communities China, Switzerland, and Norway, the USITC's explanation is *ex post* and unrelated to the increased imports during the investigation period. In their view, the USITC's explanation of unforeseen developments is subsequent to, and divorced from, the findings on increased imports and serious injury, contrary to the requirements contained in Article XIX:1(a) of the GATT 1994.[584]

7.197 The United States argues, on the other hand, that the USITC's issuance of the Supplementary Report after it finished its analysis of all imports does not make the Supplementary Report an "*ex post facto* analysis". The USITC provided the response prior to the decision to apply the safeguard measures, which meets the requirement under Article 2.1 of the Agreement on Safeguards to apply a measure "only if that Member has determined" that increased imports of a product are causing serious injury.[585] The United States submits that the "determination" for purposes of Articles 2 and 4 of the Agreement on Safeguards is the legal conclusion of the competent authorities as to whether a product is being imported in such increased quantities and under such conditions as to cause serious injury. The United States' determination in this sense was made on 22 October 2001.[586]

7.198 In counter-response, China points out that the issuing of a number reports over a period of time raises certain concerns, where the original report serves as the basis for the determination of serious injury and a supplementary report provides additional pertinent information particularly regarding unforeseen developments. China asks whether the additional information could have been taken into account by the USITC in its Report for the determination of injury? If so, how is this compatible with the fact that there were no comments on unforeseen developments in the USITC Report and that it was necessary to wait for the specific request of the USTR for identification of unforeseen developments to receive explanations from the USITC? In China's opinion, the Supplementary Report could not heal the defects found in the USITC Report.[587]

7.199 The United States responds by pointing out that the complainants have not attempted to explain why the format and structure of the Report is not the sort of internal detail specifically left to a competent authority.[588] Moreover, the complainants ignore the fact that the USITC specifically labelled the developments as unforeseen, cited evidence regarding the expectation of negotiators when

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[582] United States' second written submission, para. 168.

[583] European Communities' first written submission paras. 124-125, citing USITC Second Supplementary Report, Attachment I, pp. 1 to 4, Exhibit CC-7; Switzerland's first written submission, paras. 110-112.

[584] European Communities' first written submission, para. 131; China's first written submission, para. 91; Switzerland's first written submission, para. 118; Norway's first written submission, para. 119.

[585] United States' first written submission, para. 951.

[586] United States' written reply to Panel question No. 15 at the first substantive meeting.

[587] China's second written submission, para. 31.

[588] United States' second written submission, para. 169, citing Appellate Body Report, *US – Line Pipe*, para. 158.

undertaking the Uruguay Round, and added in the expectations of professional forecasters to demonstrate the extent to which these events were unforeseen even as they were unfolding.[589]

D. "A PRODUCT"

1. Order of identification of the imported product and the domestic industry

7.200 The European Communities and China claim that USITC's approach of basing its determinations on arbitrary and shifting groups of products without first identifying specific imported products is fundamentally flawed and inconsistent with Article 2.1 of the Agreement on Safeguards.[590] The United States argues in its defence that there is no requirement in the Agreement on Safeguards to first identify a specific imported product.[591]

7.201 The European Communities, Korea, China, Switzerland and Norway argue that the first obligation in a safeguards investigation under Article 2.1 of the Agreement on Safeguards is to identify a specific imported product. This exercise precedes the definition of the "domestic industry producing like or directly competitive products".[592] New Zealand argues that the process for determining the relevant "domestic industry" must focus at the outset on the product which it is alleged is being imported in increased quantities. This requires an initial definition of that imported product.[593]

7.202 Korea argues that, in the absence of such an analysis, the petitioning domestic industry would determine the scope of the like product, which clearly turns the legal requirements of the Agreement on Safeguards on their head.[594] Similarly, Norway submits that if the imported product is not properly defined, then there cannot be a "like product", and thus no definition of the domestic industry. First defining the domestic industry results in "turning everything up-side down" and is clearly not permissible under the Agreement on Safeguards.[595]

7.203 For Japan, however, the order in which the imported product and like product are defined is immaterial, as long as the scope of the domestic like product and, in turn, the domestic industry is properly defined. Japan and Brazil submit that the debate over sequencing masks the real issue of how products – like and imported – are properly divided, in order to ensure that there is a one-to-one "likeness" relationship between the imported and domestic products in defining the domestic industry. In Japan's view, the guidance on how to divide products exists in the context of like product, for which there is a wealth of jurisprudence.[596]

7.204 The United States contends that while the USITC begins with the universe of imports identified in the request, the USITC is only required to define or identify the domestic product or products like or directly competitive with the imported article or articles in the petition or request. It

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[589] United States' second oral statement, para. 110.

[590] European Communities' first written submission, para. 181; China's first written submission, para. 171.

[591] United States' first written submission, paras. 97 and 101.

[592] European Communities' first written submission, paras. 179, 185; China's written reply to Panel question No. 35 at the first substantive meeting; Korea's first written submission, para. 19; Norway's first written submission, paras. 168, 176; Switzerland's first written submission, paras. 164, 171.

[593] New Zealand's first written submission, para. 4.32.

[594] Korea's first written submission, para. 22.

[595] Norway's second written submission, para. 52.

[596] Japan's written reply to Panel question No. 17 at the second substantive meeting; Brazil's written reply to Panel question No. 23 at the second substantive meeting.

is not required to consider whether and how to subdivide (or combine) the imported article or articles identified in the request into relevant sub-groupings prior to identifying the domestic like products.[597]

7.205 The United States submits that the complainants' arguments seem to be based on a notion that definitions of the like product are made prior to the gathering of evidence. The USITC, however, does not predetermine its definitions of like product. In the present case, the USITC appropriately began its like product analysis with the imports subject to this particular investigation, which included a range of steel products, and after considering the factors appropriate for the context and the facts of this particular investigation, made its like product definitions. Contrary to the complainants' allegations, the USITC was not required to begin with any predefined like products that had been identified in different investigations pursuant to other statutory standards and based on the particular records of the cases in which they were defined.[598]

7.206 The United States also responds that it would be acceptable under the Agreement on Safeguards for competent authorities to first identify the domestic industries (domestic product) that have been injured and then secondly to identify the specific imported products that are considered to have caused the injury. Article 4.2(a) indicates what the competent authorities must do before reaching a determination; it does not require them to perform these tasks in a particular order. The United States submits that, in any event, the USITC did not identify the domestic industry first. It first considered the merchandise subject to investigation, identified the identical domestically produced steel, divided the domestic steel into discrete like products, and divided imports into the same categories.[599] After defining its domestic like product(s), the USITC identified the subject imports (i.e., "such product", or "specified imported product") that corresponded or matched up to each of the like product definitions in order to conduct each of its analyses of increased imports, serious injury, and causation.[600]

7.207 In response, the European Communities submits that the United States' approach can not be reconciled with the text of Article 2.1 of the Agreement on Safeguards, which explicitly distinguishes between "a product" or "such product" on the one hand and the "like or directly competitive products" produced by the domestic industry on the other. The term imported "product" is used with reference to each of the conditions specified in Article 2.1 ("a product" or "such product"). Contextually, the difference between these two concepts is further corroborated by Article 4.1(c) of the Agreement on Safeguards which elaborates on the definition of the "domestic industry" and clarifies that such definition is only relevant "in determining injury or threat thereof". Article 4.2(a) of the Agreement on Safeguards then assumes a determination of "increased imports" before it can be analysed whether these have caused or are threatening to cause serious injury and Article 4.2(b) contains the term "product concerned". Finally, Article 2.2 of the Agreement on Safeguards also refers to "a product being imported" against which a measure can be imposed.[601]

7.208 Korea submits that the absence of a specific requirement as to how the analysis of the imported product must be done is not determinative. By its terms, the Agreement on Safeguards makes very clear that it is "such imported product" or, in the case of Article XIX of the GATT 1994, a "particular product or products" which must be identified.[602] Article 2.2 refers to "a product being imported" against which a measure can be imposed. The Agreement makes clear that while there is

[597] United States' first written submission, para. 95.
[598] United States' first written submission, para. 105.
[599] United States' written reply to Panel question No. 23 at the first substantive meeting.
[600] United States' written reply to Panel question No. 145 at the first substantive meeting.
[601] European Communities' second written submission, para. 113.
[602] Korea's second written submission, para. 21.

no limitation on the scope of the products that are subject to investigation, each "such product" in the investigation must be identified and analysed, otherwise there would be no basis for imposing a measure on that product.[603]

7.209 The United States counter-argues that there appears to be some consensus that the order of analysis employed in the USITC's general methodology (i.e., whether the domestic like product or specific imports are identified first) is not the issue but, rather, it is whether some product definitions in this particular investigation were too broad.[604] The USITC's focus on the domestic product rather than the imported product for its analysis of whether there is a single or multiple like products is fully consistent with the object and purpose of the Agreement on Safeguards. The Agreement on Safeguards provides for an analysis of the condition of the domestic industry (i.e., consideration of whether the domestic producers of the like product are experiencing serious injury) in order to protect it if necessary, albeit temporarily, from increased imports. Given the purpose of the Agreement, examining the products domestically produced to ascertain the composition and scope of the pertinent like products is eminently reasonable. After all, the United States argues, if the objective is a precise identification of the domestic like product so as to be able to define the relevant domestic industry in order "to ensure that only domestic producers suffering serious injury are given temporary breathing room to facilitate adjustment"[605], logic dictates that the analysis start with consideration of the domestic products, not the subject imports. The focus of the safeguard analysis is on the condition and response to stimuli of the domestic industry. The nature of the exporting producer and industries would not logically further this required analysis.[606]

7.210 The United States further submits that any like product analysis must be based on an evidentiary record. Subdividing imports into various groups prior to the collection of any evidence as part of the investigation, as some complainants advocate, would call into question the very basis of any resulting finding. In contrast, the USITC did not predetermine its like product definitions, but rather first gathers evidence, and only then proceeds to an analysis using the factors appropriate to its investigation, and a like product determination based on the facts of the particular case. This approach ensures that, as with other pertinent issues of law and fact, the consideration of like product definitions is consistent with Article 3.1.[607]

7.211 According to the United States, requiring a competent authority to delineate the relevant like product divisions based exclusively on the imported products set forth in a petition or request for investigation raises a number of concerns, not the least of which is the fact that there is no basis for such an obligation in the Agreement on Safeguards. The imposition of such a requirement could also hamstring the competent authority in ways that would prove detrimental to its investigation and, therefore, would likely also detract from the conclusions that the authority ultimately reaches. The very global nature of a safeguards proceeding means that an investigation often will implicate products from many countries and the products originating in each of those countries may vary considerably. Therefore, for the competent authority to focus its inquiry on the imported products rather than the domestic products is far less likely to produce information that will be useful for defining the domestic like product or products, and the relevant domestic industry or industries.[608]

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[603] Korea's second written submission, para. 22.
[604] United States' second written submission, para. 44.
[605] European Communities' written reply to Panel question No. 51 at the first substantive meeting.
[606] United States' second written submission, para. 47.
[607] United States' second written submission, para. 49.
[608] United States' second written submission, para. 50.

2. Defining/identifying the "imported product"

(a) Specificity of the imported product

7.212 The European Communities, Switzerland, Norway and Brazil recall that the Appellate Body has made clear in *US – Lamb* that "a safeguard measure can only be imposed on a specific 'product', namely the imported product", and that the correct definition of a "specific product" is important to ensure that a safeguard measure is only imposed "if that specific product ("such product") is having the stated effects upon the 'domestic industry that produces like or directly competitive products.' The conditions in Article 2.1, therefore, relate in several important respects to specific products".[609] [610]

7.213 According to the European Communities, Switzerland and Norway, this notion of "specific product" is distinct and narrower than the concept of "like or directly competitive" products referring to domestic versus imported products.[611] This requirement was already reflected in Article XIX of the GATT 1947, entitled "emergency action on imports of particular products".[612] The requirement of specificity implies that each product be identified and treated separately with respect to increase in imports and causality.[613] It prevents investigating authorities from grouping together two or more imported products for the purpose of the increased imports, causation analysis and when imposing the safeguard measures, although they can establish an increase in imports and the effect of causing injury only for one of them.[614]

7.214 According to the United States, the complainants provide no support for their allegation that "the notion 'specific product' referring to imports is distinct and more narrow than the concept 'like or directly competitive product' referring to domestic versus imported products".[615] Moreover, their rationale for defining "specific imported products" first is to require authorities to consider whether such imports have increased, as a "filter", prior to conducting the like product analysis. The complainants' proposed methodology has no basis in the Agreement. Moreover, it is ironic that the complainants, who have alleged incorrectly that the USITC's like product definitions were made in order to attain a desired result, actually propose that the USITC should have conducted a results-oriented test prior to defining the domestic like product.[616]

7.215 The European Communities also argues that the Agreement on Safeguards clearly envisages that safeguard investigations be conducted with respect to a single identified product – "a product", not into a bundle of distinct products or a bundle of selected sub-products.[617] Read in the light of the object and purpose of the Agreement on Safeguards, which is to ensure that serious injury is not wrongly attributed to an imported product, it prohibits a definition of the imported product that is so

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[609] Appellate Body Report, *US – Lamb*, para. 86.

[610] Brazil's first written submission, para. 87; Switzerland's first written submission, para. 170; Norway's first written submission, para. 175.

[611] European Communities' first written submission, para. 185; Switzerland's first written submission, para. 171.

[612] European Communities' first written submission, para. 186; Switzerland's first written submission, paras. 171-172.

[613] European Communities' first written submission, paras. 186, 188.

[614] European Communities' first written submission, para. 186; China's written reply to Panel question No. 35 at the first substantive meeting; Norway's first written submission, paras. 176-177; Switzerland's first written submission, paras. 171-172.

[615] European Communities' first written submission, paras. 184-185.

[616] United States' first written submission, paras. 100-101.

[617] European Communities' written reply to Panel question No. 19 at the first substantive meeting; European Communities' second written submission, para. 90.

"broad" as to result in injury being wrongly imputed to a product which is not imported at increased quantities.[618]

7.216 The United States maintains that the Agreement on Safeguards does not establish any parameters for defining "such product".[619] The complainants' alleged requirement to subdivide or identify separate imported products prior to defining the domestic like product has no support in the Agreement. The complainants urge that there is support for such requirements and narrow definitions by reading interpretations into the Agreement that are not permitted by the text or purpose of the Agreement on Safeguards.[620] The dictionary definition affirms that the meaning of the term "product" is quite flexible and depends on the context in which it is used. It can apply to one particular item sold, to a group of items, or to a class of items. In almost every situation in which items may be referred to as a "product", it is possible to discern both a broader "product" of which that product is a subset, and a subset of that product that itself may be referred to as a "product".[621] [622]

7.217 The United States further submits that the complainants' reliance on the Appellate Body's findings in *US – Lamb* in alleging that the USITC was required to define "specific imported products" is misplaced. The Appellate Body rejected imposing a safeguard measure on an imported article, lamb meat, because of the prejudicial effects that such imported article had on the domestic producers of another wholly different domestic product, live lambs, that had not been defined as a like product.[623] This statement pertains to the process of defining a domestic industry consisting of producers of like or directly competitive products and does not speak to separating subject imports into categories prior to defining domestic like products as the complainants allege.[624] Furthermore, in the paragraph following this finding, the Appellate Body explicitly states that "the first step … is the identification of the products which are 'like or directly competitive' with the imported product", i.e., the first step is defining the domestic like product.[625] [626]

7.218 The European Communities and China respond that it can be derived from the Appellate Body Report in *US – Lamb* that imports must be identified before the like domestic product.[627] According to the European Communities, it can also be derived from Article 2.1 of the *Agreement on Safeguards* as clarified by the Appellate Body Report in *US – Lamb* that the bundle of domestically produced articles may not contain products that are not even like or directly competitive with each other.[628] The United States seems to suggest that, had the imported product been defined as lamb meat and live lambs, then the determination of the like product and domestic industry would be different – the like and imported product would have been lamb meat and live lamb, because live lamb is an input product for lamb meat. However, the approach taken by the United States severs what the Appellate Body has called the logical continuum set forth by Article 2.1 of the Agreement on Safeguards.[629] Brazil argues that the Appellate Body report in *US – Lamb* made it clear that an

[618] European Communities' written reply to Panel question No. 138 at the first substantive meeting.
[619] United States' written reply to Panel question No. 19 at the first substantive meeting.
[620] United States' first written submission, para. 96.
[621] For example, depending on context, each of the following could be considered a "product": a disposable, retractable blue ball point pen; all disposable blue ball point pens together; all disposable ball point pens together; all ball point pens together; all disposable pens together; or all pens together.
[622] United States' written reply to Panel question Nos. 19 and 21 at the first substantive meeting.
[623] Appellate Body Report, *US – Lamb*, para. 86.
[624] Appellate Body Report, *US – Lamb*, para. 86.
[625] Appellate Body Report, *US – Lamb*, paras. 87, 92 and 94, footnote 55.
[626] United States' first written submission, para. 97.
[627] China's second written submission, para. 45.
[628] European Communities' second written submission, paras. 134-137.
[629] European Communities' second written submission, paras. 139-140.

imported product cannot be like more than a single domestic product. For each imported product there is a single domestic like product.[630]

7.219 The United States rejects the argument that Article XIX and the provisions of the Agreement on Safeguards require that the competent authorities analyse the Article 2.1 conditions in a particular order.[631] While there is admittedly a logical order to parts of the analysis, there is no specified order of analysis imposed by the Agreement on Safeguards. If the Article 2.1 conditions are met, it is irrelevant whether the competent authorities found increased imports or serious injury first. All that is required is that each of the conditions for imposing a safeguard measure is met. The United States agrees that Article XIX and the Agreement on Safeguards envision a chronological order in the evolution of an increase in imports that would meet the requirements of Article XIX: an obligation or tariff concession, then an unforeseen development, then an increase in imports, and finally, serious injury. However, this does not impose an obligation on the competent authorities to follow this chronological order in structuring their analysis. There are certainly logical first steps in the analysis. The domestic like product must be identified before determining whether the domestic industry producing the like product was seriously injured, and both the domestic like product and the imported product must be defined before determining whether imports have increased relative to domestic production. However, there is no requirement in the Agreement on Safeguards that the imported product must be defined before the domestic like product, or that unforeseen developments be established before determining whether there were increased imports. So long as the competent authorities have made all of the requisite findings, it is largely irrelevant in what order those findings are made. A failure to follow the order of findings advocated by the European Communities and Switzerland does not establish a prima facie case of a violation of the Agreement on Safeguards.[632]

7.220 According to the complainants, it is true that the order of making findings does not always matter. However certain findings cannot properly be made in the absence of other required findings. Thus, for example, a product cannot be held to be like something that has not yet been defined. These complainants contend that the United States admits to having conducted this analysis the other way round and has, therefore, done so incorrectly.[633]

7.221 Korea submits that under the definition adopted by the United States in this case, if the imported product is CCFRS, CCFRS is the domestic like product which is composed of slab, hot-rolled, cold-rolled, corrosion-resistant, and plate. Assuming, *arguendo*, that CCFRS is a separate like product, if the industry chose instead to limit its safeguard petition to imports of slab alone, the question is whether the domestic like product would continue to be CCFRS or slab. According to the United States' analysis of *US – Lamb*, and the United States' matching-up approach[634], if the only imported product is slab then the like product would only be slabs. In contrast, Korea takes the position that if the United States is correct that slab is simply a part of a broader like product, then the fact that a petition is brought against slab alone does not change the like product. In other words, the like product for slab imports alone would still be CCFRS. Each imported product must be "like" each domestic product. Mere overlap between the imported products (i.e., slab, hot-rolled, cold-rolled, etc.) and the like products (i.e., slab, hot-rolled, cold-rolled, etc.) is not sufficient to find there is a

[630] Brazil's second written submission, para. 10.
[631] United States' second written submission, paras. 36-39.
[632] Switzerland's written reply to Panel question No. 23 at the first substantive meeting.
[633] European Communities second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 28.
[634] Korea's second written submission, paras. 25-33.

single like product. Korea argues that this is their fundamental disagreement with the United States' position.[635]

7.222 The European Communities reiterates that according to Article 2.1, the determination whether "a product" fulfils certain conditions cannot be made without identifying "such product". Thus, although WTO Members are not obliged to regulate the scope of complaints or requests to start a safeguard investigation, they must ensure that their competent authorities identify the imported product concerned for the purpose of the determination. The European Communities submits that the United States has not done so.[636]

7.223 Brazil believes that the United States' position on whether investigations and measures apply to a single imported product or whether multiple products can be grouped into a single investigation of imports has been confused and is confusing. On the one hand, the United States appears to imply that multiple imported products can be bundled together in a single investigation so long as the domestic industry is defined as including producers that produce like products which are coextensive with the multiple imported products.[637] On the other hand, the United States points out that "the USITC identifies the subject imports (or specific imported product) that corresponds or matches up to each of its like product definitions in order to conduct each of its analyses of whether increased imports of the product have caused serious injury to the domestic producers of the like product".[638] Thus, the United States appears to concede that authorities cannot bundle multiple imported products and investigate whether imports of these multiple imported products have increased and caused serious injury to a domestic industry which consists of producers of multiple like products, and which have likewise been bundled together. According to Brazil, there must be discrete investigations and determinations regarding each individual imported product and the corresponding domestic like product.[639] Since an imported product must correspond to a domestic product like the imported product, the like product criteria used to define domestic products must also be applied to the imported product.[640]

7.224 According to New Zealand, the position of the United States is that it has to take the imports as they are presented to it in the petition. This, of course, ignores that in fact the USITC did group the imported products differently from the way they were set out in the petition. However, it also misconstrues the nature of the obligation under Article 2 of the Agreement on Safeguards and the need for some degree of specificity in the imported product for any coherent "like" product determination to be made.[641] The term used is "product", not "products", so there is an implication at the outset of product specificity. That conclusion is reinforced both by the context and the object and purpose of Article 2 of the Agreement on Safeguards. While a safeguard measure can be imposed only where the domestic industry suffering serious injury produces a "like or directly competitive" product, equally the imported product on which the safeguard measure is imposed must be "like or directly competitive" with the domestic product. Only such products are competitive and only injury caused by an increase in competitive imports could be the subject of a safeguard measure.[642] Although the United States seeks to deny that there is any requirement to demonstrate likeness between bundled products, the USITC did, in fact, engage in an attempt to show some degree of

[635] Korea's written reply to Panel question No. 9 at the second substantive meeting.
[636] European Communities' second written submission, para. 99.
[637] See in this regard, the United States' arguments in para. 7.232.
[638] United States' written reply to Panel question No. 19 at the first substantive meeting .
[639] Brazil's second written submission, paras. 6-8.
[640] Brazil's second written submission, para. 9.
[641] New Zealand's second written submission, para. 3.49.
[642] New Zealand's second written submission, paras. 3.50 and 3.51.

likeness between them.[643] The European Communities also argues that the Agreement on Safeguards does not allow determinations (and data collection) based on "types" or "categories" of products instead of a specific imported product. If the Agreement on Safeguards allowed, as argued by the United States, determinations based on "types of products" (between which the USITC does not see "clear dividing lines") without separating specific imported products that are not even like or directly competitive, the Agreement on Safeguards would also allow a determination on T-shirts and televisions. In conclusion, different products may be covered by one investigation procedure, as long as that investigation collects data and provides evidence relating to "such product" and the "domestic industry that produces like or directly competitive products", thereby enabling the investigating authority to make a correct determination.[644]

(b) Purpose of specific identification of the imported products

7.225 Japan and Korea consider that imported products must not necessarily be narrower than like products.[645] Rather, the boundary of the imported product should provide a reasonable basis for a meaningful like (or directly competitive, if applicable) product analysis/comparison with the domestic like product. In Brazil's view[646], the grouping of products whether on the import side or the domestic side must also permit an analysis of the competitive dynamics in the market so that it can be determined whether imports are actually the cause of the industry's alleged injury. If these products are too broadly defined by bundling together products which are not like one another, the one-to-one competitive relationship between imports and domestic products cannot be established, and would result in a violation of the Agreement on Safeguards. Brazil submits that it is difficult to see how determinations of injury and causation could be appropriately made with respect to multiple imported products and multiple domestic industries producing products like those imported products.[647]

7.226 Japan further submits that if it is ensured that the imported products and the domestic products have the proper competitive relationship, this boundary for the imported products is eventually narrowed down to meet the "like product" criteria, i.e., physical properties, end-use, consumer perception, and tariff classification. This way, the "like product" question is interrelated with the "a product" argument.[648]

7.227 Norway argues that the product must be sufficiently defined in order to allow for an adequate evaluation of all the conditions specified in Article 2 of the Agreement on Safeguards for each and every product. The four criteria developed by the Appellate Body to establish likeness (physical characteristics, end-uses, consumer preferences, customs classification) may be taken as a point of departure for defining the imported product, but they must be applied even more narrowly than for the determination of what constitutes the "like product". Bundling of different products is not allowed, as it would undermine the criteria set out in Article 2.1. Norway also submits that the concept of "likeness" is irrelevant in this respect, as that is the second test to identify the domestic industry, not

[643] New Zealand's second written submission, para. 3.55.
[644] European Communities' written reply to Panel question No. 10 at the second substantive meeting.
[645] Japan's written reply to the Panel question No. 33 at the first substantive meeting; Korea's written reply to Panel question No. 33 at the first substantive meeting.
[646] Brazil's written reply to Panel question No. 138 at the first substantive meeting.
[647] Brazil's written reply to Panel question No. 137 at the first substantive meeting.
[648] Japan's second written submission, para. 8.

the test to specify the imported product.[649] Even if two selected distinct products are "like", it is not admissible to bundle them together for the purpose of defining a separate imported product.[650]

7.228 Korea also submits that it is logical that the product must be sufficiently defined in order to allow for the required evaluation as to the conditions specified in Article 2.2 and elaborated in Article 4.2 of the Agreement on Safeguards. The "such" product and "like" product are obviously intrinsically linked in the Agreement on Safeguards. According to Korea, the analysis of the conditions specified in Article 2.1 and Article 4.2 must reveal the proper relationship between each product, imported and like, so that the analysis of serious injury and causation is meaningful and in compliance with the Agreement on Safeguards. If each imported and like product is distinct from the other products investigated, then an analysis which fails to take into account that distinction cannot be deemed sufficient.[651] [652]

7.229 Switzerland adds that besides not fulfilling the requirement of being "a product", bundles of different (imported) products can also not be compared to a "like or directly competitive" product, because products can only each be "like or directly competitive" with another product. If each of these different products is imported in such increased quantities that it causes or threatens to cause serious injury to the domestic industry, then an investigation is needed for each of the different products.[653]

(c) Grouping

7.230 China asserts that the USITC is not allowed to group domestic like products and then use these groupings as imported products for the purpose of the determinations on increased imports. In doing so, the USITC uses the "bundling effects" to cover products for which the requirements of the Agreement on Safeguards are not met.[654]

7.231 Brazil argues that an implication of grouping of products is that the imported product may include products which are neither like nor directly competitive with each other and that the effects of these imports may be measured on domestic industries producing products that are neither like nor directly competitive. In this situation, it is difficult to see how the United States could "ensure that the domestic industry is the appropriate industry in relation to the imported product" or avoid imposition of safeguard measures based on the "prejudicial effects that an imported product has on domestic producers of products that are not 'like or directly competitive products' in relation to the imported product".[655]

7.232 The United States contends that, in the present case, the USITC's definitions of like products are coextensive with the subject imports. The like product and domestic industry definitions in this case correspond exactly to the imports subject to investigation. The USITC did not define the domestic "like products" to encompass more or different types of steel than the imported articles identified as subject to investigation. Moreover, the USITC considered the effects of only the subject imports (that corresponded to each domestic like product definition) on the domestic industry consisting of the producers of the corresponding domestic like product. The USITC's approach is

[649] Norway's written reply to Panel question No. 22 at the first substantive meeting; Norway's first written submission, para. 176.
[650] Norway's written reply to Panel question No. 32 at the first substantive meeting.
[651] Appellate Body Report, *US – Lamb*, para. 90 (input and end products must be "like.").
[652] Korea's second written submission, para. 23.
[653] Switzerland's written reply to Panel question No. 12 at the second substantive meeting.
[654] China's second written submission, para. 40.
[655] Brazil's second written submission, para. 42.

clearly consistent with the Agreement on Safeguards and the Appellate Body's findings in *US – Lamb*.[656] The United States also submits that the complainants fail to recognize that within almost every defined like product, and the corresponding imported product, there exist a range of goods of different sizes, grades, or stages of processing. While goods along the continuum share similar or like factors, individual items at the end of the continuum may not be as similar.[657]

7.233 In Korea's view, the argument by the United States that the USITC merely matches up the imported product to the like product[658] is nothing more than a *post hoc* rationalization that should be ignored by the Panel. Korea submits that the USITC record, however, contradicts even this new like product formulation: the USITC readily admits that the imported product and like product do not need to be "coextensive".[659] The United States appears to advance its *post hoc* formulation of like product ("matching up") to permit a pretext for dismissing the relevance of *US – Lamb*[660] (the imported product did not include lambs) and to distinguish the USITC's prior precedents in the anti-dumping and countervailing duties context.[661] [662]

7.234 Japan considers that even when two products are "coextensive", such "coextensiveness" alone does not assure the required relationship, as it still requires that the sub-component products within a grouping be like the other sub-components within that grouping in order to secure the likeness relationship between the imported and the domestic like products in their entirety.[663] Bundling of unlike products, as was done by the United States for CCFRS grouping, is absurd because it results in comparing imports with unlike domestic products, and in allowing the wrong industry to benefit from imposed relief.[664] Such comparisons violate Article 2.1, which requires that increased imports be found to cause serious injury, or threat thereof, "to the domestic industry that produces like or directly competitive products". According to Japan, by relying on the "coextensive" excuse, the United States has masked the true competitive dynamics between the imported and domestic products by bundling unlike products into a single "like product". Such bundling should also be rejected, particularly in light of the specific warnings of the Appellate Body in *US – Lamb* and *US – Cotton Yarn* not to benefit the wrong industry in safeguard cases.[665] [666]

7.235 Brazil further submits that the notion that competent authorities could group several domestic like products together that do not compete with each other directly and are not like each other, so long as they are coextensive with the imported products, would leave the issue of like product wide open. It would mean that the only parameter in defining the domestic product like or directly competitive with the imported product is that the domestic products must be coextensive with the imported products. Thus, the interpretation being urged upon the panel by the United States could yield absurd results such as conducting an investigation of imports of cotton shirts and televisions together, with

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[656] United States' first written submission, paras. 65, 98.
[657] United States' second written submission, para. 86.
[658] United States' first written submission, para. 65; United States' first oral statement, para. 16.
[659] Korea's second written submission, paras. 26-27.
[660] Appellate Body Report, *US – Lamb*, para. 98.
[661] Appellate Body Report, *US – Lamb*, paras. 105-106.
[662] Korea's second written submission, para. 32.
[663] Japan's written reply to Panel question No. 9 at the second substantive meeting.
[664] Japan does not believe it matters when the imported product is defined, as long as it is appropriately defined in accordance with the appropriate like product grouping.
[665] Appellate Body Report, *US – Lamb*, para. 86; Appellate Body Report, *US – Cotton Yarn*, para. 95.
[666] Japan's written reply to Panel question No. 10 at the second substantive meeting.

the only constraint being that the domestic industries must be defined as those producing cotton shirts and televisions.[667]

7.236 China agrees that a single determination related to increased imports and serious injury for both cotton shirts and televisions would be absurd. While several products can be subject to one investigation, the specific imported products that will be subject to the determinations required by Article 2.1 of the Agreement on Safeguards should always be identified. The absurdity would be to have a single determination covering products that are not "specific", since this would fall short of the requirement of the Agreement on Safeguards to first identify a specific imported product. This would be the case if a single determination would cover both cotton shirts and televisions.[668]

7.237 In Brazil's view, there must be separate investigations and determinations of increased imports, serious injury and causation of each individual imported product and the domestic industry producing the corresponding domestic like product. Competent authorities cannot collapse or bundle multiple imported products and corresponding multiple like products into the same investigations and determinations.[669] Brazil also submits that the Appellate Body in both *US – Lamb* and *US – Cotton Yarn* refers to "the imported product" and not to "imported products", implying a single identifiable imported product. A single identifiable imported product must correspond with a single identifiable like product not multiple like products.[670]

7.238 Brazil[671] and New Zealand agree that the term used is "product", not the plural "products", so there is an implication at the outset of product specificity. It is difficult to see how one can read this language as permitting inclusion in a single investigation multiple imported products which correspond to multiple domestically produced like or directly competitive products. When there is bundling of different products into an imported product category, the test for determining whether that is an appropriate "product" for the purposes of the Agreement on Safeguards must be likeness. That is to say, if the products within that imported product category are not "like" each other, then there has not been a proper identification of the imported product. Only like products are competitive and since "likeness" is the basis for determining the domestic product and for determining the product on which a safeguard measure can be imposed, likeness must be the criterion for determining whether the imported good is "a product" or a set of separate products.[672] Norway agrees that Article 2.1 of the Agreement on Safeguards implies that an investigation is directed towards "a" (one) product and that the grouping of products is not permitted.[673] With two different products there would have to be two investigations – which can of course be carried out in parallel.[674]

(d) Parameters for identifying the imported product

(i) Likeness

7.239 New Zealand submits that since "likeness" is the basis for determining the domestic product and for determining the product on which a safeguard measure can be imposed, then likeness must be the criterion for determining whether the imported good is a "product" or is a set of separate or different products. Thus, when there is bundling of different products into an imported product

[667] Brazil's second written submission, para. 43.
[668] China's written reply to Panel question No. 12 at the first substantive meeting.
[669] Brazil's written reply to Panel question No. 10 at the second substantive meeting.
[670] Brazil's second written submission, para. 44.
[671] Brazil's written reply to Panel question No. 19 at the first substantive meeting.
[672] New Zealand's written reply to Panel question No. 19 at the first substantive meeting.
[673] Norway's first written submission, para. 179.
[674] Norway's written reply to Panel question No. 10 at the second substantive meeting.

category, the test for determining whether that is an appropriate "product" for the purposes of the Agreement on Safeguards must be likeness.[675] Norway agrees that it will be useful to apply the four criteria for "likeness" as a point of departure, but argues that the criteria be applied even more narrowly than for the determination of what constitutes the "like product".[676]

7.240 In contrast, the European Communities argues that the question of the "likeness" of imported products amongst themselves is not relevant. Article 2.1 of the Agreement on Safeguards employs the term "like product" only for defining the domestic industry, a distinct step which takes place after establishing that there are increased imports. However, it can safely be said that bundling together imported products which are not even "like" one another certainly does not satisfy the requirement of increased imports of specific products.[677] The European Communities adds that the Appellate Body clarified in *US – Cotton Yarn*[678] that there must be a matching between "such product" and the domestic products so as to establish that they are like or directly competitive. Such matching exercise cannot, however, be undertaken, if imported (and domestic) products may be "bundled" in a way that the components of the imported product bundle are not even like or directly competitive with all the components of the domestic product bundle.[679] China further argues that it is not permissible to justify a safeguard measure on one specific imported product based on a finding of "increased imports" of a different specific product, even if "like or directly competitive".[680]

(ii) Tariff lines

7.241 The European Communities and Switzerland consider that the primary basis for identifying the specific imported product should be tariff codes. According to them, tariff classification is a conventional and generally accepted way of classifying and identifying products. Article XIX of the GATT 1994 establishes a clear link between imported products and the corresponding tariff concessions, which are made for single specific products.[681]

7.242 In the United States' view, each tariff line generally does not correspond to a distinct or specific product. The process of defining the domestic like product and the corresponding specific imported product is based on the facts in each particular case and customs treatment is just one out of a number of criteria.[682] Moreover, allegations that tariff classifications should define specific products begs the question of the appropriate level of tariff classification (i.e., four-digit level, six-digit level, eight-digit level, or ten-digit level), not all of which are harmonized among countries.[683] [684]

7.243 In response, the European Communities notes that the Harmonized Commodity Description and Coding System (HS) provides an international product nomenclature at the six-digit level. The HS is commonly used by WTO members to negotiate schedules and concessions and also referred to

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[675] New Zealand's second written submission, para. 3.52.
[676] Norway's second written submission, para. 55.
[677] European Communities' written reply to Panel question No. 21 at the first substantive meeting.
[678] Appellate Body Report, *US – Cotton Yarn*, paras. 97 and 98.
[679] European Communities' second written submission, para. 129-131.
[680] China's first written submission, para. 158.
[681] European Communities' written reply to Panel question Nos. 19-20 at the first substantive meeting.
[682] United States' first written submission, paras. 86-89.
[683] Moreover, a number of prior safeguard disputes have involved single like products covering multiple tariff classifications. *US – Line Pipe*; *Korea – Dairy*, Notification pursuant to Article 12.1(c), G/SG/N/10/KOR/, dated 27 January 1997; *Argentina – Footwear (EC)*, Notification pursuant to Article 12.1(c) and Article 9, G/SG/N/10/ARG/1/Suppl.3, G/SG/N/11/ARG/1/Suppl.3, dated 17 May 1999.
[684] United States' written reply to Panel question No. 20 at the first substantive meeting.

in the analogous provisions of the Agreement on Textiles and Clothing. It should therefore be the starting point for the definition of "a product".[685]

7.244 The United States responds that, like many of the complainants, it takes the view that while consideration of customs treatment/tariff classification may be a relevant factor in an analysis of whether there are clear dividing lines between products, depending on the facts of a particular case, it is still just one of a number of criteria and not alone dispositive.[686] The Appellate Body in *Japan – Alcoholic Beverages II*, albeit interpreting a different agreement with a different object and purpose, reached the same conclusion and considered that tariff classifications of products could be relevant as one of a series of factors in determining what are "like products", but not as the primary or decisive factor.[687] Moreover, the United State contends, it is clear that identification by tariff lines has not been the decisive factor in other safeguard actions, which have involved single like products covering multiple tariff classifications.[688] [689] In fact, in its recent safeguard action on steel, the European Communities also included numerous tariff classifications in each of its single imported products that correspond to its various like or directly competitive products.[690] According to the United States, the European Communities' reference to tariff concessions as the basis for using tariff lines to identify products also fails to recognize that tariff concessions may include a wide range of products. The Appellate Body in *Japan – Alcoholic Beverages II*, interpreting a different agreement, warned that while precise tariff bindings "can provide significant guidance as to the identification of 'like products' … these determinations need to be made on a case-by case basis. … [since] tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product 'likeness.'"[691] [692] The United States also argues that the European Communities' rationale for defining imported products by tariff lines first is intended to require authorities to consider whether such imports have increased, as a "filter", prior to conducting the like product analysis. This methodology is neither required by the Agreement on Safeguards nor apparently followed by the European Communities in its own safeguard actions.[693] The European Communities' proposal would appear to place the cart before the horse in that it focuses on what imports are increasing regardless of whether there is serious injury to an industry and before the composition of the relevant domestic industry has been defined. According to the United States, the European Communities would look at increased

[685] European Communities' second written submission, paras. 123-124.

[686] Brazil's written reply to Panel question No. 20 at the first substantive meeting; Japan's written reply to Panel questions Nos. 20 and 31 at the first substantive meeting; Korea's written reply to Panel questions Nos. 20 and 31 at the first substantive meeting; New Zealand's reply to Panel question No. 20 at the first substantive meeting. United States' first written submission, paras. 86-89.

[687] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22; Panel Report, *Japan – Alcoholic Beverages I*, para. 5.6.

[688] *US – Line Pipe*; *Korea – Dairy*, Notification pursuant to Article 12.1(c), G/SG/N/10/KOR/, dated 27 January 1997; *Argentina – Footwear (EC)*, Notification pursuant to Article 12.1(c) and Article 9, G/SG/N/10/ARG/1/Suppl.3, G/SG/N/11/ARG/1/Suppl.3, dated 17 May 1999.

[689] Allegations that tariff classifications should define specific products begs the question of the appropriate level of tariff classification (*i.e.*, four-digit level, six-digit level, eight-digit level, or ten-digit level), not all of which are harmonized among countries.

[690] *European Communities – Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products*, Commission Regulation No. 1694/2002/EC of 27 September 2002, paras. 10-15 (Exhibit US-84). (For example, the European Communities defined hot-rolled coils as a single "product concerned", or imported product, consisting of numerous (11) tariff classifications and found that it corresponded to a single like or directly competitive product. The European Communities made similar findings regarding other products in this action.).

[691] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 22.

[692] United States' second written submission, paras. 54-56.

[693] *See European Communities – Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products*, Commission Regulation No. 1694/2002/EC of 27 September 2002 (Exhibit US-85).

imports by tariff lines, without regard to whether tariff lines should be grouped together, as most parties agree is appropriate. The approach advanced by the European Communities would result in a scrutiny of imports to determine which imports are showing increases in volume only then to be followed by an investigation to determine the domestic like product corresponding to an import tariff line or lines and then if there was an industry somewhere that was being injured as a result of such increased imports. Therefore, looking at increases in imports by tariff lines, as proposed by the European Communities, before defining the domestic like product prevents any consideration of increases in imports relative to domestic production, since the industry would not yet been have defined, which the Agreement on Safeguards requires.[694]

7.245 The European Communities reiterates that tariff classifications up to the six-digit level form an important starting point in determining what a product is.[695] Internationally agreed customs classifications are relevant for determining the "like domestic product" and reflect the "physical properties" of products. Against that background, it is all the more incomprehensible why the United States continues to defend its untenable position that the term "product" in Article 2.1 of the Agreement on Safeguards is so flexible that it permits a competent authority to bundle an array of different individual products. According to the European Communities, although the term "product" may differ between different legal provisions, where safeguard measures that suspend tariff concessions are at stake, as in this case, tariff concessions form an important context. Although the United States agrees that tariff classifications are relevant, the USITC did not consider them in this determination. According to the European Communities, however, the key point is that the term "product" does not depend on the industry, but rather, as the Appellate Body has clarified, the definition of the domestic industry follows the definition of the imported product and the like or directly competitive domestic products.[696] [697]

7.246 Japan, Korea, Norway and Brazil argue that tariff lines are helpful, but not determinative, given that there is sometimes an overlap, particularly in terms of customer perceptions and end-uses, regarding products in different tariff lines.[698] Other considerations, such as end-use, consumer perceptions, and physical properties, may be (and in this case are) more important than distinctions in tariff classifications.[699] New Zealand submits that the practice of the USITC itself confirms that in reality, tariff classification is an important aid to product differentiation.[700] Norway argues that the six-digit level that is internationally harmonised should be seen as the outer perimeter of the internationally agreed definition of specific product. While you will normally not have a situation where a distinct or specific product is divided into several tariff lines, you may have several products under the same tariff line.[701]

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[694] United States' second written submission, para. 57.

[695] European Communities' written reply to Panel question No. 19 at the first substantive meeting; European Communities' second written submission, paras. 119-127.

[696] Appellate Body Report, *US – Lamb*, para. 87.

[697] European Communities' written reply to Panel question No. 9 at the second substantive meeting.

[698] Japan's written reply to Panel question Nos. 20 and 31 at the first substantive meeting; Korea's written reply to Panel question No. 20 at the first substantive meeting.

[699] Japan's written reply to Panel question No. 31 at the first substantive meeting; Brazil's written reply to Panel question No. 19 at the first substantive meeting; Norway's written reply to Panel question No. 22 at the first substantive meeting.

[700] New Zealand's written reply to Panel question No. 20 at the first substantive meeting.

[701] Norway's second written submission, paras. 60-61.

(iii) Consensus on parameters?

7.247 The United States asserts that the complainants have suggested a variety of definitions for "such imports" (tariff lines, product exclusion requests, predetermined definitions that are not universally accepted) with no clearly suggested criteria, other than like product criteria, to actually consider the evidence collected and the facts of the case in making such a finding. The complainants' own arguments, therefore, show that no such consensus on steel product definitions exists. The like product criteria (i.e., physical properties, uses, consumer tastes, and tariff classifications) suggested by the complainants do not include a market parameter or competition criteria.[702]

7.248 The United States responds that the complainants' varied and inconsistent arguments regarding the appropriate definitions of like product demonstrate that no such universal definitions of steel products exist.[703] Moreover, the complainants, submits the United States, are urging the Panel to identify a requirement for analysis in all cases, but no-one contends that such alleged universal definitions exist and should control in all cases. The United States also rejects the proposition that the complainants do not have to agree on what definition would be appropriate, but rather it is enough to show that "what the US did was too broad".[704] This begs the question of how the complainants know that the USITC's definitions were too broad if complainants cannot reach a consensus on any alternative definition.[705]

7.249 The European Communities responds that the United States exaggerates differences in the arguments of the complainants where there are none.[706] The European Communities and Switzerland also argue that the allegation of the absence of universal product definitions is not true. An internationally agreed definition of products is provided under the Harmonized Commodity Description and Coding System, (the "HS"), developed by the World Customs Organization (WCO) and governed by "*The International Convention on the Harmonized Commodity Description and Coding System*".[707] It provides an international product nomenclature at the six-digit level. All contracting parties, including the United States, undertake that "[their] tariffs and statistical nomenclatures shall be in conformity with the HS".[708] The HS is commonly used by WTO Members to negotiate their schedules of concessions, and safeguards measures are a safety valve against unforeseen effects of such tariff concessions.[709] Norway adds that the product definitions provided for by the HS, therefore, provide an internationally agreed basis for determining what is a specific

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[702] United States' first written submission, para. 103; United States' written reply to Panel question No. 141 at the first substantive meeting.

[703] The complainants' proposals for appropriate like product definitions ranges from product definitions used in trade remedy cases under other statutes, to tariff classifications (612 classifications in all), to product descriptions contained in requests for product exclusions.

[704] Japan's first oral statement (like product), para. 23. Japan stated in relevant part:

> "First of all, it should be noted that none of the complainants intends to suggest that there is only one possible definition of the "like product" for the products at issue in this case. . . . The Panel need not decide which of the breakdowns presented in the complainants' submissions is most appropriate; it merely needs to find that what the US did was too broad, which it clearly was."

[705] United States' second written submission, paras. 52-53.

[706] European Communities' second written submission, para. 92.

[707] *The International Convention on the Harmonized Commodity Description and Coding System*, Brussels, 14 June 1983.

[708] Ibid., Article 3.1(a).

[709] European Communities' second written submission, para. 120; Switzerland's second written submission, para. 40; Norway's second written submission, para. 59.

imported product. The six-digit level that is internationally harmonized should therefore be seen as the outer perimeter of the internationally agreed definition of specific product.[710]

7.250 China submits also that it is not arguing that there should be universally accepted definitions of steel products, although such a classification may exist. China rather challenges the methodology used by the competent authority to define the product categories that are the subject of the investigation.[711]

3. Methodology used by the USITC in determining the "imported product"

7.251 The European Communities, China, Switzerland and Norway submit that the safeguard measures adopted by the United States are already fundamentally flawed because of the arbitrary and unjustified manner in which the USITC considered itself entitled to group products together for the purposes of the investigation and the determination[712], contrary to the Agreement on Safeguards.

(a) Identification of the imported product

7.252 The European Communities, China[713] and Norway point out that the USITC completely omitted the first and fundamental step of identifying the "specific imported product". Instead of making its own determination of the specific imported product, the USITC blindly accepted the arbitrary description of "the imported product or products included within the investigation that [was] set forth in the request or petition".[714] The USITC explicitly rejected identifying specific imported products it investigated when it stated in its general methodology that "[t]he Commission … is not required to consider, in the first instance, whether and how to subdivide the imported article or articles".[715] Korea and Norway also argue that the USITC in the instant investigation failed to carry out an analysis of the imported product, and used as its "starting point" the four general product categories proposed by the President.[716]

(b) Grouping

7.253 The European Communities and Switzerland recall that the President's request grouped "a wide array of steel products into four general categories: (1) CCFRS products, (2) certain carbon and alloy long products, (3) certain carbon and alloy pipe and tube products, and (4) certain stainless steel and alloy tool steel products". The USITC then established "33 product categories" for the collection of data.[717] Again, a number of products were grouped together, and each specific imported product was not considered separately for the purpose of showing increase in imports and causality.[718]

7.254 Brazil submits that the starting point was a broadly defined domestic steel industry making products ranging from carbon steel slab and hot-rolled flat products, to long products, stainless products, and tubular products. In effect, the entire steel making sector of the United States' economy

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[710] Norway's second written submission, para. 60.
[711] China's second written submission, para. 38.
[712] European Communities' first written submission, para. 206; China's first written submission, para. 154; Norway's first written submission, para. 202; Switzerland's first written submission, para. 192.
[713] China's second written submission, para. 33.
[714] USITC Report, Vol. I, p. 31. (Exhibit CC-6).
[715] European Communities' written reply to Panel question No. 145 at the first substantive meeting; Norway's first written submission, para. 204.
[716] Korea's first written submission, para. 22; Norway's first written submission, para. 204.
[717] USITC Report, Vol. I, p. 32.
[718] Switzerland's first written submission, paras. 195-196.

was perceived as being in crisis and the sector convinced the President that imports were to blame. Thus, the starting point was not individual products and domestic facilities producing those products but, rather, the entire steel sector making virtually the entire range of steel products. While the President provided the USITC with an exhaustive list of products based on harmonized tariff categories and various product descriptions, what the USITC really received was a request to figure out how imports were injuring the steel sector and what to do about it. Thus, the starting point was not individual products, but an entire sector of the United States' economy and how to protect that entire sector from import competition.[719] [720]

7.255 Similarly, the European Communities argues that the starting point was not an individual product but a broadly defined domestic steel industry making products described by 612 tariff headings. The USTR request of 22 June 2001 was based on the perception that the entire steel sector making virtually the entire range of steel products was in crisis.[721] The request responded to immense pressure by the Senate to impose steel safeguards to protect the domestic steel industry by referring to "national security" considerations.[722] The European Communities submits that, given the assumption at the start – that the entire steel sector was being injured by unspecified imported products – the approach of the USITC, by its own admission, was to protect as broad an array of productive facilities as possible.[723] According to the European Communities, this backward approach of first identifying a domestic industry that is allegedly being injured and then bundling a broad array of "certain imported steel products" is contrary to the Agreement on Safeguards. The United States agreed under the Agreement on Safeguards to a safeguard determination where the definition of the domestic industry depends on the proper identification of such imported products and like or directly competitive products (and not the other way round). This was also clarified by the Appellate Body in *US – Lamb*.[724] The European Communities also clarifies that it is conceivable that a request (or petition from the industry) covers a broad array of products or even a whole industry. However, such request does not relieve a competent authority from discharging its responsibility to identify specific imported products on the basis of which it can make its determinations.[725]

7.256 The United States stresses that in defining the domestic like product, the USITC started with the imported article (or articles) that had already been identified in the request or petition for an investigation ("subject imports") and examined the evidence in order to determine the domestic product(s) that are like the subject imported product(s).[726] This request or petition identified the universe of imports subject to investigation. Second, the USITC considered whether there were domestic products that are like the subject imports. Third, the USITC applied its long-established factors to the domestic products corresponding to the subject imports to consider whether there were

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[719] Brazil submits that in the Bush Administration's request to the USITC to conduct a safeguards investigation, although the investigation covered "certain" steel products, the clear intent was to investigate "the effect of imports on the US steel industry", and not merely some component of that industry. Letter from Ambassador Robert Zoellick to USITC Chairman Stephen Koplan, 22 June 2001. (Common Exhibit CC-1 to Brazil's first written submission).

[720] Brazil's written reply to Panel question No. 17 at the second substantive meeting.

[721] USTR request to the USITC to initiate a safeguard investigation under Section 201 of the Trade Act of 1974, Exhibit CC-1, paras. 1-3.

[722] Press Release by Senator Rockefeller of 22 May 2001, available at http://www.senate.gov/~rockefeller/2001/pr052201.html (visited 5 January 2003), Exhibit CC-110. Resolution of the Committee on Finance of the United States Senate, transmitted to the USITC by letter of 26 July 2001, paras. 2, 3 and 7, Exhibit CC-111.

[723] USITC Report, Vol. I, p. 30.

[724] Appellate Body Report, *US – Lamb*, para. 87.

[725] European Communities' written reply to Panel question No. 17 at the second substantive meeting.

[726] United States' first written submission, para. 95.

clear dividing lines among domestic products in order to define like products.[727] The USITC traditionally takes into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (i.e, where and how it is made), its uses, and the marketing channels through which the product is sold, and any other relevant factors.[728]

7.257 The United States explains more particularly that the USITC begins with the universe of imports subject to investigation, as identified in the request or petition. After determining what domestic products are like or directly competitive with the subject imports, the USITC considers whether the domestic products corresponding to the subject imports consist of a single domestic like product or whether there are clear dividing lines among the products so as to constitute multiple domestic like products. The USITC applies its like product criteria, including production or manufacturing processes, in its analysis of whether there are such clear dividing lines as to constitute multiple like products, or that there are no clear lines and that a single like product definition is appropriate.[729]

7.258 China responds that the USITC did more than defining or identifying the domestic product or products like or directly competitive with the imported article or articles in the petition or request. It grouped these products together and used these groupings as categories of imported products. Therefore, according to China, for these categories, none of the steps required by the Agreement on Safeguards were followed.[730] In China's view, the investigating authority was not allowed to turn from the products identified as being subject to the investigation (which might eventually have been considered as "specific" enough) into broader product categories without any further justification, and in particular when these products were not "like". In this context, it is clear that the bundle under investigation cannot be considered as a "specific product". China is of the opinion that, in doing so, the USITC is, to a large extent, reshaping the range of imported products identified as subject to the investigation. Therefore, the investigation was no longer conducted on specific products, but on a group of products that are unrelated since they are not even "like".[731] The USITC conducted a "likeness" analysis between these domestic products and grouped them into bundles. Therefore, the USITC did not conduct an increased imports analysis on some of those products, while in the end, they are subject to safeguard measures. This methodology is contrary to the Agreement on Safeguards.[732]

7.259 The European Communities, China, Switzerland and Norway argue that the product "categories" created by the United States' authorities for the purposes of the safeguard investigation and imposition of measures are not justified by definitions that can allow them to be considered specific products.[733] Where the USITC did consider arguments to the effect that its products groupings were incorrect[734], it rejected these arguments with considerations relating not to the specificity of the products but, rather, to production processes, vertical integration and coincidence of economic interests. However, the very fact that the USITC itself needed to rely on 33 different product categories for the purpose of data collection, demonstrates the artificial nature of the broader product categories created for the purpose of the determination.[735] The European Communities also

[727] United States' first written submission, paras. 83-93.
[728] United States' written reply to Panel question No. 19 at the first substantive meeting, paras. 46-50.
[729] United States' second oral statement, paras. 18 and 28-31.
[730] China's second written submission, para. 50.
[731] China's second written submission, paras. 55-56.
[732] China's second written submission, para. 57.
[733] China's first written submission, para. 162.
[734] USITC Report, Vol. I, p. 37, where the Commission considered whether to "analyse certain carbon flat-rolled steel separately or as a whole".
[735] Switzerland's first written submission, paras. 197-198.

argues that the USITC confirmed that the imported product must be identified for the purpose of the determination because it collected data on the basis of 33 product groups.[736] In this way, a lack of increased imports for one specific product could be, and indeed was, masked by combining it with other products.[737]

7.260 Switzerland contends that the Agreement on Safeguards and the Appellate Body require that a safeguard measure be imposed on a specific product ("such product"). Therefore, each specific product has to be determined at the outset of an investigation. Because the USITC failed to do so, it did not fulfil this first requirement of the Agreement on Safeguards.[738] The European Communities argues that the arbitrary and artificial product definitions used by the USITC in the present case vitiates the whole basis of the USITC Report.[739] Switzerland further considers that, having failed to establish each relevant specific product that is being imported, the United States cannot determine the domestic industry that produces the like or directly competitive product, thereby violating Article 2.1 of the Agreement on Safeguards.[740]

7.261 The United States points out that if there are multiple domestic like products corresponding to the subject imports, the USITC identifies the subject imports (or specific imported product) that corresponds or matches up to each of its like product definitions in order to conduct each of its analyses of increased imports, serious injury and causation.[741] The USITC defined 27 separate like products that corresponded to all the subject imports. Ten of these definitions corresponded to subject imports on which remedies were imposed and are subject to review by this Panel.[742]

7.262 The European Communities responds that the United States offers two contradictory responses to what constitutes the "imported products" or the "subject imports". First, the United States frankly admits that the USITC has not identified the specific imported product concerned and denies such legal obligation. The United States subsequently attempts to sell the USITC's domestic industry definition as identification of the specific imported product.[743] The European Communities also notes that the term "matching" is inaccurate in this context. What the USITC has done to identify the imported products is rather the "cloning" of the domestic industry definition and to re-label it as "imported product". The approach of the United States puts the cart before the horse, contrary to the logical continuum of Article 2.1 of the Agreement on Safeguards.[744] According to the European Communities, the United States itself admitted that in "cloning" the domestic like product bundles and calling them imported product, it had not established that all components of the domestic product bundle are like all components of the imported product bundle.[745] Specifically, the European Communities asserts that the United States admitted that, for example, imported slab and domestic corrosion-resistant (i.e.) coated steel are both components of a single like product, CCFRS.[746] The

[736] European Communities' second written submission, para. 100.
[737] China's first written submission, paras. 164, 169; European Communities' first written submission, para. 216; Norway's first written submission, paras. 205-210.
[738] Switzerland's second written submission, para. 49.
[739] European Communities' first written submission, paras. 218, 259.
[740] Switzerland's first written submission, para. 199.
[741] United States' written reply to Panel question No. 21 at the first substantive meeting, para. 40.
[742] United States' first written submission, para. 114.
[743] European Communities' second written submission, para. 92.
[744] European Communities' second written submission, para.106.
[745] United States' written reply to Japan's question No. 1, para. 19.
[746] United States' written reply to Japan's question No. 1, para 19.

United States further conceded that "individual items at the respective ends of the continuum may be less similar to each other than those in the middle of the continuum".[747] [748]

4. Measure-specific argumentation

(a) CCFRS

(i) Grouping

7.263 Brazil submits that the United States investigated whether imports of CCFRS had increased and were causing serious injury to the domestic industry producing CCFRS. According to Brazil, the United States' determinations of increased imports, the existence of serious injury and the existence of a genuine and substantial causal link between the serious injury and increased imports were based on a single CCFRS imported product and a single domestic industry producing CCFRS.[749] However, CCFRS constitutes multiple imported products produced by industries in the United States producing separate and distinguishable multiple like products.[750] The European Communities and China argue that by artificially aggregating slabs, plate, hot-rolled, cold-rolled and coated products as CCFRS, the USITC attempted to disguise a sharp dive in imports of plate throughout the entire investigation period.[751]

7.264 Japan argues that, in the case of CCFRS products, the United States has essentially decided that slab is like corrosion resistant steel and has thus created an inappropriate, overly broad grouping.[752] According to Japan, the United States obviously failed to meet the like product requirement when it conjoined, among others, slab with corrosion resistant steel. Japan argues that these products are simply not like one another; nor are they like the plate, hot-rolled, and cold rolled steel with which they were conjoined. Customer perceptions, for instance, show a clear dividing line between hot, cold, and coated, rather than between tariff lines within each of these three products. This is demonstrated by the industry literature that reports the broken down prices of these products.[753] Indeed, Japan argues, the USITC itself collected data based on these delineations.[754] [755]

7.265 Japan adds that the overarching point of the complainants concerning the USITC's CCFRS grouping, is that the grouping does not represent a set of products that can be logically compared with one another. The impact of imports on the domestic CCFRS industry cannot be assessed because the various parts that make up those imports are not like one another and do not compete with one another. The effect of grouping them together is to do what the Appellate Body in *US – Lamb* said

[747] United States' written reply to Japan's question No. 1, para. 19.
[748] European Communities' second written submission, para. 132.
[749] Brazil's second written submission, para. 11.
[750] Brazil's second written submission, para. 12.
[751] China's first written submission, para. 169; European Communities' first written submission, para. 216.
[752] Japan's written reply to Panel question No. 33 at the first substantive meeting.
[753] *PURCHASING MAGAZINE* (10 Oct. 2002) at 9; *METAL BULLETIN* (7 Oct. 2002) (*METAL BULLETIN'S* appraisal of prices for US steel); *and* American Iron and Steel Institute, Shipments of Steel Mill Products (Carbon) (Aug. 2002); Nucor Pricing Sheets (21 Oct. 1999) (Exhibit JPN-1).
[754] USITC Report; *see also* questionnaires issued by USITC in this case, *available at http://info.usitc.gov* (excerpted sample provided in Exhibit JPN-2).
[755] Japan's written reply to Panel question No. 20 at the first substantive meeting.

should not be done – that is, to impose a safeguard measure that results in protecting an industry that does not make like or directly competitive products.[756]

7.266 Korea submits that imports of CCFRS, for instance, are not a particular product but rather several products. They share only a basic physical similarity due to commonalties in the production process – they are flat-rolled, made of steel and often produced in integrated facilities. By treating all CCFRS imports as a single like product, the USITC determined that all CCFRS domestic products are similar in terms of physical properties, uses, production processes, and marketing channels for the reason that each "type" (*i.e.*, like product) of domestic CCFRS overlapped with the same "type" of imported product. Such circular reasoning results in broadening the like product simply to reflect the scope of imports identified in the petition, whether or not they are "like", in a manner not consistent with the Agreement on Safeguards.[757]

7.267 Brazil also considers that when the United States grouped, among others, slab with corrosion resistant steel, it completely dismissed any sense of a dividing line based on physical properties, end-uses, consumer perceptions or tariff classification. Indeed, the United States appears to have ignored its own criteria. Based on customer perceptions, for instance, a clear dividing line exists at least between hot, cold, and coated flat products, rather than between tariff lines within each of these three products. For example, the industry literature reports prices broken down by these products.[758] Indeed, Brazil argues, the USITC itself collected data based on these delineations.[759] While the tariff schedules tend to group these products together (although with multiple tariff lines), the industry categorization for commercial purposes would seem to be a more convincing criterion.[760] The impact of imports on the domestic CCFRS industry cannot be assessed because the various products that make up those imports are not like one another and do not compete directly with one another. For example, slab is imported exclusively by United States' steel mills producing the downstream finished CCFRS rolled products. Presumably, these imports benefit these mills and have an entirely different effect on the domestic industry than, for example, imports of hot-rolled flat products.[761]

7.268 The European Communities states that the USITC Report does not provide data on the artificially aggregated product CCFRS. There are no tables on increased imports, domestic industry capacity and production and domestic industry financial performance for this product group, but only tables for individual products (and one covering all seven products in the larger grouping CCFRS).[762] New Zealand adds that several disparate imported products were grouped together and termed "the imported product" CCFRS, even though the USITC had itself determined there to be five separate products for certain data collation and analysis purposes.[763]

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[756] Japan's written reply to Panel question No. 137 at the first substantive meeting.

[757] Korea's first written submission, paras. 23-24.

[758] Purchasing Magazine transaction prices (Exhibit CC-65); or US Census data on steel imports, grouped by product category (an example of this data is located at http://www.census.gov/foreign-trade/Press-Release/2002pr/09/steel/steel1cp.pdf.)(Brazil notes that the US census data groupings are the same used by the American Iron and Steel Institute to track imports and domestic shipments).

[759] *Certain Steel Products*, Inv. No. TA-201-73, USITC Pub. 3479 (December 2001) (hereinafter *"ITC Report"*), Purchasers' Questionnaire, p. 3 (*available at http://info.usitc.gov/OINV/INVEST/OINVINVEST.NSF/0a915ada53e192cd8525661a0073de7d/f26c82f49f2bd14685256a84004ee7d1/$FILE/Purchaser-carbon+flat.PDF*.).

[760] Brazil's written reply to Panel question Nos.19, 20 at the first substantive meeting.

[761] Brazil's written reply to Panel question No. 137 at the first substantive meeting.

[762] European Communities' first written submission, para. 215.

[763] New Zealand's written reply to Panel question No. 19 at the first substantive meeting.

7.269 The United States contends that contrary to the European Communities' allegations[764], the USITC clearly considered data for the domestic industry defined as the producers of CCFRS. The USITC repeatedly referred to tables, such as FLAT-ALT-7, in its opinion in the USITC Report. Many of these tables were not included in the published USITC Report, but were released later, although it is apparent from the references in the USITC Report that they were considered.[765]

(ii) Market and price for CCFRS

7.270 New Zealand submits that the USITC identified the subject imports as those that corresponded to domestic products that were, themselves, identified by reference to the industries that produced them.[766] Instead of determining the domestic industry by reference to the producers of the product that is "like" the imported product, the USITC determined the imported product by reference to its perception of products that are produced by the United States domestic industry.[767] The array of different products included within CCFRS serves to underline that market parameters were not used to distinguish between different products. As a consequence, CCFRS does not represent "one sole authentic market".[768]

7.271 Brazil argues that there is no such thing as a market for CCFRS. In contrast, there are clearly distinct markets for slab, plate, hot-rolled, cold-rolled and corrosion resistant steel. These are categories commonly used within the industry.[769] The industry itself does not recognize the existence of a category of CCFRS. While there may occasionally be discussion of "sheet" products or "flat products", these never include slab. Furthermore, the industry distinguishes between plate, hot-rolled, cold rolled and corrosion resistant steel for pricing purposes, with prices of all of these products derived from a base price for each of the individual finished flat products (e.g., a separate price list with a distinct base price and extras applicable for each of these four products).[770] Finally, the industry trade organizations generally use distinct hot-rolled, cold-rolled, corrosion resistant and plate categories when reporting on production, shipments, and imports, which indicates that the industry itself recognizes a clear division between these products.[771] Brazil believes that the fact that the industry itself recognizes separate and distinct categories of a product constitutes a prima facie case that CCFRS does not define either a product or a like product.[772]

7.272 Japan and Korea point out that there is no such thing as a price for CCFRS.[773] Rather, there are distinct prices for each of the distinct CCFRS products subject to investigation. In fact, the USITC recognized this because the USITC did not ask for pricing data for CCFRS but rather

[764] European Communities first written submission, para 215.
[765] United States' first written submission, para. 141.
[766] United States' written reply to Panel questions for the Parties, 12 November 2002, para 267.
[767] New Zealand's second written submission, para. 3.31.
[768] New Zealand's written reply to Panel question No. 141 at the first substantive meeting.
[769] Brazil's written reply to Panel question No. 141 at the first substantive meeting.
[770] The Nucor price list attached as an Annex to Brazil's written replies to Panel questions at the first substantive meeting.
[771] Shipments of Steel Mill Products – Carbon, American Iron and Steel Institute Statistical Release 10C, located at Exhibit JPN-1 of Japan's written replies to Panel questions at the first substantive meeting; US Census data on steel imports, grouped by product category (an example of this data is located at http://www.census.gov/foreign-trade/Press-Release/2002pr/09/steel/steel1cp.pdf.)(tracking virtually identical categories as the AISI statistical release).
[772] Brazil's second written submission, para. 12.
[773] Japan's written reply to Panel question No. 138 at the first substantive meeting.

requested prices for hot-rolled, cold-rolled, etc. The United States has not ever argued that hot-rolled "competes" with corrosion-resistant steel.[774]

7.273 The United States affirms that the USITC applied its traditional factors in determining that there was no clear dividing line between types of CCFRS and defining it as a single like product, corresponding to a single imported product. The USITC found that CCFRS at various stages of processing shared certain basic physical properties, were interrelated, had common end-uses, were generally distributed through the same marketing channels, and were essentially made by the same production processes (at least at the initial stages).[775] An important fact for the USITC in defining this like product was that CCFRS at one stage of processing generally is feedstock for the next stage of processing.[776] [777] In determining that there was no clear dividing line between slab and other CCFRS, the USITC recognized that slab is dedicated for use in producing the next stage of steel, hot-rolled steel.[778] Moreover, slab shares common metallurgical properties with CCFRS.[779]

7.274 According to Japan, it is irrelevant that the production processes are the same "at least at the initial stages", as the United States argues. As the comparison between live lamb and lamb meat reveals, later processes can create distinguishable products in terms of physical characteristics, end-use, and/or customer perceptions.[780]

(iii) Different remedy on slab

7.275 In the European Communities' view the imposition of a different remedy on slabs confirms that there is no such "product" as CCFRS, including slabs. The possibility to apply distinctly the two remedies provided in Proclamation No. 7529 (one for slabs, one for the rest of CCFRS) rests on the fact that the competent authorities can identify and distinguish "slabs" and the other steel products grouped as CCFRS.[781] Norway admits that it may always be possible to reduce a product to another sub-product (e.g. red vs. blue pens), but asserts that the imposition of a different remedy is a clear indication that the "product" (CCFRS), was not sufficiently defined.[782]

7.276 According to Japan, if products are like one another, then the competitive dynamics between them should, by definition, be the same, thereby requiring the same remedy to address a single level of injury. The fact that the President felt compelled to impose a tariff rate quota for slab and a high tariff for the other products within the CCFRS grouping demonstrates that there are different competitive dynamics at play between slab and the finished flat products.[783] Korea also argues that the "product" satisfying the conditions of Articles 2.1 and 2.2 is the same "product" against which a measure can be imposed. The decision to impose a different remedy for slab is a recognition that the conditions of competition, including supply and demand, for slab are different from the conditions of competition for the other products treated by the USITC as the same like product. It appears that this

[774] Korea's written reply to Panel question No. 141 at the first substantive meeting.
[775] United States' first written submission, paras. 116-142; USITC Report, pp. 36-45.
[776] United States' first written submission, paras. 119-121, 127, and 140; USITC Report, pp. 37-42.
[777] United States written reply to Panel question No. 26 at the first substantive meeting.
[778] United States' first written submission, paras. 119-121; USITC Report, pp. 37-40.
[779] United States written reply to Panel question No. 29 at the first substantive meeting.
[780] Japan's written reply to Panel question No. 13 at the second substantive meeting.
[781] European Communities' written reply to Panel question No. 22 at the first substantive meeting.
[782] Norway's written reply to Panel question No. 22 at the first substantive meeting.
[783] Japan's written reply to Panel question No. 22 at the first substantive meeting.

is a *de facto* recognition by the United States that slabs are in fact a different like product from the other CCFRS because they are responsive to very different demand conditions.[784]

7.277 Likewise, Norway argues that there cannot be various measures directed at the same product. The application of a different remedy is yet another indication that slabs (which may indeed be one or many more distinct products) are distinct from the other products within a group or bundle. The fact that the United States can easily identify "slabs" as something different from the other products in the bundle, and thus impose a different remedy, testifies to this.[785]

7.278 Brazil also questions why it is necessary to have a different remedy for a sub-category of the products within the like product category if they all compete with each other. Presumably, if slab is competing directly with plate, hot-rolled, cold rolled and corrosion resistant CCFRS products, the remedy necessary to eliminate the injury from imports of slab is no different than that necessary to eliminate the injury from imports of these downstream products. The need for a different remedy for slab demonstrates that the products within the grouping are not like one another, do not directly compete with one another and should not be grouped together. There are different competitive dynamics at play between slab and the finished flat products, meaning that they cannot be part of the same like product.[786]

7.279 New Zealand submits that the USITC treated slab as indivisible from CCFRS for every determination except remedy. Thus, increased imports of CCFRS were found to have caused serious injury to the domestic industry producing the competitor like product, CCFRS. Logically, the same remedy would then be applied to the whole imported product.[787]

7.280 With regard to the slab remedy, the United States asserts that the Agreement on Safeguards permits the application of a safeguard measure at different levels to different items covered by that measure, and even the complete non-application of the measure to some items.[788]

(b) Tin mill products

7.281 Norway considers that there are six broad categories of tin mill products, with specified sub-categories and very specific end-uses. In this regard, Norway makes reference to the explanation given of tin mill products in the USITC Report.[789] Norway notes that thickness and surfaces also vary greatly depending on the end-use of the product.[790] Norway adds that distinctions between the different products can easily be made and that examples of the different products comprised within this group of products may be found in the later exclusions provided by the USTR, where ten different tin mill products were excluded from the safeguard measures on 22 August 2002.[791] [792]

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[784] Korea's written reply to Panel question No. 22 at the first substantive meeting.
[785] Norway's written reply to Panel question No. 22 at the first substantive meeting.
[786] Brazil's written reply to Panel question No. 22 at the first substantive meeting.
[787] New Zealand's reply to the Panel question No. 22 at the first substantive meeting.
[788] United States written reply to Panel questions No.22-29 at the first substantive meeting.
[789] USITC Report, Vol. II, at p. FLAT-4.
[790] Norway's first written submission, footnote 216; Norway's reply to the Panel question No. 34 at the first substantive meeting.
[791] USTR: "List of additional products to be excluded from the Section 201 safeguards measures, as established in Presidential Proclamation 7529 of March 5, 2002", dated 22 August 2002. (Available from the USTR-website, www.ustr.gov) (Exhibit CC-92). This list shows that 10 different tin mill products, with specific product specifications, are excluded.
[792] Norway's written reply to Panel question No. 34 at the first substantive meeting.

7.282 Brazil believes that there was a basis for the USITC to conclude that tin mill products constitute a single imported product and that the domestic industry producing the like product is the industry producing all tin mill products.[793]

7.283 The United States contends that tin mill products consist of a wide variety of flat-rolled carbon or alloy steel, plated or coated with tin or with chromium oxides or with chromium and chromium oxides.[794] Certain complainants would accept defining tin mill products as a single like product and others, such as Norway, appear to suggest that tin mill should have been defined far more narrowly as many like products corresponding to certain requests for product exclusions.[795] [796] Tin mill is made of cold-rolled steel that has been coated with tin or chromium or chromium oxides. The like product, "tin mill", consists of a continuum of tin or chromium coated products that, similar to most "like product" definitions, includes a range of varying sizes, coatings, grades, etc. Four Commissioners found that the continuum of tin mill shared similar physical properties or characteristics, uses, manufacturing processes, and marketing channels.[797] [798]

(c) FFTJ

7.284 The European Communities further argues that the lack of precise definitions of the imported products concerned vitiates all the USITC's findings on increased imports, injury and causation, as illustrated by the example of "carbon and alloy fittings". Even the USITC itself recognized that this "category contains a mix of *products*", or diverse "pipe connection *products*".[799] The artificial inflation of this product group fundamentally distorted the increased imports and causation analysis and resulted in the imposition of safeguard measures on a broad "mix of products" although the USITC only established a price undercutting effect for one very specific product that accounts for around 1% of all imports: "Carbon steel butt-weld pipe fitting, 6 inch nominal diameter, 90 degree elbow, long radius, standard weight, meeting ASTM A-234, grade WPB or equivalent specification".[800] The European Communities further argues that the products group as "carbon and ally fittings" are not even like or directly competitive (the relevant arguments are summarised in section E.7(d)). The European Communities notes that the United States did not respond to the specific claim that the products bundled as "FFTJ" were not even like each other. Thus, all determinations based on such imported product should be found incompatible with Article 2.1 of the Agreement on Safeguards.

E. DEFINITION OF THE DOMESTIC INDUSTRY PRODUCING PRODUCTS THAT ARE LIKE OR DIRECTLY COMPETITIVE WITH THE IMPORTED PRODUCT

1. Introduction

7.285 The European Communities, Japan, Norway and the other complainants claim that the United States acted inconsistently with its obligations under Articles 2.1 and 4.1(c) of the Agreement on Safeguards in the definition of the "domestic industry that produces like or directly competitive products". Japan adds that the United States further violated Articles X:3(a) and XIX:1 of GATT

[793] Brazil's written reply to Panel question No. 34 at the first substantive meeting.
[794] USITC Report, p. FLAT-4.
[795] Norway's first written submission, para. 223.
[796] United States' first written submission, para. 104.
[797] United States' first written submission, paras. 143-144; USITC Report, pp. 48-49.
[798] United States' written reply to the Panel question No. 27 at the first substantive meeting.
[799] USITC Report, Vol. I, pp. 175 and 179.
[800] USITC Report, Vol. II, p. TUBULAR-59, Table TUBULAR-61.

1994.[801] In its defence, the United States contends that the complainants have not established any basis for the Panel to conclude that any of the USITC's determinations of like product are inconsistent with Articles 2.1 and 4.1 of the Agreement on Safeguards or Articles X:3(a) and XIX:1 of GATT 1994.[802]

7.286 The United States contends that the USITC's approach regarding the definition of the like product is consistent with the Agreement on Safeguards.[803] The USITC defined 27 separate like products that correspond to subject imports. Ten of these definitions correspond to subject imports on which remedies were imposed and are subject to review by this panel.[804] The USITC considered the record evidence using long established factors and looked for clear dividing lines among the various types of domestic steel corresponding to the imported steel subject to this investigation. The methodology employed by the USITC was unbiased and objective. The USITC's definitions of like products were adequate, reasoned, and reasonable explanations were provided, consistent with United States' obligations under the Agreement on Safeguards.[805] The USITC's like product determinations were fully justified given the specific facts with respect to each of the products in question, and the USITC's adequate and reasonable explanations of its analysis with respect to each like product determination.[806]

2. Defining/identifying the "like product"

(a) Guidance in prescribing a definition

7.287 The European Communities, Japan, Korea, China, Switzerland and Norway consider that the notion of "like product" in the Agreement on Safeguards should be guided by the Appellate Body's teaching that "when construing the prerequisites for taking [safeguard] actions, their extraordinary nature must be taken into account". The purpose of a safeguard determination is not, as suggested by the USITC, to provide the widest possible blanket of protection to an affected industry. The Appellate Body clarified that safeguard measures may only be resorted to "in an extraordinary emergency situation". This purpose mandates that the domestic industry is defined accurately enough to ensure a meaningful analysis of all the conditions imposed by the Agreement on Safeguards.[807]

7.288 According to the European Communities, Japan, Switzerland, New Zealand and Brazil, one consequence is that it is not sufficient that one domestic product in a bundle is like or directly competitive with an imported product, irrespective of how specifically or broadly this has been defined. The competent authorities must establish that all components of the bundle of the domestic products are like or directly competitive with all specific imported products or all components of the bundle of imported products. Japan emphasises that in the absence of any competition between the

[801] European Communities' first written submission, para. 222; Japan's first written submission, paras. 78-82; and Norway's first written submission, para. 213. For detailed discussions on the violation of GATT 1994 Article X:3(a), see, infra section VII.O.2.

[802] United States' first written submission, para. 63.

[803] United States' first written submission, para. 96.

[804] United States' first written submission, paras. 64 and 114.

[805] United States' first written submission, para. 115.

[806] United States' second written submission, para. 30.

[807] European Communities' first written submission, paras. 197-198; Japan's first written submission, paras. 95-96; Japan's second written submission, para. 27; Korea's first written submission, para. 27; China's first written submission, paras. 148-149; Switzerland's first written submission, paras. 183-184; Norway's first written submission, para. 188.

imported and domestic product, there is no basis for finding a like product.[808] New Zealand adds that this means that there will be likeness between each of the products within each product bundle, and insists that a competent authority cannot group together several unlike imported products and then bundle the same unlike domestic products and claim that it has met the "like product" test of Article 2 of the Agreement on Safeguards.[809]

7.289 Brazil argues that in the instant case, the USITC's analysis of CCFRS products only concerned itself with an analysis of "like" products and did not concern itself with "directly competitive" products. In other contexts and under other agreements, the Appellate Body has found that if an industry is defined by the "like" products it produces, the definition must be more narrowly drawn than if that industry were defined by the broader "directly competitive" products.[810]

7.290 The United States argues that neither the rationale of safeguards as an exception to other obligations nor the statements in *US – Lamb* require a narrowly construed like product definition, as complainants contend.[811] First, to the extent the Agreement on Safeguards is an exception, that aspect of it has already been comprehended in the text of the Agreement on Safeguards. Members are neither directed or authorized to vary the balance of rights and obligations reflected in the Agreement by appending an unstated rule of construction on the negotiated language. Moreover, the United States submits that these arguments ignore the facts of this investigation which are very different from those in *US – Lamb*. The like product and domestic industry definitions in this case correspond exactly to the imports subject to investigation. Thus, the effects of imports on domestic producers of goods that are not defined as like products is not at issue. The complainants' arguments apparently are more about the range of products within the investigation than the USITC's like product approach.[812]

(b) Relevance of definition of like product under other WTO Agreements and existing GATT/WTO jurisprudence

7.291 Norway argues that, in light of the extraordinary nature of the measures, and the fact that the concept "like" is coupled with "or directly competitive" in Article 2.1 of the Agreement on Safeguards, "likeness" under the Agreement on Safeguards must be construed at least as narrowly as under Article III:2 of the GATT 1994.[813] [814] New Zealand also points out that "like product" in the Agreement on Safeguards stands in juxtaposition to "directly competitive product" and must, thus, be interpreted narrowly limited, so as not to encroach on situations more appropriately dealt with as "directly competitive".[815]

7.292 Korea, Japan and Brazil argue that, as the panel in *US – Lamb* found, there is no reason to construe the words "like product" in the Agreement on Safeguards any differently from their

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[808] European Communities' first written submission, para. 200; Switzerland's first written submission, para. 186; New Zealand's first written submission, para. 4.48; Brazil's first written submission, paras. 88-89; Japan's first written submission, para. 78-79.

[809] New Zealand's second written submission, paras. 3.28, 3.21.

[810] Appellate Body Report, *US – Cotton Yarn*, para. 91; Appellate Body Report, *Japan – Alcoholic Beverages II*, at 19; and *US – Lamb*, para. 88, footnote 50 (implicitly recognizing this principle).

[811] European Communities' first writtensubmission, paras. 197-199; Korea's first written submission, paras. 27-28; Japan's first written submission, paras. 88 and 95.

[812] United States' first written submission, para. 99.

[813] Appellate Body statements in respect of the two concepts in Article III:2 of the GATT in Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-20

[814] Norway's first written submission, para. 188.

[815] New Zealand's first written submission, paras. 4.38, 4.41.

definition in the Agreements disciplining anti-dumping or countervailing measures.[816] [817] Korea and New Zealand also believe that the AD and SCM Agreements are useful to the interpretation of "like product" in the Agreement on Safeguards because "the three Agreements' definitions of the industry producing a *like* product are essentially identical".[818] [819]

7.293 The United States points out that the complainants' proposals for appropriate like product definitions range from product definitions used in trade remedy cases under other statutes, to tariff classifications (612 classifications in all), to product descriptions contained in requests for product exclusions. Far from universal agreement, some complainants even propose different definitions for the same item for different purposes, based on the issue contested and their desired result.[820]

7.294 The United States points out that this dispute presents the Panel with the first occasion to examine fully the interpretation and application of the term "like products" in the context of the Agreement on Safeguards. The Appellate Body has found that the term "like products" "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears".[821] The term "like or directly competitive products", or more specifically, the term "like products" is not defined in the Agreement on Safeguards or in the GATT 1994, nor has it been at issue in dispute settlement proceedings involving the Agreement on Safeguards. Where the term "like products" has been addressed in other GATT or WTO dispute settlement proceedings, it has been in the context of provisions of GATT 1994, or other covered agreements with distinct and different purposes from those of the Agreement on Safeguards. As the Appellate Body has cautioned, the interpretation of the term "like products" for one context cannot be automatically transposed to other provisions or agreements where the phrase "like products" is used.[822] For instance, it is clear that the interpretation of the term "like products" in the context of provisions of other covered agreements (e.g., Article III of GATT 1994), whose purpose is to avoid protectionism and protect an equal and competitive relationship between products, will necessarily not be identical to, and perhaps not particularly relevant for, the Agreement on Safeguards, which has the opposite purpose, i.e., permitting the temporary protection of a domestic industry under certain circumstances. The United States argues that the Panel should recognize the clear distinction between these purposes and reject, in accordance with the Appellate Body's findings, the complainants' proposals to automatically transpose interpretations made in another context to the Agreement on Safeguards.[823]

7.295 The United States also submits that, with regard to the context of the Agreement on Safeguards, it has not been established in other GATT 1947 or WTO dispute settlement proceedings what factors are appropriate to be considered in determining whether a domestic product is like an imported product. While "general criteria, or groupings of potentially shared characteristics, provide a framework for analysing the 'likeness' of particular products … it is well to bear in mind [that such criteria are] simply tools to assist in the task of sorting and examining the relevant evidence".[824]

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[816] Panel Report, *US – Lamb*, para. 7.75 ("Another element of relevant context for interpreting the 'domestic industry' definition of SG Article 4.1(c) are the parallel provisions of the WTO agreements on Subsidies and Countervailing Measures and Anti-Dumping.").

[817] Brazil's first written submission, paras. 88-89; Korea's second written submission, para. 35; Japan's first written submission, paras. 89-94.

[818] Panel Report, *US – Lamb*, para. 7.75 (emphasis in original).

[819] Korea's first written submission, para. 30; New Zealand's first written submission, paras. 4.42-4.43.

[820] United States' first written submission, para. 103.

[821] Appellate Body Report, *EC – Asbestos*, para. 88.

[822] Appellate Body Report, *EC – Asbestos*, footnote 60 at p. 34.

[823] United States' first written submission, paras. 63-82.

[824] Appellate Body Report, *EC – Asbestos*, para. 102.

Moreover, it is clear that the domestic like product analysis under the Agreement on Safeguards should involve "'an unavoidable element of individual, discretionary judgement' … [and] be made on a case-by-case basis".[825] As the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence".[826] [827]

7.296 According to the European Communities, there are criteria to determine "like or directly competitive products" in the Agreement on Safeguards. The Appellate Body in interpreting the analogous provision in *US – Cotton Yarn* distinguished between the like and directly competitive concepts for purpose of safeguard measures and confirmed that the like product relationship is narrower than "directly competitive".[828] As to the criteria for determining likeness, the European Communities submits that the Appellate Body in *Japan – Alcoholic Beverages II* and *EC – Asbestos* confirmed that no matter where in the WTO Agreement the term "like" is used, "each" of the four border tax adjustment criteria "should be examined" as a framework[829] and that *all* of the evidence should be considered. The different purposes of Article III:2 of the GATT 1994 and the Agreement on Safeguards are not the point. What is relevant is that the purpose of the like product concept is the same in both provisions, that is to analyse whether an imported product competes with a domestically produced one. The different purposes of the underlying obligations may be a reason for stretching the accordion, but the accordion and its keyboard remains the same. According to the European Communities, the United States itself agrees that the following criteria are relevant to determine likeness in a safeguard investigation: "physical properties of the product, its customs treatment, its manufacturing process, its uses". The only divergence between the United States and the European Communities on this point relates to the relevance of the "continuous line of production between an input and an end-product".[830] Japan adds that the central teaching of *US – Line Pipe* is that the Agreement exists to prevent Members from abusing their right to protect domestic industries.[831]

7.297 Korea also disagrees that the protection of domestic industries is the object and purpose of the Agreement on Safeguards. Such reasoning also would beg the fundamental question: "Which domestic industries can be protected?" The Agreement on Safeguards makes clear that only those domestic industries producing the like product can be the basis for a safeguard measure.[832] [833] The chapeau of the Agreement on Safeguards includes as its object and purpose "the need to enhance rather than limit competition". The entire context of Article XIX of the GATT 1994 and the Agreement on Safeguards is to provide only a very limited exception to increased competition from imports brought about by WTO concessions.[834]

(i) Physical properties, end-uses, consumer perception and tariff classification

7.298 The European Communities, China, Switzerland, Norway, New Zealand and Brazil submit that an examination of likeness must involve, at a minimum, consideration of the four border tax

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[825] Appellate Body Report, *EC – Asbestos*, para. 101; *see also* Appellate Body Report, *Japan – Alcoholic Beverages II*, at pp. 20-21.

[826] Appellate Body Report, *EC – Asbestos*, para. 102.

[827] United States' first written submission, paras. 65, 83, 88.

[828] Appellate Body Report, *US – Cotton Yarn*, paras. 97 and 98.

[829] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21, Appellate Body Report, *EC – Asbestos*, para. 109.

[830] European Communities' second written submission, paras. 244-249.

[831] Japan's second written submission, para. 27.

[832] Appellate Body Report, *US – Lamb*, para. 94; Appellate Body Report, *US – Cotton Yarn*, para. 95.

[833] Korea's second written submission, para. 37.

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

adjustment criteria: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing similar functions in order to satisfy a particular need; and (iv) the international classification of the products for tariff purposes.[835] New Zealand adds that the narrow scope of the term "like product" in the Agreement on Safeguards dictates that there will need to be a high degree of similarity across these characteristics.[836]

7.299 Japan asserts that the Appellate Body has held in the context of GATT Article III (e.g., in *Japan – Alcoholic Beverages II*) that the most relevant factors are the products' physical properties, end-uses, consumer preferences, and tariff classifications. The point of these factors is clear: they help determine whether the products compete with each other. Only if the products compete with each other are they properly grouped together. Otherwise, the analysis to be performed in the injury investigation, as well as in choosing an appropriate remedy, is meaningless.[837]

7.300 The European Communities argues that the purpose of the "like or directly competitive products" test set out in Article 2.1 of the Agreement on Safeguards is to define the domestic industry sufficiently precisely so as to ensure that only domestic producers suffering serious injury are given temporary breathing room to facilitate adjustment.[838] Brazil, Japan and Switzerland submit that a safeguard measure is not permitted unless serious injury is caused by competition with imports. The four factor analysis developed in the context of Article III, which is aimed at discerning the extent of competition, therefore, is equally applicable in the safeguard context.[839] Norway argues that the purpose of defining the parameters of the "like product or directly competitive product" is similar under Article 2.1 of the Agreement on Safeguards and under Article III:2 of the GATT 1994: the like or directly competitive product test is a tool to analyse the competitive relationship between imported and domestically produced products.[840] [841]

7.301 China agrees that the interpretation of "like products" given in the context of one specific agreement cannot be automatically transposed in the context of other agreements.[842] However, China asserts that this can sometimes be the case and, in any case, such interpretations provide useful guidance.[843] China, therefore, reaffirms that the factors identified by the Working Party on *Border Tax Adjustments*, and further used by the Appellate Body in *Japan – Alcoholic Beverages II*, are relevant in this case. [844] The suggested criteria of the Working Party on *Border Tax Adjustments* were meant to be used for all the different cases occurring under the GATT. It is clear that these factors can be transposed for assessing "likeness" in the context of the Agreement on Safeguards.[845]

7.302 The United States submits that all parties agree on the reasonableness of the following criteria: physical properties/characteristics, uses, and customs treatment/tariff classification. Many

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[835] European Communities' first written submission, para. 202; China's first written submission, para. 150; Switzerland's first written submission, para. 188; Norway's first written submission, para. 188; New Zealand's first written submission, para. 4.45; Brazil's first written submission, para. 94.

[836] New Zealand's first written submission, para. 4.44.

[837] Japan's first written submission, paras. 98-101.

[838] European Communities' written reply to Panel question No. 51 at the first substantive meeting.

[839] Japan's, Switzerland's and Brazil's written reply to Panel question No. 51 at the first substantive meeting.

[840] Norway's written reply to Panel question No. 51 at the first substantive meeting.

[841] European Communities' second written submission, paras. 244-249.

[842] United States' first written submission, para. 64.

[843] China's second written submission, paras. 61-62.

[844] China's second written submission, para. 67.

[845] China's second written submission, para. 69.

parties agree that consideration of manufacturing processes may be appropriate. While several of the complainants maintain that consumer tastes also is an appropriate criteria, no party has objected to the USITC's consideration of marketing channels. The USITC's traditional like product criteria are consistent with the Agreement on Safeguards, there is no directly related treatment of the term in panel or Appellate Body reports to provide guidance on the issue of the appropriate criteria for the like product analysis. Moreover, resorting to the "ordinary" or "plain" meaning of the term "like" provided by the dictionary "leave[s] many interpretative questions open".[846] The Appellate Body in *EC – Asbestos*, interpreting Article III of the GATT, noted that the dictionary definition of "like" does not resolve the following three issues of interpretation: (i) which characteristics or qualities are important; (ii) the degree or extent to which products must share qualities or characteristics; and (iii) from whose perspective "likeness" should be judged.[847] [848]

7.303 According to the United States, the Appellate Body, when addressing the term "like" pursuant to Article III of the GATT, recognized in *Japan – Alcoholic Beverages II*, and most recently affirmed in *EC – Asbestos*, that the purpose and context of the covered agreement is important in interpreting the term "like products"[849] and that such interpretation for one context cannot be automatically transposed to other provisions or agreements where the phrase "like products" is used.[850] In accordance with the Appellate Body's findings, this Panel should recognize the clear distinction between agreements with different purposes and reject the complainants' proposals to automatically transpose criteria established for another context, such as Article III, to the Agreement on Safeguards.[851]

7.304 The United States further contends that the purpose of the Agreement on Safeguards is to permit the temporary protection of a domestic industry under certain circumstances.[852] The United States reiterates that the focus of the analysis in a safeguards investigation is on the condition of the domestic industry and not, as it is under Article III, on whether imports are being treated in a manner different from domestic products in the home market, i.e., whether they are afforded national treatment.[853] While protecting the competitive relationship between imports and domestic products and avoiding protection to domestic production is the purpose of Article III[854], affording temporary

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[846] Appellate Body Report, *EC – Asbestos*, para. 92.

[847] Appellate Body Report, *EC – Asbestos*, para. 92.

[848] United States' second written submission, paras. 58-61.

[849] Appellate Body Report, *EC – Asbestos*, para. 88.

[850] Appellate Body Report, *EC – Asbestos*, footnote 60, at p. 34, referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, at p. 20. Appellate Body Report, *EC – Asbestos*, para. 93.

[851] United States' second written submission, para. 62.

[852] Appellate Body Report, *US – Line Pipe*, para. 82; Panel Report, *US – Lamb*, para. 7.76 (the Agreement's objectives of "creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury. . . .").

[853] The term "like products" has primarily been addressed in dispute settlement proceedings regarding allegations that national treatment has not been afforded regarding 1) internal taxes pursuant to Article III:2 of GATT 1994, and 2) laws and regulations pursuant to Article III:4 of GATT 1994. The Appellate Body has indicated in *EC – Asbestos*, para. 97, regarding the purpose of Article III of GATT 1994 that:

> The broad and fundamental *purpose of Article III is to avoid protectionism* in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures *'not be applied to imported and domestic products so as to afford protection to domestic production'* " Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. (emphasis added)

[854] Specifically, the Appellate Body in *EC – Asbestos*, para. 99, stated:

protection if necessary to the domestic industry is the purpose of the Agreement on Safeguards. The traditional like product criteria considered by the USITC focus on objective rather than subjective factors. Moreover, since the focus of the analysis in a safeguard investigation is on the condition of the domestic industry rather than the consumer or the relationship of imported and domestic products in the market, "likeness" should be viewed from the perspective of the domestic product rather than a consumer, consistent with the purpose of the Agreement on Safeguards.[855] Indeed, the Appellate Body cautioned in *EC – Asbestos* that it may be important to consider "*from whose perspective* 'likeness' should be judged. For instance, ultimate consumers may have a view about the 'likeness' of two products that is very different from that of the inventors or producers of those products".[856]

7.305 The United States submits that, in any event, the USITC's like product factors in a safeguard investigation include the three criteria on which all parties agree (physical properties, uses, and customs treatment), as well as focus on such other objective factors as the product's marketing channels and manufacturing process.[857] [858] These are not mandatory criteria and do not limit the USITC from considering other factors, as appropriate, in making its findings.[859] No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the particular case.[860] The USITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations.[861]

7.306 The European Communities maintains its allegation that the United States failed to systematically look at each of the classical criteria and all the relevant evidence. According to the European Communities and Switzerland, the USITC has nowhere considered tariff classifications.[862] The European Communities and Switzerland argue that the United States cannot defend itself by claiming that there are too many classifications at the ten-digit level and that there is no universal agreement on what constitutes specific steel products in general.[863] Chapters 72 and 73 of the HS harmonize tariff classifications for steel products at the six digit level.[864] Japan submits that, in fact, the United States is not discerning the proper dividing line between products, but rather between producers.[865]

> ... a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.

[855] Appellate Body Report, *US – Line Pipe*, para. 82 (purpose of Agreement on Safeguards is to permit a WTO Member to "resort[] to an effective remedy in an extraordinary emergency situation that ... makes it necessary to protect a domestic industry temporarily".

[856] United States' second written submission, paras. 62-64.

[857] Panel Report, *Japan – Alcoholic* Beverages I, para. 5.7 (Panel was of the view that the likeness of products must be examined taking into account objective criteria (such as composition and manufacturing processes of products)).

[858] United States' first written submission, paras. 83-93.

[859] Appellate Body Report, *EC – Asbestos*, para. 102 (general criteria "are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products").

[860] United States' second written submission, para. 65.

[861] United States' first written submission, para. 84.

[862] Switzerland's second written submission, paras. 42-43; European Communities' second written submission, para. 263.

[863] Switzerland's second written submission, para. 58; United States' first written submission, paras. 65 and 103.

[864] European Communities' second written submission, para. 263.

[865] Japan's second written submission, para. 20.

7.307 The United States responded that while consideration of customs treatment may be a relevant factor in such an analysis depending on the facts of a particular case, it still is one of a number of criteria.[866] The USITC found that consideration of customs treatment for purposes of the definition of the like product was not a "useful factor" given the large number of classification categories (612) applicable to this investigation. The fact is, in this case the numerous tariff classifications did not provide clear distinctions between products. For instance, each of the 33 data collection categories individually have from 2 to 65 tariff classifications.[867]

(ii) Production processes

7.308 All of the complainants recall that, in *US – Lamb,* the Appellate Body held that the degree of integration of production processes with respect to products being considered was found to be irrelevant for the determination of the "domestic industry". "The focus", the Appellate Body said, "must, therefore, be on the identification of the [domestic] *products* and their 'like or directly competitive' relationship [with the imported products], and not on the *processes* by which those products are produced".[868] [869] China adds that it is clear from this statement that production processes are not an element of the like or directly competitive relationship between products.[870]

7.309 The United States contends that, in spite of complainants' mischaracterizations, the dispute settlement proceedings in *US – Lamb* provides little guidance on the issue of defining the like product. There was no disagreement in that dispute regarding the definition of like product.[871] Rather, the issue in *US – Lamb* involved the definition of the domestic industry after the USITC had already defined the like product. The findings in *US – Lamb* spoke to which producers could be considered members of the domestic industry producing a single domestic like product and not to defining the like product, as complainants have alleged.[872] The United States further argues that, contrary to the complainants' mischaracterizations, the Appellate Body has recognized that it may be appropriate to consider the production process for a product in defining like products, particularly when the question arises as to whether two articles are separate products.[873]

7.310 New Zealand responds that it is the United States that mischaracterizes the issue in *US – Lamb*. What had been defined in *US – Lamb* was the imported product, and the issue was whether the domestic industry included the producers of a product that was not "like" the imported product. Thus, *US – Lamb* is of direct relevance to this case.[874] Japan takes the view that the United States draws a distinction without a difference. As specified in Article 4.1(c) of the Agreement on Safeguards, the scope of the like (or, if applicable, directly competitive) product defines the scope of the relevant domestic industry. Ultimately, the inquiry is about defining the "like" product and domestic industry in ways that reflect meaningful and substantial competitive interactions. Taking the United States' theory to its logical extreme, a competent authority would be authorized to combine any number of

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[866] United States' written reply to Panel question No. 20 at the first substantive meeting.
[867] United States' first written submission, para. 86.
[868] Appellate Body Report, *US – Lamb*, para. 94. See also, Appellate Body Report, *US – Cotton Yarn*, para. 86.
[869] European Communities' first written submission, paras. 191-193; Japan's first written submission, paras. 103-104; Korea's first written submission, para. 32; China's first written submission, para. 140; Switzerland's first written submission, para. 179; Norway's first written submission, para. 197; Brazil's first written submission, para. 96; New Zealand's first written submission, para. 4.35.
[870] China's second written submission, para. 71.
[871] Appellate Body Report, *US – Lamb*, para. 88.
[872] Appellate Body Report, *US – Lamb*, paras. 84, 90 and 95.
[873] United States' first written submission, paras. 70, 91.
[874] New Zealand's second written submission, para. 3.41.

products, regardless of the extent of their likeness. Indeed, if it were true, Japan sees no reason why the United States would not have simply conducted an investigation and imposed a measure on imports of all "steel". Japan argues that the fact that there must be some control on the scope of like product definitions under the Agreement on Safeguards is evident in *US – Lamb*. The Appellate Body clarified the overarching importance of ensuring that the nexus between imports and their domestic counterparts – whether like or directly competitive – is close enough to ensure that a measure is not imposed to protect industries that do not make like or directly competitive products. The point is that the like product and, in turn, the industry cannot be so broadly defined as to provide protection to producers of products with which the imports do not compete.[875]

7.311 Korea also objects to the United States' proposition and insists that the Appellate Body in *US – Lamb* discussed the issue of like products, in conjunction with the issues of imported products and domestic industry, for the first time in the context of the Agreement on Safeguards. The Appellate Body clarified that the nexus between imports and their domestic counterparts should be close enough to ensure that a measure is not imposed to protect industries that do not make like or directly competitive products.[876] Obviously, the definitions of like product and domestic industry are interrelated and interdependent concepts – Article 2.1 of the Agreement on Safeguards refers to the domestic industry that produces *like or directly competitive* products while Article 4.1(c), which was at issue in *US – Lamb*, defines the *domestic industry* as "producers … of the *like* or *directly competitive* products …" (*emphasis added*). The Appellate Body's decision in *US – Lamb* turned on the interpretation of the "like product" to determine the scope of the domestic industry.[877] The Appellate Body further stated, "…only when those products have been identified is it possible then to identify the "producers" of those products".[878] Whether the like product was improperly defined by reference to the industry's production process (in this case) or the domestic industry producing the like product was improperly defined by reference to the production process (in *US – Lamb*), the result is the same: "in our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are not 'like or directly competitive' products in relation to the imported product".[879] This same improper "departure" would occur under the United States' definition of the like product in this case.[880]

7.312 China also disagrees and stresses that the statement from the *US – Lamb* case confirms that the definition of the domestic industry, through an assessment of the "like or directly competitive" relationship, first requires the identification of the specific imported product. In no way can the imported product be re-defined after the domestic industry producing like or directly competitive products has been identified. China submits that the United States is misusing this statement and trying to create confusion.[881]

7.313 In the view of the European Communities, Japan, China, Switzerland, Norway and Brazil, the Appellate Body in *US – Lamb* also clarified which criteria are not capable of establishing likeness between domestic and imported products. These are, first, the existence of a "continuous line of production from the raw to the processed product" and second, a "substantial coincidence of economic

[875] Japan's second written submission, paras. 10-13.
[876] Appellate Body Report, *US – Lamb*, para. 86.
[877] Appellate Body Report, *US – Lamb*, para. 87.
[878] Appellate Body Report, *US – Lamb*, para. 87.
[879] Appellate Body Report, *US – Lamb*, para. 86.
[880] Korea's second written submission, paras. 13-17.
[881] China's second written submission, para. 65.

interests" between producers of both products.[882] [883] Japan adds that these Appellate Body statements in *US – Lamb* could not be more relevant to a case than the present one in which an authority has conjoined, into a single like product, products that serve as feedstock for one another, but which, in fact, have independent uses in the marketplace.[884]

7.314 The United States insists that the USITC's methodology for analysing like product does not contravene the Agreement on Safeguards, as the complainants assert, because it employs factors different than those suggested by complainants. First, the Agreement on Safeguards does not stipulate which factors are to be considered in the like product analysis under the Agreement on Safeguards. Second, there is no Appellate Body or panel ruling that provides any interpretative guidance as to the criteria to be used in determining the like product for purposes of the Agreement on Safeguards.[885] The United States insists that *US – Lamb* did not address the USITC's methodology for determining like product. Rather, that dispute concerned the definition of the domestic industry. Indeed, the two factors at issue in *US – Lamb* that are cited repeatedly by complainants – "continuous line of production" and "substantial coincidence of economic interests" – are factors used by the USITC to identify who are the appropriate domestic industry members *after* the like product was defined. They are cited nowhere by the USITC in its like product findings with regard to CCFRS products or any of the other like products. While the complainants try to imply that these criteria were applied in the determinations at issue here[886], they fundamentally misstate the analysis actually performed by the USITC.[887] [888]

7.315 According to the United States, one of the factors considered by the USITC in defining like products is the product's manufacturing process (i.e., where and how it is made). In the context of the Agreement on Safeguards where the purpose is to allow measures to protect the domestic industry, albeit temporarily and under certain circumstances, consideration of the manufacturing process for a product is an appropriate and objective factor. The Appellate Body in *US – Lamb* recognized that it may be appropriate to consider the production process for a product in defining like products, particularly when the question arises as to whether two articles are separate products, as noted at footnote 55.[889] [890] The complainants have erroneously urged application of Appellate Body findings in *US – Lamb* regarding the definition of a domestic industry to the like product definition and ignored the Appellate Body's explicit recognition that consideration of production processes may be a relevant factor in defining like products.[891] The Appellate Body also recognized that, when faced with products at various stages of production, a relevant factor for determining the like product definition (as opposed to the domestic industry definition) was whether products at different stages of

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[882] Appellate Body Report, *US – Lamb*, paras. 77 and 95.

[883] European Communities' first written submission, para. 201; Japan's first written submission, paras. 103-104; China's first written submission, para. 204; Switzerland's first written submission, para. 229; Norway's first written submission, paras. 194-195; Brazil's first written submission, para. 96.

[884] Japan's second written submission, para. 13.

[885] United States' second written submission, para. 27.

[886] Japan's first oral statement (like product), para. 13 ("a continuous line of production between products – a characteristic heavily relied upon by the US in this case").

[887] Panel Report, *Argentina – Footwear (EC)*, para. 8.124.

[888] United States' second written submission, paras. 26-29.

[889] Appellate Body Report, *US – Lamb*, para. 94, footnote 55; Panel Report, *Japan – Alcoholic Beverages I*, para. 5.7 (Panel thought it was important to assess "likeness", as much as possible, on the basis of objective criteria, including, in particular, composition and manufacturing processes of the product, in addition to consumption habits.).

[890] United States' second written submission, para. 66.

[891] Appellate Body Report, *US – Lamb*, para. 94, fn. 55; Panel Report, *Japan – Alcoholic Beverages I*, para. 5.7.

processing were different forms of a single like product or had become different products.[892] The United States submits that although most complainants agree that consideration of manufacturing processes, i.e., how a product is made, is an appropriate criteria for a safeguard investigation, they disagree with the USITC's additional consideration of where the product is made in the manufacturing process.[893]

7.316 According to New Zealand, the United States' reliance on footnote 55 in the *US – Lamb* Appellate Body report is misguided. The interpretation advanced by the United States would have the footnote contradict the plain meaning of the body of the Report. It is clear from reading footnote 55, that it is dealing with the question of "separate products". It does not, as the United States suggests, deal with the issue of "like products".[894] Similarly, Korea also argues that footnote 55 of the Appellate Body Report in *US – Lamb* adds nothing to its argument. The Appellate Body was simply affirming that the production process could be relevant to the question of whether the products produced from that process were separate products (e.g., the production process could confer certain physical characteristics or could make the product adapted to certain end-uses, but the production process is not a "like" product characteristic). The inquiry is still to determine the domestically-produced like product that is to be analysed in relation to the imported product. For this reason, an evaluation of the production process could illuminate, but not determine, whether the products were "like". The like product determination must still be based on the product produced – not on the nature of the domestic production process itself.[895] [896]

7.317 Likewise, the European Communities, China, and Japan consider that the United States misunderstands this footnote by equating the terms "production process" used in that footnote with what has been outlawed by the Appellate Body in *US – Lamb* as a criterion to establish likeness between products which are otherwise not like: "a continuous line of production between an input product and an end-product".[897] The term "production process" refers to how a product is manufactured. The Appellate Body in the above-cited footnote clarified that the production process may be a useful tool to further separate two products that have the same physical characteristics, customs classifications and uses.[898] The European Communities considers that in most cases, the production process does not add to the like product determination established on the basis of the physical properties, customs classifications and end-uses. Thus, the production process may be used to further separate products, but it can never serve as criterion to bundle products that are otherwise not like based on the *Border Tax Adjustment* criteria.[899]

7.318 Japan adds that, even if production process is relevant, in any event, the reliance by the United States on this passage misses an important distinction made in *US – Lamb* – the distinction, on the one hand, between: (i) an analysis of production processes themselves to discern the extent to which those processes create separately identifiable products; and (ii) the vertical integration of those

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[892] Appellate Body Report, *US – Lamb*, paras. 90, 92 and 94; Panel Report, *US – Lamb*, paras. 7.95 and 7.96.

[893] United States' second written submission, para. 67, referring for example to Brazil's, Korea's, Japan's and Norway's written reply to Panel questions Nos. 69 and 150 at the first substantive meeting.

[894] New Zealand's written reply to Panel question No. 9 at the second substantive meeting.

[895] Appellate Body Report, *US – Lamb*, para. 94.

[896] Korea's second written submission, para. 17.

[897] European Communities' second written submission, paras. 251-255, citing Appellate Body Report, *US – Lamb*, para. 90.

[898] Japan's second written submission, para. 15; China's second written submission, paras. 74-75; European Communities' second written submission, paras. 251-255.

[899] European Communities' second written submission, paras. 251-255.

processes.[900] The Appellate Body specifically stated in *US – Lamb* that it had "reservations about the role of an examination of the degree of integration of production processes for the products at issue".[901] By suggesting in footnote 55 that production processes might be relevant to determining whether two articles are separate products, the Appellate Body was not endorsing an analysis of vertical integration. After all, vertical integration does not mean production processes are somehow blurred; it merely means they are under the same corporate hat, and perhaps located at the same general location. This is particularly relevant for flat-rolled steel. Despite vertical integration of some (not all) CCFRS production, each separate product that the USITC chose to bundle is produced on different machines, housed in different buildings. Integration, therefore, determines very little about the processes themselves and the extent to which those *processes* create separate products.[902]

7.319 Brazil also argues that the United States confuses the issue of the relevance of whether one product is an input for another product, with the relevance of production processes in making a determination that products are like each other. It also confuses the issue of coincidence of economic interests and commonality of facilities with the ability to separately identify the production processes for the products at issue where there is a very high degree of integration of these processes. If anything, the Appellate Body indicated, in footnote 55 to paragraph 94, that it would not find as much relevance as did the panel, of processing and vertical integration in the identification of products. As such, the panel report would seem to describe the outer limits of the relevance of processing and vertical integration in the identification of products.[903] The relevant inquiry is not whether slab is an input to downstream products, but rather what happens to slab in the downstream processing – for example in hot-rolling, cold-rolling and galvanizing – and whether the changes imparted by the processing create a different product.[904] The Appellate Body simply recognized, consistent with the statements of the panel report it was reviewing, that there may be situations where an inquiry into the production processes of products may be relevant in determining whether two articles are separate products. However, the language on which the United States is relying does not in any way alter the clear findings of the Appellate Body that whether a product is an input to a downstream product is irrelevant to the like product analysis and that vertical integration is also irrelevant to this analysis.[905] Read in context, the concern of the Appellate Body expressed in footnote 55 is nothing more than a common sense statement. The fact is that a production process may or may not create a separate like product; whether or not a separate product is created will depend on what happens to the product during a particular stage of processing. Therefore, one cannot assume that a further processed product is either like or unlike the prior stage product, but rather it will depend on whether and to what extent the processing changes the product itself. This does not in any way, however, qualify the Appellate Body's declaration in the same case that it is irrelevant for purposes of determining the likeness of products whether there is a continuous line of production between an input product and an end product.[906]

7.320 The European Communities argues that the United States was not entitled to bundle domestic (or imported) products on the sole basis of a "continuous line of production between an 'input product' and an 'end-product'". This has been unambiguously said by the Appellate Body in *US – Lamb*[907] and is in fact common sense: a pound of flour is not like a cake, although at the initial stage both flour

[900] Japan's second written submission, para. 15.
[901] Appellate Body Report, *US – Lamb*, para. 94.
[902] Japan's second written submission, para. 16.
[903] Brazil's second written submission, para. 33.
[904] Brazil's second written submission, para. 35.
[905] Brazil's second written submission, para. 39.
[906] Brazil's written reply to Panel question No. 19 at the second substantive meeting.
[907] Appellate Body Report, *US – Lamb*, para. 90.

and a cake are made by milling grain. Similarly, a roll of raw cotton cloth is not like a T-shirt, although both share the initial stage of cleaning and weaving cotton.[908] According to China, the fact that two products correspond to two different steps of a continuous production line cannot be considered as meaning that these two products share the same production process. It is therefore not a relevant criterion for assessing "likeness".[909]

7.321 According to New Zealand, the implication of the USITC approach is that a competent authority petitioned by a highly integrated domestic industry to investigate imports of sawn pine logs, finished lumber, treated pine and pine furniture could conclude that a depressed "domestic industry" that manufactures that bundle of products was seriously injured by increased imports even though the only imports that increased were of sawn logs. Equally, a competent authority could bundle imported ice-cream, butter, yoghurt, cheese and skim milk powder into one "imported product", and conclude that there was serious injury from increased imports to the whole of that "domestic industry" even though the part of that "domestic industry" that produced ice cream was not suffering any injury at all. Thus, bundling as the USITC has done in this case undermines the limitation in the Agreement on Safeguards that only the domestic industry that produces a product that is "like" the imported product is entitled to the benefit of a safeguard measure.[910]

7.322 The United States responds that the complainants' position is based on the erroneous assertion that the USITC "bundled together" predefined products rather than that the USITC identified clear dividing lines, using its long-standing analysis. The USITC begins with the universe of imports subject to investigation, as identified in the request or petition. After determining what domestic products are like or directly competitive with the subject imports, the USITC considers whether the domestic products corresponding to the subject imports consist of a single domestic like product or whether there are clear dividing lines among the products so as to constitute multiple domestic like products. The USITC applies its like product criteria, including production or manufacturing processes, in its analysis of whether there are such clear dividing lines as to constitute multiple like products, or that there are no clear lines and that a single like product definition is appropriate. The complainants' position that it might be permissible to use production processes to *separate* articles into different products, but not to determine that articles are in fact one product, is illogical. Surely the complainants do not mean to suggest that these are in fact different exercises, requiring different criteria. If it is appropriate to use production processes to look for clear dividing lines, it must be appropriate to use production processes to determine that there are no clear dividing lines and that articles constitute one product. The Appellate Body clearly differentiated between an analysis of "domestic industry" and an analysis as to whether two articles are "separate products", and found that production processes "may be relevant" in the latter inquiry. In an inquiry into whether articles are "separate products" – which the USITC performed for slabs, plate, hot-rolled steel, cold-rolled steel, and coated steel – one possible conclusion is that they are not, and are in fact a single product.[911] Consideration of manufacturing or production processes, both how and where a product is made, is particularly relevant where the inquiry involves a product at different stages of processing. The interrelationship of the manufacturing processes for a product at different stages of processing may be informative in finding clear dividing lines between the stages of processing. For example, since earlier processed CCFRS, such as slab or hot-rolled steel, is the feedstock for further processed steel, such as cold-rolled steel or coated steel, all such steel, i.e., slab, hot-rolled steel, cold-rolled steel, and coated-steel, is produced using essentially the same production processes in the initial manufacturing

[908] European Communities' second written submission, paras. 256-257.
[909] China's second written submission, para. 76.
[910] New Zealand's second written submission, paras. 3.24-3.26.
[911] United States' written reply to Panel question No. 18 at the second substantive meeting.

stages.[912] All certain CCFRS is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills.[913] Substantial quantities of earlier processed steel are captively consumed by the producer in the production of further processed steel.[914] This tends to blur product distinctions until the processing reaches its final stages.[915]

7.323 According to the European Communities, China and Switzerland, in this case, the USITC did not establish "likeness" on the basis of physical characteristics, end-uses, consumer-tastes and habits and tariff classification. The USITC "focused [its] analysis in this investigation primarily on the degree to which the products in question are produced in common production facilities and using similar production processes"[916], although the Appellate Body in *US – Lamb* had ruled out this criterion for the like product determination.[917] As a result of these flaws all of the USITC's definitions of the domestic industry are inconsistent with Articles 2 and 4 of the Agreement on Safeguards.[918]

7.324 Similarly, Brazil submits that the United States defined a domestic industry based on a continuous line of production (i.e., that each product in the sequence could be an input for the next stage product) and coincidence of economic interests (i.e., the fact of vertical integration) and then defined the imported products based on the universe of products produced by this already defined industry, because they were largely produced by the same manufacturers.[919]

7.325 Korea submits that by focusing primarily on the production process to determine the like product[920], the USITC's analysis permitted an industry's self-definition to substitute for an analysis and definition of the "industry producing the like product". The Agreement on Safeguards requires that the domestic industry be defined by the like product it produces – not the reverse.[921] [922]

(iii) Competition

7.326 Japan submits that the "like or directly competitive" relationship that must exist between the imported product and the product produced by the domestic industry, as required by the Agreement on Safeguards and Article XIX:1 of the GATT 1994, should be based on the existence of competition

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[912] The USITC's analysis provided a detailed discussion of the five stages of processing certain carbon flat-rolled steel. The manufacturing processes for carbon steel involve three distinct stages that include: (1) melting or refining raw steel; (2) casting molten steel into semifinished form, such as slab; and (3) performing various stages of finishing operations, including hot-rolling, cold-rolling, and/or coating. USITC Report, p. OVERVIEW-7.

[913] USITC Report, pp. 40-41.

[914] Virtually all US-produced slab is internally consumed by the domestic slab producers in their production of hot-rolled steel (sheet, strip, or plate), with large shares of hot-rolled and cold-rolled steel also internally transferred. During the year 2000, 99.4% of the quantity of domestic producers' total US shipments of slab were internally transferred, as were 66% of the quantity of domestic producers' total US shipments of hot-rolled steel, and 58.7% of the quantity of total US shipments of domestically-produced cold-rolled steel. USITC Report, pp. FLAT-1 and 3, nn. 4 and 5.

[915] United States' second written submission, paras. 68-69.

[916] USITC Report, Vol. I, p. 191. See also pp. 30.

[917] Appellate Body Report, *US – Lamb*, paras. 95 and 77.

[918] European Communities' first written submission, paras. 233-234; China's first written submission, para. 181; Switzerland's first written submission, paras. 205-206.

[919] Brazil's written reply to Panel question No. 23 at the first substantive meeting.

[920] USITC Report, Vol. I, pp. 38-39 (flat-rolled), 154-155 (welded other) (Exhibit CC-6); United States' written reply to Panel question No. 69 at the first substantive meeting; United States' replies to questions from other Parties (15 November 2002), paras. 19-20.

[921] Appellate Body Report, *US – Lamb*, para. 94.

[922] Korea's second written submission, para. 18.

between the imported and domestic products to justify imposition of a safeguard measure. This requirement exists regardless of whether domestic products are deemed "like" or "directly competitive" with the imported product.[923] More generally, no causal relationship can be found between an increase in imports and a sales decline in domestic products if these products do not compete for similar end-uses. As an example, Japan assumes that that sales of domestically produced semi-finished slab decline during the same period, and that sales of all (other) CCFRS products, domestic or foreign, remain unchanged. With all CCFRS products plus semi-finished slab chosen to define subject imports and their "like products" for the domestic industry, some causal link may be found between the import increase in a certain part of the subject imports (*i.e.*, semi-finished slab), and a decrease in sales in that part of the domestically produced "like products" (again, *i.e.*, semi-finished slab). However, this finding cannot justify the imposition of safeguard measures on imports of semi-finished slab plus all CCFRS products. While safeguard measures might be justified with respect to imports of semi-finished slab products, domestic producers of all flat-rolled steel products would enjoy protection from import competition without justification.[924]

7.327 Korea argues that competition and the analysis of competition is fundamental to a proper safeguards investigation.[925] Korea submits that "competition" has been used to analyse like product under the Agreement on Textiles and Clothing ("ATC") by the Appellate Body in *US – Cotton Yarn*. Japan, Korea and New Zealand recall that the Appellate Body specifically relied on its prior findings in the GATT 1994 Article III context when it indicated that "like" is a subset of "directly competitive".[926] [927] Japan adds that the Appellate Body dismissed the United States' argument in that case that the panel erroneously relied on *Korea – Alcoholic Beverages*, using the same "different provision and different agreement" argument it espouses here.[928] [929] Given that Article 6 of the ATC essentially has the same purpose as the Agreement on Safeguards, it is clear that the domestic industry must be of narrower scope under the Agreement on Safeguards when an authority relies solely on the words "like product", as the USITC did in this case. Brazil, Japan and New Zealand stress that, more importantly, in *US – Cotton Yarn*, the Appellate Body also clearly established the importance of the competitive relationship between imported and domestic products in discerning whether they are like or directly competitive with one another by stating that: "[l]ike products are, necessarily, in the highest degree of competitive relationship in the marketplace".[930] [931] New Zealand submits that excluding any consideration of competitive relationships from a determination of likeness is plainly absurd. Competition is, thus, at the heart of a likeness determination under the Agreement on Safeguards, and the Appellate Body jurisprudence on the meaning of "like product" under GATT Article III is of direct relevance.[932]

7.328 Japan also submits that, as regards the existence of precedents to help discern the proper treatment of "like product" under the Agreement on Safeguards, there is relevant jurisprudence in *US – Lamb* and *US – Cotton Yarn*, and the jurisprudence concerning like product delineations under Article III of the GATT 1994 is also relevant. The central purpose of the "like or directly competitive" product analysis is to define appropriately the domestic industry whose performance is

[923] Japan's first written submission, para. 79.
[924] Japan's first written submission, para. 81.
[925] Korea's second written submission, para. 41.
[926] Appellate Body Report, *US – Cotton Yarn*, paras. 95-97, footnote 68.
[927] Korea's second written submission, para. 35; New Zealand's second written submission, para. 3.35.
[928] Appellate Body Report, *US – Cotton Yarn*, paras. 21, 92-94.
[929] Japan's second written submission, para. 23.
[930] Appellate Body Report, *US – Cotton Yarn*, para. 97.
[931] Japan's second written submission, paras. 18-19; New Zealand's second written submission, para. 3.35; Brazil's second written submission, paras. 41-42.
[932] New Zealand's second written submission, para. 3.35.

allegedly hampered by competition with imported products subject to the investigation. This competitive relationship between the domestic industry's product and imports must exist regardless of whether the domestic product is deemed "like" or "directly competitive" with the imported product. Absent this tight competitive nexus – which is required by both the "like" and the "directly competitive" standards – it makes no sense to blame imports for whatever problems the domestic industry may be experiencing.[933] *US – Lamb* underlines the critical importance of the competitive dynamic that must exist between imported and domestic products, including between products that exist along a continuum of production processes. Regardless of whether the products are produced using processes that happen to be vertically integrated, if they do not compete with each other in the market place, their combination into a single grouping renders any findings by a competent authority regarding increased imports, serious injury, or causation null and void. Nor could an authority, as a result, devise a proper remedy as required under Article 5.1. Therefore, an improper definition of the domestic industry makes it impossible to ensure that the wrong industry is not protected.[934]

7.329 The United States responds that substitutability is not one of the traditional factors considered by the USITC in conducting it analysis of whether there are clear dividing lines between domestic products in order to define like product(s).[935] Nor has substitutability been one of the criteria suggested for the like product analysis in the context of dispute settlement proceedings regarding other covered agreements.[936] The complainants' references to *US – Cotton Yarn* as relevant to the like product definition fail to recognize the Appellate Body's statement that "there is no disagreement ... that yarn imported from Pakistan and yarn produced by the producers of the United States ... are like products. ... It is, therefore, not necessary for us to address the meaning of the term '*like products*' for the purposes of this appeal".[937] The issue in *US – Cotton Yarn* was whether imported and domestic products determined to be like could be determined not to be directly competitive.[938] There clearly is a competitive relationship between the imported and domestic products. The complainants have not disputed, and neither did the parties in the underlying investigation, that the imported and domestic products generally consist of the same types of steel, are interchangeable and thus compete with each other. Moreover, within any defined like product and the corresponding specific imported product there exists a range or continuum of goods of different sizes, grades, or stages of processing. While goods along the continuum share identical or similar factors, individual items at the extremes of the continuum may not be as similar or substitutable.[939] Each like product definition must be based on the facts of the particular case and as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence".[940] The United States argues that the methodology used by the USITC is unbiased and objective. Neither Article 2 nor any other provision in the Agreement on

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[933] Japan's second written submission, paras. 5-6.

[934] Japan's second written submission, para. 14.

[935] The USITC has considered substitutability between products to be a factor it would consider if it made its definition(s) on the basis of a directly competitive product analysis.

[936] *Border Tax Adjustments*, para. 18; *quoted in part in* Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.

[937] Appellate Body Report, *US – Cotton Yarn*, para. 89.

[938] The terminology in the safeguard provision of the *Agreement on Textiles and Clothing* ("ATC") is different, *i.e.*, "like *and/or* directly competitive products" rather than the "like *or* directly competitive products" language in the Agreement on Safeguards. Based on this different terminology and the findings of the underlying investigation, the Appellate Body in *US – Cotton Yarn* rejected a finding that a product could be part of the like product definition but then defined out as not directly competitive and thus not included in the definition of the domestic industry. Appellate Body Report, *US – Cotton Yarn*, para. 105.

[939] Moreover, goods within a single tariff line consist of a range of items as demonstrated most clearly by requests by some complainants for like products to be defined more narrowly than by tariff line.

[940] Appellate Body Report, *EC – Asbestos*, para. 102.

Safeguards sets forth the factors or the order that the competent authority must consider in identifying the imported product that is like or directly competitive with the domestic product.[941]

7.330 Brazil further argues that the USITC emphasized that its mandate went beyond narrow product categories and the facilities producing those products when it talked about "serious injury to the productive resources employed in the divisions or plants in which the article in question is produced".[942] Thus, the USITC viewed its mandate under Section 201 to protect not only against the effects of specific imported products on the United States' industry producing those products, but also to protect more broadly the "divisions" and "plants" in which the imported product (and other products) is produced. This approach by the USITC reinforced the problems presented by the nature of the request and ultimately led to industry definitions which were facility based (i.e. taking into account vertical integration and continuous lines of production) rather than product based.[943] Within the CCFRS category, tin mill products and corrosion-resistant products both use a cold-rolled substrate.[944] Tin mill products are coated with tin or chromium; corrosion-resistant products are coated with zinc or zinc-aluminum alloys.[945] Yet, they were treated as separate like products, with all commissioners treating corrosion-resistant products as part of the larger CCFRS product category, and four commissioners treating tin mill products as its own separate like product. If anything, it would make more sense to consider tin mill and corrosion-resistant products as a single like product given their physical characteristics, their location in the production chain, and their sometimes common treatment in the HS. However, the USITC made the odd leap to consider, effectively, slab and plate to be more comparable to corrosion-resistant steel than tin mill products. The USITC's logic led to other bizarre results and inconsistencies similar to the tin mill product example.[946] [947]

7.331 In particular, the United States stresses that the complainants' arguments that the USITC should have defined the various like products using the same factors and with the same results as it had in anti-dumping and countervailing duty investigations involving steel fails to recognize that those definitions (as they are in a safeguard investigation) are dependent on the imports subject to that particular investigation. Contrary to the complainants' allegations, the USITC had no obligation nor reason to explain why its like product definitions in the instant safeguard action based on a different type of trade remedy investigation, with a very different scope of subject imports and a different record, were not the same as the various decisions in other types of trade remedy investigations that were based on different subject imports and different underlying facts.[948]

(c) Relevance of like product definitions used in the anti-dumping and countervailing duty contexts

7.332 Korea, Japan, New Zealand and Brazil point out that in this case, the USITC substantially departed from the traditional like product factors it had used in the safeguards and anti-dumping or countervailing duty context to define like products, stating that the concept of industry may be more

[941] United States' second written submission, paras. 71-73.
[942] USITC Report, p. 30.
[943] Brazil's written reply to Panel question 17 at the second substantive meeting.
[944] USITC Report, Vol. II, at FLAT-2 (Exhibit CC-6).
[945] Ibid.
[946] For example, despite its determination that carbon and alloy steel slab are "like" finished carbon and alloy flat products, the USITC elected to treat stainless steel slab and finished stainless flat products as separate like products. USITC Report, Vol. I, pp. 193-194 (Exhibit CC-6). Similarly, the USITC treated semifinished long products – billets – as a separate like product, distinct from finished long products. Ibid., pp. 82-83.
[947] Brazil's first written submission, paras. 113-114.
[948] United States' first written submission, para. 106.

broadly defined than in anti-dumping and countervailing duty cases.[949] In light of the stated purpose of Section 201, the USITC expanded its like product consideration, making "both the productive facilities and processes and the markets for these products … [a] … fundamental concern in defining the scope of the domestic industry".[950] The result was not only inconsistent with the USITC's past practice, it was also erroneous and inconsistent with the USITC's findings on other products simultaneously under investigation in this case.[951]

7.333 The United States stresses that the complainants' arguments that the USITC should have defined the various like products using the same factors and with the same results as it had in anti-dumping and countervailing duty investigations involving steel fails to recognize that those definitions (as they are in a safeguards investigation) are dependent on the imports subject to that particular investigation. Contrary to the complainants' allegations, the USITC had no obligation nor reason to explain why its like product definitions in the instant safeguard action based on a different type of trade remedy investigation, with a very different scope of subject imports and a different record, were not the same as the various decisions in other types of trade remedy investigations that were based on different subject imports and different underlying facts.[952]

3. Comparison of imported product and domestic like product

7.334 China, the European Communities, Norway and Switzerland assert that the United States has not only acted inconsistently with the first step of properly identifying the like or directly competitive product, but that it also acted inconsistently with its obligations under Articles 2.1 and 4.1(c) of the Agreement on Safeguards at the second step, i.e., the definition of the "domestic industry that produces like or directly competitive products".[953]

7.335 In the view of the European Communities, China and Switzerland, the USITC fails to compare imported and domestic products to establish whether they are like or directly competitive. Instead, the USITC endeavoured to explain at great length why its groups of domestically produced products form one single like domestic product.[954] For example, the USITC considered whether to analyse specific types of CCFRS separately or as a whole for the purpose of the domestic industry definition.[955] The USITC declined to identify specific products by essentially pointing to: (i) physical properties such as a common metallurgical base of those products[956]; (ii) the "single common production base"[957] (iii) and the common end-use of all products in the automobile and construction industry.[958] [959]

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[949] USITC Report, Vol. I, p. 30 (footnotes omitted) (Exhibit CC-6).

[950] USITC Report, Vol. I, pp. 30-31 (ExhibitCC-6).

[951] Korea's first written submission, paras. 34-36; Japan's first written submission, paras. 129-148; New Zealand's first written submission, paras. 4.68-4.70; Brazil's first written submission, para. 99, 115.

[952] United States' first written submission, para. 106.

[953] European Communities' first written submission, para. 222; China's first written submission, para. 172; Switzerland's first written submission, para. 200; Norway's first written submission, para. 213.

[954] European Communities' first written submission, paras. 224-225; China's first written submission, paras. 174-175; Switzerland's first written submission, paras. 202-203.

[955] USITC Report, Vol. I, p. 37.

[956] USITC Report, Vol. I, pp. 37-38.

[957] USITC Report, Vol. I, pp. 30, 31, 37.

[958] USITC Report, Vol. I, pp. 43-44.

[959] European Communities' first written submission, para. 231; China's first written submission, para. 179.

7.336 The European Communities asserts that the complainants have made a prima facie case that the USITC has only justified the bundling of certain domestic producers by arguing that the products they produce are like between themselves, but failed to carry out the essential comparison between imported and domestic products.[960] Japan submits that comparing the imported and domestic products is indeed the essential step in the analysis to ensure the proper scope of the domestic like product. The United States failed to do this. This failure incidentally resulted in the fact that the United States has also failed to justify the bundling of domestic products together. Its only justification for this bundling is the integration of certain production processes, which we know is irrelevant to the question of whether products are distinct or not. Hence, the domestic products are just as distinct among themselves as they are when compared "across borders".[961]

7.337 The United States responds that the USITC found that the evidence demonstrated that domestic and imported steel consisted of mainly the same types of steel, and thus that imported steel competes with corresponding domestic steel. The European Communities does not contend that the facts do not support the finding that imported and domestic steel are generally the same types of steel. The parties, including steel industry experts representing both domestic and foreign producers and importers, did not dispute these findings in the underlying proceeding. While there is no challenge to the USITC's factual findings, the European Communities seeks to misrepresent the USITC's approach. The USITC considers whether there are domestic products that are like the subject imports. This analysis considers whether subject imports and domestic products generally share similar physical properties, uses, production processes and marketing channels. This comparison shows whether domestic and imported CCFRS are similar and whether they are interchangeable, and as such whether they compete with each other. For example, in its CCFRS analysis, the USITC found that the evidence showed that imported CCFRS consists mainly of the same range of carbon steel as the domestic CCFRS.[962] The USITC found that imported and domestic CCFRS share the same basic physical attributes and are generally interchangeable, have similar uses with the same metallurgic composition, thickness, width, and amount of processing, generally were not produced by significantly different production processes, and overlap in the marketing channels for domestic and imported CCFRS. The domestic like product, CCFRS, is like and coextensive with the imported CCFRS used in the USITC's injury analysis. The USITC performed this comparison between imported and domestic products in making its like product determination, in its report.[963]

7.338 The European Communities and Switzerland submit that in respect of five products, i.e. hot-rolled bar, cold-finished bar, rebar, welded pipe, as well as carbon and alloy fittings, the USITC did not make any finding that imported and domestically produced are alike.[964] [965]

7.339 In response to a related question of the European Communities[966], the United States refers to the passages in the USITC Report containing findings that domestic and imported products were like

[960] European Communities' second written submission, para. 239.
[961] Japan's written reply to Panel question No. 18 at the second substantive meeting.
[962] The complainants do not take issue with the USITC's findings regarding this comparison nor that the evidence showed that domestic and imported CCFRS consisted mainly of the same range of carbon steel. European Communities' first written submission, paras. 223-233.
[963] United States' written reply to Panel question 18 at the second substantive meeting.
[964] USITC Report, Vol. I, pp. 81-83, 147-157.
[965] European Communities' first written submission, para. 226; Switzerland's first written submission, para. 204.
[966] European Communities' question No. 4 to the United States at the first substantive meeting.

for each of the products.[967] According to the United States, the complainants have not disputed, nor did parties to the underlying proceeding, that the imported product and domestic like product generally are of the same types of steel and are like.[968]

7.340 The European Communities responds that for the "products" CCFRS[969], tin mill products, stainless steel bar, stainless steel rod, and stainless steel wire[970], the USITC provided some cursory assertions, e.g., that "domestic CCFRS is like the imported CCFRS", because in "terms of physical properties, imported and domestic CCFRS share the same basic physical attributes and are generally interchangeable". These assertions are certainly not a sufficient analysis, in particular because there is no comparison addressing physical characteristics, common end-uses, consumer perceptions and tariff classifications.[971]

7.341 In particular, the European Communities and China submit that the USITC did not establish that all components of the bundle of domestic products are like or directly competitive with components of the groups of imported articles. For example, although the USITC explicitly acknowledged the existence of different types of CCFRS, it neither showed that, e.g., domestically produced slabs are like imported cold-rolled sheets, nor that domestically produced hot-rolled steel is like imported coated steel. Similarly it is not shown that imported flanges are like domestically produced fittings, although the USITC explicitly recognized the heterogeneity of FFTJ, and that this "category contains a mix of *products*".[972] Instead, the USITC Report erroneously compares domestic products within each of the product groupings between themselves. [973]

7.342 Norway adds that the methodology employed by the USITC – according to which each domestically produced article in principle is "like" at least one of the many different imported products within the same bundle – would also have allowed it to consider "steel" to be one specific product, and all domestically produced steel to be the "like product", and thereafter to slap a tariff on stainless steel wire for alleged injury to slab-producers. This methodology allows for great possibility of "cross-fertilization" of increases in imports of one product to be counted against alleged injury to producers of a product that is "like" an imported product not subject to increase, thus clearly contradicting the explicit statements by the Appellate Body in *US – Lamb*.[974] [975]

7.343 The United States contends that the complainants do not take issue with the USITC's findings regarding the comparison nor that the evidence showed that domestic and imported CCFRS consisted mainly of the same range of carbon steel.[976]

7.344 In response, the European Communities insists that it challenges the United States' like product determination on the basis of a vitiated comparison (or no comparison at all) between bundles

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[967] USITC Report, p. 79 for hot-rolled bar, cold-finished bar and rebar; pp. 147 and 158 for certain welded pipe; pp. 147 and 175 for carbon and alloy fittings; pp. 36-37 for certain carbon flat-rolled steel; p. 49 for tin mill products; p. 190 for stainless steel bar, stainless steel rod and stainless steel wire.

[968] United States' written reply to the European Communities' question No. 4 to the United States at the first substantive meeting.

[969] USITC Report, Vol. I, p. 36.

[970] USITC Report, Vol. I, pp. 49, 196, 198 and 201.

[971] European Communities' first written submission, paras. 227-228.

[972] USITC Report, Vol. I, pp. 175 and 179.

[973] European Communities' first written submission, paras. 229-230, 261; China's first written submission, paras. 177-179.

[974] Appellate Body Report, *US – Lamb*, para 86.

[975] Norway's second written submission, paras. 66-68.

[976] United States' first written submission, para. 118, footnote 142.

of imported and domestic slab, plate, hot-rolled sheet, cold-rolled sheet and coated sheet claimed to be like. For all products but CCFRS and tin mill, the USITC Report contains, if at all, the tautological assertion that "there are ten domestic industries producing articles like and corresponding to the similar imported articles subject to investigation within the long products category".[977] Only for CCFRS products and tin mill, the USITC saw itself in a position to at least write a few more lines, however, as demonstrated by the complainants these do not sufficiently establish likeness because these only compare "types" or "ranges" of products according to a "no clear dividing line" test without any basis in the Agreement on Safeguards.[978]

4. "Directly competitive" products

7.345 The United States submits in response to a question from the Panel that if, despite the United States' analysis of like products, the Panel finds that its findings are consistent with a directly competitive product analysis, it cannot find that the USITC's findings are inconsistent with the Agreement on Safeguards.[979]

7.346 The European Communities responds that the United States cannot rescue its flawed domestic industry definition by relying on a "directly competitive product" determination that was somewhat implicit in its like product determination.[980] A competent authority that only makes a finding on "like product" has not given a reasoned and adequate explanation of its "like product" determination if the country concerned later argues that the products of the domestic industry are "directly competitive" even if not like. The Panel cannot conduct a *de novo* investigation and examine whether the competent authority could have considered the products "directly competitive". The Panel is, therefore, confined to reviewing the determinations actually made in the report.[981] Japan, Korea, China, Norway, New Zealand and Brazil agree with the European Communities. Korea and Norway add that the USITC did not, and could not have made, a *de facto* "directly competitive" analysis because the USITC explicitly said that it was not doing so. The USITC stated as follows: "Having identified domestic producers of an article that is like the imported article, we are not required to, and do not in this case, look further for an industry producing articles that are directly competitive but not like the imported article".[982] [983]

7.347 The United States responds that, contrary to certain allegations, the United States has not shifted its position to urge this Panel to approach its findings on the basis of a directly competitive product analysis. The USITC conducted its analysis and made its findings on the basis of a like product analysis and did not, *de facto,* carry out a directly competitive product analysis. Moreover, the USITC applied a like product analysis in this investigation consistent with the United States'

[977] USITC Report, p. 79 for hot bar, cold bar and rebar. The same applies to the determinations for welded pipes, pp. 147 and 157 and fittings, pp. 147 and 175. The European Communities argues that for SS bar, rod and wire, the United States' reference to USITC Report, p. 190 cuts and pastes the same meaningless language.

[978] European Communities' written reply to Panel question No. 146 at the first substantive meeting (for flat products); the European Communities refers to Norway's submission for tin mill products; European Communities' written reply to Panel question No. 9 at the second substantive meeting.

[979] United States' written reply to Panel question No. 65 at the first substantive meeting.

[980] United States' written reply to Panel question No. 65 at the first substantive meeting. See also United States' reply to Panel's question No. 67 at the first substantive meeting.

[981] European Communities' written reply to Panel question No. 21 at the second substantive meeting.

[982] USITC Report, Vol. I, p. 45, footnote 139 (flat-rolled) (Exhibit CC-6); USITC Report, Vol. I, p. 147, n. 893 (pipe and tube) (Exhibit CC-6).

[983] Japan's, Korea's, China's, Norway's, New Zealand's and Brazil's written replies to Panel question No. 21 at the second substantive meeting.

obligations under the Agreement on Safeguards. However, if the Panel finds that the USITC analysis – which the United States considers as defining a "like product" under both the Agreement on Safeguards and United States law – actually falls within the realm of "directly competitive product" for Agreement on Safeguards purposes, its characterization as a "like product" analysis would not affect its consistency with WTO rules.[984]

5. Identification of domestic producers

7.348 The European Communities and Norway contend that, at least for some product groups, the USITC did not provide an explanation for how it determined the producers of the products it had grouped together, contrary to Article 3.1 of the Agreement on Safeguards. For example, with respect to the CCFRS group, the USITC only noted that "***% of total production of certain carbon flat-rolled steel [were] made by producers of at least 4 of the 5 types of certain carbon flat-rolled steel" but unjustifiably confidentialized the data relating to domestic producers.[985] On this basis, it is not possible to assess the accuracy of the determination of the producers with respect to the quantitative element.[986]

6. Burden of proof

7.349 The United States contends that the complainants have not met their burden of making a prima facie case that the United States' measure is inconsistent with the Agreement on Safeguards because of the manner in which like products were defined.[987]

7.350 According to the United States, the complainants do not specifically challenge six of the ten like product determinations made by the USITC in the ten safeguards measures at issue. The failure of the complainants to specifically challenge the majority of the like product determinations made by the USITC by itself suggests that the USITC's methodology is not inconsistent with the requirements of the Agreement on Safeguards. Indeed, those like product factors considered by the USITC are entirely consistent with the United States' obligations under the Agreement on Safeguards. As a result, the only basis on which the Panel can consider whether complainants have met their burden of proof with respect to like product is to examine whether the specific factual findings made by the USITC with respect to each of the contested like product findings cannot support a finding of "likeness" consistent with the ordinary meaning of the Agreement on Safeguards, in its context and in light of the object and purpose of the agreement. In this regard, the United States recalls that the Panel is not to engage in a *de novo* review but, rather, to engage in a review that is limited to an objective assessment, pursuant to Article 11 of the DSU, 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 United States' obligations under the Agreement on Safeguards.[988] [989]

7.351 The European Communities submits that the United States wrongly asserts that only four of the ten "like product determinations" have been specifically challenged and that this suggests that the

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[984] United States' written reply to Panel question No. 21 at the second substantive meeting.
[985] USITC Report, Vol. I., pp. 39 and 50.
[986] European Communities' first written submission, para. 256; Norway's first written submission, paras. 233-234.
[987] United States' second written submission, para. 73.
[988] Panel Report, *Argentina – Footwear (EC)*, para. 8.124.
[989] United States' second written submission, paras. 26-29.

other six are sound.[990] The methodologies used were inappropriate and therefore all the determinations are unsound. For example, the "subject imports" were selected on the basis of unknown criteria (relating apparently to whether there were "potential import problems")[991], and then they were divided into bundles that waxed and waned over the course of the proceeding and according to the Commissioner concerned. In particular, the product bundles are too broad and contain gaps.[992] For none of the product bundles, the USITC carried out the essential comparison between imported and domestic products (see section E.3 above).

7.352 Korea asserts that if a prima facie case has been made that the United States determination with respect to the definition of the like product is in violation of the Agreement on Safeguards, it is the United States that has the obligation to demonstrate that its like product determination is in accord with the requirements of the Agreement regardless of whether it agrees with the like product formulations of complainants.[993]

7. Measure-specific argumentation

(a) CCFRS

(i) General

7.353 The European Communities and China claim that the USITC's definition of the domestic industry with respect to CCFRS is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards.[994] Japan and Brazil submit that because the USITC did not find each of the five CCFRS products to be "like" the imports under investigation, and did not even try to establish whether they were "directly competitive" in relation to the imports under investigation, its determination to combine all CCFRS products into a single like product and its consequent decision to define the domestic industry by such products is inconsistent with Article XIX:1 of GATT 1994 and Articles 2.1 and 4.1(c) of the Agreement on Safeguards.[995]

7.354 The United States asserts that the USITC found that domestic CCFRS is like the corresponding imported CCFRS that is subject to this investigation and defined CCFRS as a single like product. The USITC considered the facts using long established factors and looked for clear dividing lines among the various types of domestic CCFRS corresponding to imported CCFRS subject to this investigation. The methodology employed by the USITC was unbiased and objective based on data analysed using a long-standing and transparent methodology and factors. The USITC's definition of certain CCFRS as a single like product is consistent with Articles 2.1 and 4.1 of the Agreement on Safeguards and should not be disturbed by the Panel.[996]

7.355 New Zealand submits that the USITC divided the request category CCFRS into three categories, namely CCFRS, GOES, and tin mill products. By doing this, it effectively also divided

[990] United States' second written submission, para. 28.
[991] United States' written reply to the European Communities' question No. 2 at the first substantive meeting, para. 5.
[992] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 18.
[993] Korea's second written submission, para. 64; Norway makes a similar argument with regard to the identification of domestic producers of the "like product" in Norway's second written submission, paras. 70-71.
[994] European Communities' first written submission, para. 236; China's first written submission, para. 182.
[995] Japan's first written submission, para. 124; Brazil's first written submission, para. 112.
[996] United States' first written submission, para. 142.

the imported "product" into three separate product categories. It did this on the basis that there were separate domestic industries producing these products.[997] In aggregating a range of different products into the category of CCFRS, even though the requisite degree of likeness between these products and the imported products could not be demonstrated, the United States incorrectly defined the "domestic industry that produces like … products". The "bundling" approach employed by the USITC in this case made it impossible to apply the crucial "like product" requirement, which is essential to the identification of the relevant domestic industry, in the way intended by the Agreement on Safeguards.[998] In effect, the United States determines "like product" by reference to the "domestic industry", rather than determining the "domestic industry" by reference to its production of a "like product". It accepted as an imported "product" a range of different and distinguishable CCFRS and then defined its "domestic industry" by reference to the producers of that broad range of distinct products, notwithstanding the fact that the products within that range were not like each other. The result was that each of the products included within the domestic product category were equally not like all of the products within the imported product category.[999]

7.356 New Zealand further argues that, while the category of domestically produced CCFRS may be the same as the category of imported CCFRS, each of the products within that category is very different. CCFRS is not a single identifiable product – it is a product category comprised of four distinct finished products, finished flat steel plate, hot-rolled steel, cold-rolled steel, and coated steel, together with the semi-finished product slab. Instead of focussing on the differences or similarities amongst these products, the USITC focussed on commonalties within the industry producing the range of CCFRS products. In effect, the USITC did exactly what the Appellate Body in *US – Lamb* said should not be done – it focussed on the producers rather than the product. Although the jurisprudence indicates that the concept of "like product" in the Agreement on Safeguards is to be construed narrowly, the USITC argues that the appropriate policy is to provide the widest possible blanket of protection to the relevant industry.[1000] [1001] New Zealand adds that in this case, imports of slab, a semi-finished input product, were apportioned part of the blame for alleged serious injury to producers of a highly finished end-product, coated steel. This result is particularly perverse since the only increase in slab imports during the period of investigation was from 1998-1999[1002] which coincided with a period of coated steel profits.[1003] This illustrates the point that there can be no causal relationship between increased imports of one product and serious injury to an industry that produces products that are unlike the imported products, but this is entirely concealed by the bundling approach. The USITC does not demonstrate what would be the only relevant point, that is, whether increased imports of slab caused serious injury to the domestic producers of the like product – slab – because this, too, is concealed by the bundling approach.[1004]

7.357 In the view of the United States, the USITC found that domestic CCFRS is like the corresponding imported CCFRS that is subject to this investigation and defined CCFRS as a single like product. The Agreement on Safeguards includes no definition of "like product" nor addresses what factors to consider in determining whether to define separate like products and corresponding domestic industries. The USITC's methodology and definition of CCFRS as a single like product was adequate, reasoned and reasonable explanations were provided. The USITC started this analysis with

[997] New Zealand's second written submission, para. 3.30.
[998] New Zealand's second written submission, para. 3.21.
[999] New Zealand's first written submission, paras. 4.49-4.50.
[1000] USITC Report, Vol. I, p 30.
[1001] New Zealand's first written submission, paras. 4.53, 4.54 and 4.58.
[1002] New Zealand first written submission, para 4.92, Figures 12 and 13.
[1003] USITC Report, Vol. I, p 53.
[1004] New Zealand's second written submission, para. 3.23.

the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). After examining the evidence and conducting its analysis regarding the corresponding domestic CCFRS products, the USITC found clear dividing lines so as to define three separate like products from this category.[1005] In comparing the domestic steel to the imported steel, the evidence indicated that imported CCFRS consists mainly of the same range of carbon steel as the domestic CCFRS.[1006] [1007]

7.358 Japan insists that no one in the world, whether now or 1993, thinks of CCFRS as a single product. The various CCFRS products do not comprise one authentic market. They are each distinct in their physical properties, use, customer perceptions, general tariff classifications, and even production processes. Japan submits that even the United States industry breaks down its marketing and pricing materials in the manner that Japan proposes. Plate is sold and marketed separately from hot-rolled, which is distinct from cold rolled, which is distinct yet again from corrosion resistant steel.[1008]

7.359 The United States insists that the USITC applied its traditional factors in determining that there was no clear dividing line between types of CCFRS and defined such steel to constitute a single like product. The USITC found that CCFRS at various stages of processing shared certain basic physical properties, were interrelated, had common end-uses, were generally distributed through the same marketing channels, and were essentially made by the same production processes (at least at the initial stages). The USITC also recognized that there were some differences in physical properties and end-uses.[1009] Since CCFRS in an earlier processed form is the feedstock for further processed CCFRS, all such steel is produced using the same production processes at the initial stages, with downstream steel merely employing additional stages of processing. All CCFRS is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills. Substantial quantities of earlier processed steel are internally transferred for production of further processed steel. The USITC found that this tends to blur product distinctions until the processing reaches its final stages since earlier stages of steel comprise feedstock for the next stage.[1010] As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the USITC also recognized that there is substantial commonality in production facilities and vertical integration in the industry. The USITC recognized that the interrelationship between the production processes and integration of the producers demonstrates that the market for each type of CCFRS is not isolated, but directly affected by the markets across the spectrum of all CCFRS.[1011]

[1005] Four Commissioners found clear dividing lines so as to define three separate like products from this category and two Commissioners determined that this category was a single like product. Commissioners Okun, Hillman, Miller, and Koplan defined the following three separate like products: 1) certain carbon flat-rolled steel ("CCFRS"); 2) grain-oriented electrical steel ("GOES"); and 3) tin mill products. Commissioners Bragg and Devaney defined a single like product, carbon and alloy flat products (including slab, hot-rolled sheet and strip, cut-to-length plate, cold-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products).

[1006] USITC Report, pp. 36-37.

[1007] United States' first written submission, paras. 116-118.

[1008] Japan's second written submission, para. 36.

[1009] United States' second written submission, paras. 77-78.

[1010] USITC Report, pp. 38-39.

[1011] United States' second written submission, paras. 79-82.

(ii) Like product criteria

General

7.360 China argues that, contrary to the WTO standard for likeness and its own stated methodology, the USITC did not establish the "likeness" of the five distinct downstream products (slabs, plate, hot-rolled steel, cold-rolled steel and coated steel) on the basis of their physical characteristics, end-uses, consumer-tastes and habits and tariff classification. The USITC essentially relied on commonalties in the chain of production and the end-users of all five types of flat steel – the two criteria that had already been ruled out by the Appellate Body.[1012]

7.361 Similarly, Japan argues that the USITC's determination to conjoin the five products into a single "CCFRS" like product is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994. There are wide differences between subject imports and domestic products in terms of the factors identified by the Appellate Body for a determination on "like products": the products' physical properties, end-uses, consumer perceptions, and tariff classifications. It is evident from the USITC's own findings that semi-finished slab produced by domestic producers is not a like product of any of the imported corrosion-resistant steel, cold-rolled, hot-rolled, or plate products, because of the stark differences in terms of product properties and end-uses. Domestic corrosion-resistant steel products are not "like products" of any imported semi-finished slab, plate, hot-rolled, or cold-rolled products. Domestic cold-rolled products are not like products of any flat-rolled steel products except for cold-rolled products. The same is true for plate and hot-rolled. In a nutshell, imports and domestic products falling within the same category – semi-finished slab, plate, hot-rolled, cold-rolled, or corrosion-resistant steel products – might be "like products" of each other, but imports and domestic products that fall within different categories are definitely not "like" one another.[1013]

7.362 Brazil argues that in expanding its like product consideration to "both the productive facilities and processes and the markets for these products"[1014], the USITC determined that semi-finished slab and other major finished flat-rolled carbon and alloy steel products – plate, hot-rolled, cold-rolled, and corrosion-resistant steel sheet – constitute a single like product. Where the USITC had found in previous cases that each of these products was a distinct like product, these same products were now somehow one like product.[1015] In fact, application of the USITC's own traditional like product factors – including most of those identified by the Appellate Body as appropriate to separate products from one another – to the information contained in its own report compels the conclusion that the various products within the CCFRS category are distinct from one another. The USITC's report admits, without thoughtful analysis, many distinctions, and the foreign producers in the case produced even more information that leads to the same conclusion.[1016]

7.363 The United States asserts that many of the specific allegations raised by the complainants regarding the USITC's CCFRS like product definition are based on their erroneous interpretation of what factors the USITC was either "required or not permitted" to consider in making its like product definitions. The complainants can identify nothing in the Agreement on Safeguards addressing what

[1012] China's first written submission, para. 181.
[1013] Japan's first written submission, para. 117.
[1014] USITC Report Vol. I at 30-31 (Exhibit CC-6).
[1015] Brazil's first written submission, paras. 99 and 115.
[1016] Joint Respondents' Prehearing Framework Brief (11 September 2001) (filed by the Law Firm of Willkie Farr & Gallagher) at 17-24 (Exhibit CC-50); Joint Respondents' Prehearing Brief on Slab (11 September 2001) (filed by the Law Firm of Willkie Farr & Gallagher) at 3-10 (Exhibit CC-51).

factors may or may not be considered in determining like products. They instead assert that the USITC was bound to use the four factors suggested by the Working Party on *Border Tax Adjustments.* These factors, which were suggested for use in border tax adjustments, were for a different purpose, and the Appellate Body has recognized that "[n]o one approach to exercising judgement will be appropriate for all cases".[1017] Thus, the USITC was not required to consider the four factors derived from the Working Party that are urged by the complainants.[1018] The United States notes that the USITC's like product factors in a safeguards investigation include the three criteria on which all the parties agree (physical properties, uses, and customs treatment), and also focus on such other objective factors as the product's marketing channels and manufacturing process.[1019]

7.364 New Zealand and Brazil note that three of the six factors relied upon by the USITC to support the grouping of CCFRS related to the issue of vertical integration and commonality of facilities linked to vertical integration. These are, in fact, the same factors as the continuous line of production and coincidence of economic interests at issue in *US – Lamb.* Japan concurs in this argument. The Appellate Body could not have stated more clearly that the fact that one product is an input to another product, even if there is no other use for the input product, is simply not relevant to the determination of whether products are like each other. Similarly, the Appellate Body was clear in its statement that a coincidence of economic interests between the producers of upstream and downstream products is also not relevant to the determination of whether products are like each other. That is, vertical integration and commonality of facilities are not relevant to the like product determination.[1020] According to Brazil, the discussion of physical properties relates to the physical properties resulting from a stage prior to slab, steelmaking, and not to physical properties imparted as a result of production of the downstream products. Finally, end-use applications are very broadly defined, although there is an admission that the various products are not generally substitutable between the various products within CCFRS. There is, of course, no mention of the fact that slab is not sold at all to the automotive or construction industries (or, indeed, any industry other than steel) and a variety of other factors traditional to the United States' analysis (e.g., channels of distribution/marketing channels) are not addressed at all.[1021]

7.365 The United States responds that as part of its consideration of the manufacturing process in this particular case (i.e., how and where it is made), the USITC recognized that the interrelatedness of CCFRS at different stages of processing resulted in substantial captive consumption, with a concomitant commonality of production facilities and vertical integration in the industry. This interrelationship between the production processes and integration of the producers demonstrated that distinctions in markets for each type of CCFRS were blurred, all types of CCFRS were directly affected by the markets for the whole spectrum of CCFRS, given that each type of CCFRS constituted the feedstock for the next processed stage of steel within the overall category. Considering the manufacturing processes of steel at various stages of processing, particularly the fact that they are feedstocks, is a "product-oriented" and not "producer-oriented" analysis, as alleged by the complainants.[1022] The complainants' arguments fail to recognize that within almost every defined like product, and the corresponding imported product, there exist a range of goods of different sizes,

[1017] Appellate Body Report, *EC – Asbestos*, para. 101.
[1018] United States' first written submission, para. 124.
[1019] United States' second written submission, para. 65.
[1020] New Zealand's second written submission, paras. 3.42-3.43; Brazil's second written submission, paras. 29-30; Japan's first written submission, paras. 121-122.
[1021] Brazil's second written submission, para. 16.
[1022] United States' second written submission, para. 70.

grades, or stages of processing. While goods along the continuum share similar or like factors, individual items at the end of the continuum may not be as similar.[1023]

7.366 Korea submits that the United States' analysis was inadequate as demonstrated by the following table:[1024]

Distinguishing Characteristics in Defining "Like Product"

Flat-Rolled Products

	Physical Properties*	Customs Treatment*	Manufacturing Process*	Uses*	Marketing Channels*
Slabs	Semi-finished form, usually 4 in. Slab has a rectangular cross-section with width at least two times the thickness. Low fracture toughness and high porosity.	Three distinct HTS headings: 7207.12, 7207.20 and 7224.90	Molten steel cast by continuous casting. No rolling takes place.	All further processed into hot-rolled steel or plate. No independent use.	99.6% to end-users, 0.4% sold to distributors
Plate	It is made from slab, and it is thicker and stronger than the other flat products. It typically ranges between 3/16" to more than 1 foot in thickness. Thick gauge and superior strength.	Ten distinct HTS headings: **7208.40**, 7208.51, 7208.52, 7208.90, **7210.90**, 7211.13, **7211.14**, 7225.40, **7225.50**, **7226.91**	Hot-rolled on Steckel mill or reversing mill.	Designed for heavy industry uses, such as bridgework, machine parts (body or frame), transmission towers and light poles, buildings, self-propelled machinery such as cranes and bulldozers, railway cars, tanks, oceangoing ships and floor plate or formed into pipe, oilwell rigs and platforms.	45.2% to end-users and 54.8% to distributors
Hot-Rolled	>2mm in thickness. The least refined steel sheet product. Thinner and weaker than plate, but heavier and less smooth than cold-rolled. Lower quality than both cold-rolled and coated.	Sixteen distinct HTS headings: 7208.10, 7208.25, 7208.26, 7208.27, 7208.36, 7208.37, 7208.38, 7208.39, **7208.40**, 7208.53, 7208.54, **7211.14**, 7211.19, 7225.30, 7225.40, and **7226.91**	Hot-rolled in hot-strip mill or Steckel mill.	For cold-rolling/galvanizing/coating; Formed and welded to make pipe; Cut to length for sheet; HR sheet is sold for uses where surface finish and light weight are not crucial, such as structural and internal parts of autos and appliances.	60% to end users, 40% to distributors
Cold-Rolled	25-90% reduction in thickness of hot-rolled to under 2mm ; Special mechanical properties or surface texture. Thin-gauge, smooth surface and high strength to weight ratio, created by the cold-rolling process.	Sixteen distinct HTS headings: 7209.15, 7209.16, 7209.17, 7209.18, 7209.25, 7209.26, 7209.27, 7209.28, 7209.90, 7211.23, 7211.29, 7211.90, 7225.19, **7225.50**, 7226.19 and 7226.92	After being hot-rolled on strip mill and undergoing other processing similar to hot-rolled, it is finished on a cold-reduction mill.	Feedstock for corrosion-resistant steel, tin mill, and GOES. CR sheet sold for applications where surface finish and light weight are important consideration (panels in electrical equipment and appliances, utensils, cutting tools, cutlery, seat belt components). Also sold for unexposed auto body parts such as automotive transmission components.	71.3% to end users and 28.7% to distributors
Coated	Has metallic or non-metallic coating; coated, clad or plated with metals and alloys for corrosion-resistance and improved aesthetics.	Nineteen distinct HTS headings: 7210.20, 7210.30, 7210.41, 7210.49, 7210.61, 7210.69, 7210.70, **7210.90**, 7212.20, 7212.30, 7212.40, 7212.50, 7212.60, 7225.91, 7225.92, 7225.99, 7226.93, 7226.94 and 7226.99	Electro-galvanizing or hot-dip galvanizing. There are seven alternative processes fo applying coatings.	Used mostly in applications requiring protection against the weather and other corroding agents (Auto parts such as mufflers and trunk lids, construction uses such as roofing and siding, garbage cans, storage tanks and building products, gasoline tanks, chemical containers, oil filters, television chassis, highway equipment and agricultural buildings and equipment.)	64.3% to end-users and 35.7% to distributors

* Identified by the ITC as a distinguishing factor the it takes into account when determining what constitutes the "like product." ITC Determination, Views on Injury of the Commission, Vol. I, p. 30. (**Exhibit CC-6**)
Note: HTS classifications in bold font indicate the only 5 HTS classifications that are shared among the 55 distinct HTS classifications.
Sources: ITC cites are all found in **Exhibit CC-6**.
Slab: ITC at 39 and at FLAT-1 (physical characteristics), at FLAT-1 (customs treatment), at 40 (manufacturing processes) at 40 and OVERVIEW-13 (end uses); and at 44 (marketing channels).
Also, First Submission of Japan, at 41 (physical characteristics and end uses).
Plate: ITC at 41 and at FLAT-1 (physical characteristics), at FLAT-1 (customs treatment), at 40-41(manufacturing processes), at FLAT-I (end-uses) and at 44 (marketing channels).
Also, First Submission of Japan at 40 (physical characteristics).
Hot-Rolled: ITC at 44 (physical characteristics), at FLAT-2 (customs treatment), at 40 (manufacturing processes) at 38 and FLAT-2 (end uses); and at 44 (marketing channels).
Also First Submission of Japan at 39 (physical characteristics and end uses), at 40 (manufacturing process) and Exhibit CC-55 (Exhibit 2) (physical characteristics and end uses).
Cold-Rolled: ITC at 41and 44 (physical characteristics), at FLAT-3 (customs treatment), at 41, OVERVIEW-13 and FLAT-2 (manufacturing process and end-uses), and at 44 (marketing channels).
Also, First Submission of Japan at 39 (phsycial characteristics and end uses) and Exhibit CC-55 (Exhibit 2) (end uses).
Coated: ITC at 42 and FLAT-3 (physical characteristics and manufacturing process); at FLAT-3 (end uses); and at 44 (marketing channels).
Also, First Submission of Japan at 37 (physical characteristics) and at 39 (physical characteristics and end uses) and Exhibit CC-55 (Exhibit 2) (manufacturing process).

Physical properties

7.367 The European Communities and China submit that the USITC's finding that all five CCFRS products share "certain basic physical properties and are interrelated to a certain degree"[1025] is

[1023] United States' second written submission, para. 86.
[1024] Korea's second written submission, para. 68.
[1025] European Communities' second written submission, para. 275; USITC Report, Vol. I, p. 37.

untenable. It is only based on the commonplace of "a common metallurgical base".[1026] However, the basic chemical combination of carbon and iron is not sufficient to demonstrate that these products share the same physical properties and may therefore be regarded as one specific product: indeed, the very same chemical mix in metallurgy can also be found in other steel product categories that have been classified as separate products (e.g., carbon and alloy long steel products or stainless steel).[1027] In order to establish common physical properties, the USITC would have needed, in accordance with its own stated methodology and the general definition of physical properties under WTO law[1028], to look at size, shape and texture of the five flat products. The USITC itself acknowledged significant difference in "thickness" (slabs are 4 inches while cold-rolled steel is reduced to size to below 2 mm) and other qualities (corrosion resistance and surface texture).[1029] [1030]

7.368 New Zealand adds that a proper comparison of physical properties cannot stop at the conclusion that CCFRS has a "common metallurgical base", a finding that the United States merely notes rather than tries to defend.[1031] The fact that ice cream and cheese share certain compositional characteristics which mean they have more in common with each other than with a banana does not mean they are "like". Nor are sawn pine logs, planks, fence posts and furniture all "like" because they all started life as trees.[1032]

7.369 The European Communities and China argue that the mere generalization that the five CCFRS share certain chemical characteristics that are also common to other steel product categories identified by the USITC was certainly not an adequate and reasoned explanation to dismiss the contradicting information in its own Report.[1033]

7.370 Japan and Brazil insist that the products each have different physical properties. The USITC found, for instance, that cold-rolled steel differs from hot-rolled steel in terms of thickness, mechanical properties, and surface texture, while coated steel differs from cold-rolled steel in terms of its coating of zinc or other materials.[1034] Further, New Zealand also stresses that each of the discrete products has very different properties in terms of their shape, thickness, degree of finishing and physical performance[1035], and that these physical differences are fundamental. Clearly, slab is thicker and less refined than hot-rolled steel.[1036] According to the European Communities and China, the USITC Report also explicitly concedes a lack of interchangeability between the five products where it holds that the "vertical nature of the relationship between CCFRS at different stages limits interchangeability between products".[1037] In other words, these parties contend, the USITC admits

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[1026] USITC Report, Vol. I, pp. 37 and 38.

[1027] European Communities' first written submission, para. 237; China's first written submission, para. 184.

[1028] The USITC Report, Vol. I, p. 29 refers to "appearance, quality and texture". The Appellate Body in *EC – Asbestos*, para. 92 considered "composition, size, shape, texture, and possibly taste and smell" as relevant physical properties.

[1029] USITC Report, Vol. I, pp. 38-42 with detailed descriptions.

[1030] European Communities' first written submission, para. 238-239; China's first written submission, para. 185-186.

[1031] United States first written submission, para 119.

[1032] New Zealand's second written submission, para. 3.46.

[1033] European Communities' first written submission, para. 241; China's first written submission, para. 193.

[1034] Japan's first written submission, para. 117; Brazil's first written submission, para. 106.

[1035] The USITC highlights some such differences in "Appendix A" at pp. 9-10 of the USITC Report, Vol I.

[1036] New Zealand's first written submission, para. 4.59-4.60.

[1037] USITC Report, Vol. I, p. 44.

that part of the producers it wanted to group in a single domestic industry did not produce products interchangeable with the imported ones.[1038] China submits that through the process of coating, cold-rolled steel becomes a different product that cannot meet the definition of a "like product". Indeed, the coating process is likely to alter the physical *"properties"* of the raw product (cold-rolled steel), through the addition of a new substance (metal or non-metallic substance). The new "properties" of the product are, in particular, illustrated by the fact that the coated product becomes corrosion-resistant.[1039]

7.371 In the United States' view, the USITC found that imported and domestic CCFRS share the same basic physical attributes and are generally interchangeable, have similar uses with the same metallurgic composition, thickness, width, and amount of processing, generally do not employ significantly different production processes, and have an overlap in the marketing channels for domestic and imported CCFRS. The USITC found that the domestic article, CCFRS, is like the imported CCFRS. The USITC then applied its long established factors[1040] in considering whether to analyse specific types of CCFRS separately or as a whole.[1041] The USITC found that CCFRS at different stages of processing share certain basic physical properties and are interrelated to a certain degree.[1042] Specifically, the USITC found that this steel has a common metallurgical base, with desired properties and essential characteristics embodied in the steel prior to the casting or semifinished stage.[1043] The mix in metallurgy depends on the requirements of the end-use, whether the end-use is at the same or different stages of processing. Thus, the chemical content of such steel essentially is determined at the melt stage of processing with some reductions in carbon content possible through subsequent hydrogen annealing.[1044]

7.372 The United States stresses that it is clear from the USITC's determination that it did not ignore evidence of differences in physical properties and end-uses and in fact generally acknowledged such evidence in its analysis. Rather, it is the complainants who ignore the evidence of the interrelationship of CCFRS at different stages of processing. The complainants fail to acknowledge, although they do not dispute, the fact that CCFRS at one stage of processing generally is feedstock for the next stage of processing, which tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. This interrelationship between

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[1038] European Communities' first written submission, para. 240; China's first written submission, para. 187.

[1039] China's first written submission, para. 192.

[1040] The USITC traditionally has taken into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (*i.e.*, where and how it is made), its uses, and the marketing channels through which the product is sold in determining what constitutes the like product in a safeguards investigation. These are not statutory criteria and do not limit what factors the USITC may consider in making its determination. Appellate Body Report, *EC – Asbestos*, para. 102 (general criteria "are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products."). No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the particular case. The decision regarding the like or directly competitive article is a factual determination. The USITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations. USITC Report, p. 30.

[1041] USITC Report, pp. 36-45.

[1042] USITC Report, pp. 37-38.

[1043] The USITC found that all certain carbon flat-rolled steel originally is made of raw materials that include carbon and iron.

[1044] United States' second written submission, paras. 78-79.

CCFRS at different stages is "product-oriented" rather than "producer-oriented" and clearly was an important factor in the USITC's analysis and finding.[1045] [1046]

7.373 The European Communities submits that the United States nowhere rebuts the European Communities' argument concerning the different length, width and other qualities of the five different CCFRS products[1047], but merely insists on the "same common metallurgical base". This analysis fails to take account of the significant physical differences between the five CCFRS products[1048] and is also inconsistent with the investigation of the same criteria with respect to stainless steel products, where the USITC found that the sole metallurgical composition was not a sufficient element to define one single industry producing stainless steel products.[1049] [1050]

End-use

7.374 Brazil submits that by making gross generalizations, the USITC found that "the primary end-use applications for commercial shipments of CCFRS are the automotive and construction industries".[1051] [1052] Japan and Brazil submit that, in fact, the products differ in terms of end-uses. For example, the USITC found that while hot-rolled steel and coated steel are both used in automotive applications, they are almost always used for different applications.[1053] The overlap at issue is not of a type that may amount to the "likeness" of products under the Agreement on Safeguards. For example, the USITC found that hot-rolled and corrosion-resistant steel products are subject to similar demand trends in the automotive industry, but that they are not used for the same end-use. This finding indicates that the products are not substitutable with each other, but at most complementary. They therefore might not even be directly competitive, much less "like" one another.[1054]

7.375 According to the European Communities, the USITC did not show that the five products have common end-uses. Its finding that "all types are used in the production of automobiles, albeit in different applications" and "for end-use applications in the construction industry" admits that the end-uses, i.e., application of each product, are very different. Some (e.g. coated cold rolled) is used for making certain car parts. Other products (e.g. slab) are used purely as an input good in the production of downstream steel products.

7.376 The European Communities, Korea, China and New Zealand submit that, instead of showing common end-uses (e.g., body parts for automobiles), the USITC Report relies on common ultimate end-users of the various products in question (e.g., the automotive industry). This is not one of the criteria acknowledged by the Appellate Body to establish likeness. Moreover, a focus on end-users leads to some nonsensical results as any range of diverse input goods used by particular industries could be grafted into a single product category. Under the USITC's approach, also automotive leather and windscreen would also be like products to CCFRS and should have been analysed together.[1055]

[1045] Appellate Body Report, *US – Cotton Yarn*, para. 86.
[1046] United States' first written submission, para. 127.
[1047] European Communities' second written submission, para. 275.
[1048] European Communities' first written submission, paras. 238 to 239.
[1049] USITC Report, Vol. I, pp. 190-205.
[1050] European Communities' second written submission, para. 275.
[1051] USITC Report, p. 43.
[1052] Japan's first written submission, paras. 119-120; Brazil's first written submission, paras. 100, 102 104, 105, 109.
[1053] Japan's first written submission, para. 117; Brazil's first written submission, para. 106.
[1054] Japan's first written submission, para. 120; Brazil's first written submission, para. 104.
[1055] European Communities' first written submission, para. 243; Korea first written submission, para. 54; China's first written submission, paras. 194-195; New Zealand's first written submission, para. 4.61.

The European Communities also argues that the USITC does not consistently apply its criterion of common end-users: had it done so, also certain tubular products that are used in the automotive industry (precision tubes to conduct forces) should have formed part of the CCFRS product category or *vice versa*, because they share common end-users.[1056]

7.377 Korea further submits that the USITC record information confirms that the correct analysis – "end-use" – demonstrates that each of the five CCFRS products had different uses, and thus, is a separate like product.[1057] Slab is internally consumed for downstream products, such as sheet, strip, and plate; plate is used for bridgework, machine parts (e.g., the body of the machine or its frame), transmission towers and light poles, buildings, self-propelled machinery such as cranes and bulldozers, railway cars, oceangoing ships, and floor plate or formed into pipe and oilwell rigs and platforms; hot-rolled steel is internally consumed to make cold-rolled and/or galvanized or other coated products, formed and welded to make pipe, or cut to length to produce discrete sheet, it is also used in the manufacture of structural parts of automobiles and appliances; cold-rolled steel is internally consumed to produce coated or tin products, and it is also used to make panels in electrical equipment and appliances, body parts for automobiles, where surface finish or strength-to-weight ratio is important but corrosion-resistance is not, auto transmission and seat belt components, utensils, cutting tools, cutlery. Coated steel is used for corrosion-resistant auto parts, garbage cans, storage tanks, building products, gas tanks, chemical containers, oil filters, television chassis, highway equipment, agricultural buildings, and equipment (guardrails, bridgedeck, signs).[1058]

7.378 The United States submits that the USITC recognized that the interrelationship between the production processes and integration of the producers demonstrates that the market for each type of CCFRS is not isolated, but directly affected by the markets across the spectrum of types of CCFRS. The primary end-use applications for commercial shipments of CCFRS are the automotive and construction industries. Thus, the USITC found that all types of CCFRS are substantially affected by the collective demand of these two markets.[1059] The USITC also found that the primary end-use applications for commercial shipments of CCFRS are the automotive and construction industries.[1060] The USITC found that all types of CCFRS are substantially affected by the collective demand of these two markets.[1061] The USITC also recognized that the vertical nature of the relationship between CCFRS at different stages may result in differences in uses between stages of CCFRS.[1062] Nevertheless, the USITC found that the evidence demonstrated that in some situations, there may be some substitution for use between products from one stage to another, e.g., coated steel can be adapted for use in applications that typically use cold-rolled steel and vice versa, and hot-rolled has

[1056] European Communities' first written submission, para. 243.

[1057] USITC Report, Vol. II, pp. FLAT-51-53 (Exhibit CC-6). *See also Respondents' Joint Framework Brief*, p. 22 (Exhibit CC-50).

[1058] Korea's first written submission, paras. 54, 57; source: Joint Respondents' Posthearing Brief, Flat-Rolled Steel, Inv. No. TA-201-73, Exhibit 2: "Application of Like Product Factors to Flat-Rolled Products", pp. 11-12 (Exhibit CC-55); see also USITC Report, Vol. II, pp. FLAT1-4 (Exhibit CC-6).

[1059] United States' first written submission, para. 122.

[1060] United States' first written submission, para. 122; USITC Report, pp. 43-44.

[1061] The USITC recognized that while hot-rolled steel may not be used in place of, or substituted for, a coated sheet in a car fender, all certain carbon flat-rolled steel is directly affected by the demand for automobiles, since all types are used in the production of automobiles, albeit in different applications. The USITC also found that similarly, but to a lesser extent, all types of such steel are used for end-use applications in the construction industries. Thus, all types of certain carbon flat-rolled steel are substantially affected by the collective demand of these two markets. USITC Report, pp. 43-44.

[1062] USITC Report, p. 44.

some limited interchangeability with cold-rolled steel.[1063] [1064] The United States also submitted that the complainants fail to recognize that within almost every defined like product, and the corresponding imported product, there exist a range of good of different sizes, grades, or stages of processing. While goods along the continuum share similar or like factors, individual items at the end of the continuum may not be as similar.[1065]

7.379 Further, in the view of the United States, and contrary to the complainants' contentions, the USITC was not required to consider whether each type of CCFRS was substitutable with each other.[1066] The complainants fail to recognize that the substitutability or competitive relationship was found to be relevant in the context of Article III of GATT 1994, as discussed by the Appellate Body in *EC – Asbestos*.[1067] Protecting the competitive relationship between imports and domestic products is a purpose of Article III. However, it is not the purpose of the Agreement on Safeguards, whose purpose is to permit protection of a domestic industry under circumstances.[1068] Thus, the competitive relationship or substitutability of domestic and imported products is not a necessary factor regarding the like product definition in the context of the purpose of the Agreement on Safeguards.[1069] In considering uses for the types of CCFRS, the USITC recognized that similarity or interchangeability in uses were limited for CCFRS, as would be expected for feedstock or input products.[1070] The complainants' attempts to construe this recognition regarding uses of feedstock as consideration of a substitutability factor by the USITC is misplaced.[1071]

7.380 China responds by reaffirming that, in accordance with the Appellate Body ruling in *US – Lamb*, this fact is not relevant for the assessment of likeness. Moreover, China considers that this element rather underlines the fact that the different products included in the category CCFRS cannot share common end-uses.[1072] The United States only acknowledges that there are no common end-uses for the various CCFRS products, by referring to markets and industries in general as end-uses applications. In particular, the fact that all types of CCFRS could be substantially affected by the collective demand of the automotive and construction industries does not demonstrate in any way that

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[1063] USITC Report, p. 44. Specifically, several US companies produce hot-rolled sheet in thicknesses (*i.e.*, light-weight gauges) that have been more typically characteristic of and competitive with cold-rolled sheet. Although the overlap between hot-rolled steel and cold-rolled steel has traditionally been considered to begin at approximately 2 mm and thinner, improvements in hot-rolling have allowed mills to hot-roll below 2 mm. In addition, while cold-rolled steel generally is used as the feedstock for coated steel, coated hot-rolled sheet is a growing product niche. USITC Pub. 3446, p. I-8, and nn.18 and 19.

[1064] United States' second written submission, paras. 83-84.

[1065] United States' second written submission, paras. 72 and 86.

[1066] Japan's first written submission, paras. 79 and 101; Korea's first written submission, paras. 38-39 and 58-59; European Communities' first written submission, para. 240.

[1067] Specifically, the Appellate Body in *EC – Asbestos*, para. 99, stated:

> . . . a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace. . . .

[1068] Appellate Body Report, *US – Line Pipe*, para. 82.

[1069] Moreover, in this investigation the USITC made its definition on the basis of like product analyses and not on the basis of directly competitive analyses. Thus, while the consideration of substitutability may be relevant to the directly competitive analysis, it is not germane to, and should not be transposed to, the like product analysis.

[1070] USITC Report, p. 44.

[1071] United States' first written submission, para. 136.

[1072] China's second written submission, para. 77.

all types of CCFRS can be used for the same purposes and applications in these industries. Once again, the market on which a product is finally sold cannot be considered as its "end-use".[1073]

7.381 Korea and China also submit that substitutability is relevant in the assessment of "likeness" since like products are necessarily also directly competitive and, therefore, substitutable. Contrary to what the United States asserts, substitutability is a necessary factor regarding the like product definition in the context of the purpose of the Agreement on Safeguards, since, if imported and domestic products were not substitutable, they could in no way be considered as being "like".[1074]

7.382 The United States responded that there clearly is a competitive relationship between the imported and domestic products. The complainants have not disputed, and neither did the parties in the underlying investigation, that the imported and domestic products generally consist of the same types of steel, are interchangeable, and thus compete with each other.[1075]

7.383 The European Communities submits that the United States fails to respond to the complainants' argument that there is no similar end-use. The United States' rebuttal on this point only repeats the error of equating end-uses and end-users but does not respond to any of the arguments attacking the validity of the substantial coincidence of economic interests argument. What is more, the United States exclusively focused on the "commercial market".[1076] However, the European Communities submits that the USITC itself admits that the main end-use for up-stream products is to be a feedstock for down-stream products, out of the commercial market. How could the USITC conclude that coated products sold to the automotive industry have the same end-use as slabs, of which 99.4% of the United States' production is internally transferred? Second, the automotive and construction industry identified as the main end-user for CCFRS account respectively for only 20 and 11% of the US shipments.[1077]

7.384 Japan submits that the United States' argument that these products have common end-uses is not credible. They may be sold to the same industries, but to suggest that steel products have common applications because they are used in a specific industry is to suggest that steel, plastic, and glass should be a single like product because they are all sold to the automotive industry. End use is not the same as end-user. The fact is, no one would ever use slab to make a car; nor would hot-rolled steel be used for the same car-part as corrosion resistant steel. They are simply different products, used for different purposes. Furthermore, they each have a base price, reflected in the companies' price sheets and in the trade literature. There is no such thing as a price for "CCFRS" (as the USITC defined it). This proves not only that the industry and customers recognize the distinctions, but also that any analysis of this grouping performed by the USITC is meaningless because there is no "CCFRS" price that can be used to determine price effects in a causation analysis; rather each individual product must be analysed and then somehow combined with the other individual products.[1078] Such an analysis distorts the true competitive dynamics in the marketplace.[1079] The finding that most finished CCFRS products are sold into the automotive and construction markets is

[1073] China's second written submission, para. 78.
[1074] China's second written submission, para. 80; Korea's second written submission, paras. 39-40, with reference to the Appellate Body Report, *US – Cotton Yarn*, paras. 91(d), 97.
[1075] United States' second written submission, para. 72.
[1076] United States' first written submission, para. 122.
[1077] USITC Report, Vol. I, p. 43, footnote 127.
[1078] USITC Report, Vol. I, pp. 61-62.
[1079] Japan's second written submission, para. 37.

analogous to its earlier finding of a "coincidence of economic interests" between producers of live lambs and lamb meat.[1080]

Consumer perception

7.385 According to China and the European Communities, if "consumers" are deemed to be the auto manufacturers and construction sites that use finished products, then the five different products grouped into the category "CCFRS" cannot be seen as substitutable. As the USITC acknowledged itself, "hot-rolled steel may not be substituted for a coated sheet in a car fender"[1081] and neither may a slab be substituted for a coated sheet in a car-fender.[1082]

7.386 Brazil, Japan and New Zealand argue that if the USITC had considered the factor identified as important by the Appellate Body, consumer tastes and habits[1083], it would have found additional distinguishing characteristics, such as: slab purchases are restricted to producers of downstream rolled products[1084]; consumers regard hot-rolled steel as ideal for applications where strength is more important than appearance – for example, in the use of automobile structural parts[1085]; consumers view cold-rolled steel as ideal for applications where appearance and thinness take precedence over strength, and exposure to corrosive elements is not an issue[1086]; consumers view galvanized steel as ideal in exposed applications, where corrosion-resistance is important.[1087] [1088] New Zealand adds that the very fact that import trends differ amongst the products making up the category of CCFRS indicates that consumer needs and preferences differ product by product.[1089]

7.387 The United States points out that while the Working Party in *Border Tax Adjustment* suggested that consumers' tastes and habits may be a criterion to be considered in finding like products for purposes of border tax adjustments, contrary to complainants' arguments, this is not a required factor in a safeguard investigation. The Panel in *Japan – Alcoholic Beverages* recognized that consumer habits were variable in time and discounted consumer views in considering whether vodka was "like" shochu and thus whether the like product should consist of vodka and shochu.[1090] The consideration of consumer tastes and habits seems to conflict with the purpose of a safeguard investigation.[1091] Since the purpose of the Agreement on Safeguards is to permit protection of a

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[1080] Japan's second written submission, para. 40.

[1081] USITC Report, Vol. I, p. 43.

[1082] European Communities' first written submission, para. 245; China's first written submission, para. 197.

[1083] In *EC – Asbestos*, the Appellate Body recognized the additional factor of "consumer tastes and habits", as one of four general criteria in analysing the "likeness" of two products, the others being physical characteristics, end uses, and tariff classification. Appellate Body Report, *EC – Asbestos*, para. 101.

[1084] USITC Report Vol. II at FLAT-1 (Exh. CC-6).

[1085] Ibid., p. FLAT-2

[1086] Ibid.

[1087] Ibid., p. FLAT-3.

[1088] Japan's first written submission, para. 118; New Zealand's first written submission, para. 4.64; Brazil's first written submission, para. 107.

[1089] New Zealand's first written submission, para. 4.65.

[1090] Panel Report, *Japan – Alcoholic Beverages I*, para. 5.7 ("Panel was of the view that the 'likeness' of products must be examined taking into account not only objective criteria (such as composition and manufacturing processes of products) but also the more subjective consumers' viewpoint (such as consumption and use by consumers) "but also recognized that "consumer habits are variable in time" and "traditional Japanese consumer habits with regard to shochu provided no reason for not considering vodka to be a 'like' product").

[1091] The Appellate Body cautioned in *EC – Asbestos* that it may be important to consider "*from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness"

domestic industry under certain circumstances[1092], a focus on the subjective consumers' views of the product or market rather than producers or both is one-sided and misplaced. The USITC instead focused on such objective factors in its traditional analysis of like products such as the product's physical properties, uses, marketing channels and manufacturing process.[1093]

7.388 New Zealand responds that consumer perceptions must be a critical component in assessing the "highest degree of competitive relationship" which the Appellate Body in *US – Cotton Yarn* has stressed as crucially important. It can and should be supplemented by other factors, but how purchasers behave in a market cannot be ignored.[1094]

Tariff classification

7.389 The European Communities, Japan, Korea, China and Brazil, submit that, while the USITC impermissably discounted the customs treatment of the various products due to "the large number of classification categories"[1095] [1096], this fact is no excuse for not considering them at all for the purpose of the like product determination. On the contrary, this suggests that the products concerned are not alike. Each CCFRS product is classified under a separate HS number, but the USITC expressly discounted this factor.[1097] In *EC – Asbestos*, the Appellate Body noted that "tariff classification clearly reflects the physical properties of a product" and provided important indications for the like-product determination which must be considered.[1098] The fact that so many HS classifications have been grouped into a single imported product and a single like product is just one more indication that the USITC failed in its determination. In fact, contrary to the assertion of the USITC, HSUS classifications of CCFRS at the four-digit level (depending on the width and thickness of the product) do provide a break-out of the various like products: semi-finished (including slab), hot-rolled, cold-rolled, corrosion-resistant, and plate. Moreover, only five of the 55 distinct HSUS classifications at the six-digit (international) level are shared between two CCFRS steel products. The European Communities adds that a closer look at the 55 classifications for what the USITC calls CCFRS reveals that even the HSUS classifications distinguish at the four-digit level (depending on the width and thickness of the product) between "semi-finished products" including slabs, hot-rolled, cold-rolled, corrosion resistant and plate.[1099] This is a high level of delineation and reflects fundamental product distinctions recognized internationally for purposes of classifying imports.[1100] [1101]

7.390 The United States noted that in this case the numerous tariff classifications did not provide clear distinctions between products. For instance, each of the 33 data collection categories individually have from 2 to 65 tariff classifications. The United States also noted that the facts did not provide support for complainants' allegations that consideration of tariff classifications at the 4-digit level would have provided clear product distinctions. For example, at the 4-digit level, there are nine

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of two products that is very different from that of the inventors or producers of those products." Appellate Body Report, *EC – Asbestos*, para. 92.

[1092] Appellate Body Report, *US – Line Pipe*, para. 82; USITC Report, p. 9.

[1093] United States' first written submission, para. 137.

[1094] New Zealand's second written submission, para. 3.39.

[1095] USITC Report, Vol. I, p. 37, footnote 71.

[1096] Brazil's first written submission, para. 102; European Communities' first written submission, para. 246.

[1097] Japan's first written submission, para. 117; Brazil's first written submission, para. 106.

[1098] Appellate Body Report, *EC – Asbestos*, paras. 102, 109 and 124.

[1099] Presidential Proclamation Annex I, pp. 25 ff.

[1100] "Chapter 72 Flat-Rolled HTS Descriptions at the Four and Six-Digit Level", (Exhibit CC-83).

[1101] European Communities' first written submission, paras. 246-248; Korea first written submission, paras. 51-52; China's first written submission, paras. 198-200.

separate tariff classifications covering the like product defined by the USITC as CCFRS. Of the nine 4-digit classifications, two classifications (7225 and 7226) apply to steel at four (hot-rolled steel, CTL plate, cold-rolled steel, and coated steel) of the five stages of processing defined as CCFRS; one classification (7211) applies to three stages; two classifications (7208 and 7210) apply to two stages; and four classifications (7207, 7209, 7212, and 7224) apply to one stage of CCFRS. Thus, rather than provide clear product category distinctions, tariff classifications at this level demonstrate an interrelationship between the physical properties of steel at different stages of processing which led to the USITC defining these types of steel collectively as CCFRS.[1102]

7.391 Further, in New Zealand's view, the differences amongst the various uses to which the various CCFRS products are put are further reflected in the differing tariff classifications attributed to each of them.[1103] The role of tariff classification in like product determinations has been well accepted in the jurisprudence. Tariff classifications reflect international consensus as to the degree of similarity and difference between products. Clearly, it is not open to a competent authority simply to ignore tariff classification.[1104] Several of the five CCFRS products do not even share the same classification to four digits, let alone eight or ten.[1105] This simply reinforces the lack of likeness between them.[1106]

7.392 The European Communities maintains that the HS clearly distinguished the different products on the basis of the different stages of processing, as is demonstrated in the relevant paragraphs of Chapter 72 of the HS in exhibits CC-105. The United States is wrong in asserting that the distinction between products, which are part of a different stage of the production process is not reflected at the four digit level. As can be discerned from the tariff heading 72.07-72.09 even at the four-digit level there is a distinction between slabs (semi-finished) hot-rolled, cold-rolled and coated.[1107] The differentiation is even clearer when considering the internationally agreed tariff classifications at the six-digit level.[1108] [1109]

7.393 According to Korea, the tariff numbers have aided the USITC's classification of "like" steel products in past anti-dumping and countervailing duty investigations for over 20 years. The USITC, both in its determination and in its Staff Report, breaks the seven CCFRS products down into "like" product categories traditionally used in the various anti-dumping and countervailing duty investigations performed by the USITC: slabs, plate (cut-to-length and clad), hot-rolled, cold-rolled, grain-oriented silicon steel, coated steel and tin mill products.[1110] [1111]

[1102] United States' first written submission, paras. 86 and 89.

[1103] New Zealand's first written submission, para. 4.66.

[1104] United States' first written submission, paras. 86-87.

[1105] USITC Report Vol I, pp. 9-10.

[1106] New Zealand's second written submission, para. 3.48.

[1107] For example, products under heading 72.07 which are referred to as semi-finished products of iron or non-alloy steel (slabs) are clearly distinguished from products under 72.08, which are referred to as flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, *hot-rolled*, *not* clad, plated or *coated*.

[1108] At the six digit level products are further defined and separated from one another. For example, take products that fall under paragraph 72.11, which at the four-digit level are described as "Flat-rolled products of iron or non-alloy steel, of a width of less than 600 mm, not clad, plated or coated". At the six digit level, these products are further defined on the basis of whether they are not further worked than hot-rolled (721113, 721114, 721119) or whether they are not further worked than cold-rolled (cold-reduced) (721123, 721129, 721190).

[1109] European Communities' second written submission, paras. 272-274.

[1110] USITC Report, Vol. I*: "Appendix A"*, pp. 9-10 and Vol. II, pp. FLAT-1-4 (Exhibit CC-6).

[1111] Korea's first written submission, para. 53.

Production processes

7.394 The European Communities and China point out that the USITC's decisive argument for aggregating the five different products into one single category was the vertical integration of the industry and the common production processes.[1112] The USITC, in this safeguard determination, was, again, required by its own stated methodology to use as criterion for determining a like product "its manufacturing process (i.e., where and how it is made)".[1113] The USITC paid "particular attention" to the "sharing of productive processes and facilities" which "is a fundamental concern in defining the scope of the domestic industry under Section 201".[1114] Moreover, the USITC considered itself required "to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of Section 201, protection of the productive resources of domestic producers".[1115] Thus, the USITC's general methodology calls for the artificial aggregation of downstream products by directing the USITC to "pay particular attention" to a common integrated production base.[1116]

7.395 According to the European Communities, Japan, China, and Brazil, this criterion, however, has already been found to be at odds with the Agreement on Safeguards in *US – Lamb* well before the USITC started the steel safeguard investigation. Japan and Brazil also argue that the USITC found the "vast majority" of CCFRS to be produced by "firms that are involved in a number of the stages of processing".[1117] Consequently, these complainants contend that the USITC's like product analysis of CCFRS products is no more consistent with the Agreement on Safeguards than its faulty analysis in *US – Lamb*. As the Appellate Body held in that dispute: "[i]f an input product and an end product are not 'like or directly competitive', then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product … or that there is a substantial coincidence of economic interests between the producers of these products".[1118] Rather, the focus must be on "the identification of the products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced".[1119] The cascading nature of the production processes for various CCFRS products is irrelevant to the question of "like" products under the Agreement, as interpreted by the Appellate Body. The complainants argue that the nature of the factors to be considered in determining the scope of the "like" products – i.e., physical properties, end-use, consumer tastes and habits, and customs treatment – also indicate that the overlap in the production, the element that drove the USITC analysis[1120], is irrelevant. What matters is the competitive relationship between the products, which helps to discern whether the products are "like" one another and whether, in turn, it makes sense to collapse them together.[1121] Japan considers that

[1112] USITC Report, Vol. I, pp. 30, 31, 37.
[1113] USITC Report, Vol. I, p. 30.
[1114] USITC Report, Vol. I, pp. 30 and 151.
[1115] USITC Report, Vol. I, p. 31.
[1116] European Communities' first written submission, paras. 249-251; China's first written submission, paras. 201-203.
[1117] USITC Report, Vol. I, pp. 37-39.
[1118] Appellate Body Report, *US – Lamb*, para. 90. *See* also para. 94.
[1119] Ibid. at paras. 92-93.
[1120] USITC Report, Vol. I, pp. 36-45 (Exhibit CC-6). These complainants argue that this is apparent from the USITC's reliance on the statement that the like product determination should be driven by the "fundamental purpose of Section 201, protection of the productive resources of domestic producers." USITC Report, Vol. I, p. 31 (Exhibit CC-6) (citing to *Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, USITC Publication 1553, Washington, D.C. (July 1984), pp. 12-13).
[1121] European Communities' first written submission, para. 252; Japan's first written submission, paras. 121-122; China's first written submission, para. 204; Brazil's first written submission, paras. 100, 102, 105, 109, 111.

the USITC finding that a large percentage of domestic CCFRS producers are vertically integrated, producing four of the five flat-rolled steel products, is akin to its earlier finding of a "continuous line of production" from live lambs to lamb meat.[1122]

7.396 Japan and Brazil also insist that the products undergo different production processes. The USITC found, for example, that the production processes for hot-rolled steel and cold-rolled steel differ in that cold-rolled steel is further reduced by 25% to 90%, and is often annealed and temper rolled. Coated steel differs from cold-rolled steel in that it has been processed on an electro-galvanizing or hot-dip galvanizing line.[1123]

7.397 Japan submits that even the USITC admits that the processes that make the various CCFRS products are distinct and that distinct products come out of them.[1124] A slab caster is a process unto itself, entirely separate from the hot rolling and Steckel plate mills. These mills are in turn separate from cold rolling mills, as are the coating lines that make corrosion resistant steel. Each process, in turn, makes a product that can either be used as feedstock for the next stage, or be sold as finished products for end-use purposes (except for slab, which is only used to make finished flat-rolled steel). The processes which make these products may be located on the same general premises and be owned by the same company, but this doesn't make the processes' output "like" one another. The separate facilities in which slab is made as compared with hot-rolled, cold rolled and corrosion resistant create separate products used for distinctly different purposes.[1125]

7.398 The European Communities and China finally argue that in essence, the USITC defined "like product" by reference to the "domestic industry". This turns on its head the requirement of Articles 2.1 and 4.1(c) of the Agreement on Safeguards which mandates the "domestic industry" to be defined by reference to producers of the "like product": the "identification of the products which are "like or directly competitive with the imported product" is the *first* step required by *US – Lamb* in defining the domestic industry, not the other way round. This is not a product-focused approach as required by the Appellate Body. Rather, it is an approach driven by the aim to give the widest possible blanket of protection to the domestic industry. The United States cannot arbitrarily replace the criteria upheld by the Appellate Body. The United States had to apply such criteria so as to ensure that prejudice caused by one imported product is not unjustifiably attributed to another imported product.[1126]

7.399 The United States insists that CCFRS includes steel at any of the following five stages of processing: slab, hot-rolled steel (sheet/strip/plate in coils), cut-to-length ("CTL") plate, cold-rolled steel, and coated steel.[1127] An important factor in the USITC's analysis, which the complainants' arguments ignore, was the fact that CCFRS at one stage of processing generally is feedstock for the next stage of processing. For example, slab is feedstock for hot-rolled steel (sheet, strip, and plate); hot-rolled steel is feedstock for cold-rolled steel and cut-to-length plate; and cold-rolled steel is feedstock for coated steel. The USITC acknowledged that the interrelationship between the products is most prominent at the earlier stages.[1128] Since earlier processed CCFRS is the feedstock for further

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[1122] Japan's second written submission, para. 40.

[1123] Japan's first written submission, para. 117, footnote 183; Brazil's first written submission, para. 106.

[1124] USITC Report, pp. 40-41.

[1125] Japan's second written submission, para. 41.

[1126] European Communities' first written submission, para. 253; China's first written submission, para. 205.

[1127] USITC Report, p. 38.

[1128] For example, slab is dedicated for use in producing the next stage steel, hot-rolled steel, whether produced as sheet, strip, or plate. The majority of hot-rolled steel is further processed into cold-rolled steel. The

processed steel, such steel is produced using essentially the same production processes at least at the initial stages, with downstream steel merely employing later stages of processing. The USITC's analysis provided a detailed discussion of the five stages of processing CCFRS. The manufacturing processes for carbon steel involve three distinct stages that include: (1) melting or refining raw steel; (2) casting molten steel into semifinished form, such as slab; and (3) performing various stages of finishing operations, including hot-rolling, cold-rolling, and/or coating.[1129] All CCFRS is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills.[1130] Substantial quantities of earlier processed steel are internally transferred for production of further processed steel.[1131] This tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the USITC also recognized that there is commonality of facilities and substantial vertical integration in the industry.[1132]

7.400 The United States notes that the complainants challenge the USITC's consideration of production processes in determining the "like product" on the basis that "the Appellate Body in *US – Lamb* had ruled out this criterion for the like product determination".[1133] However, the United States maintains that contrary to the complainants' contentions, the Appellate Body in *US – Lamb* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products".[1134]

7.401 The European Communities contends that the United States acknowledged the limited similarity and interchangeability and tried to defend it on the basis of a the "important factor" "feedstock" relationship, stating that a lack of similarity "would be expected for feedstock products".[1135] However, this only admits the commonsensical reason why the Appellate Body clearly

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remaining hot-rolled steel is about equally divided between being further processed into CTL plate or pipe and tube, and used in the manufacture of structural parts of automobiles and appliances. The majority of cold-rolled steel also is used as the feedstock for further processing into coated steel, with smaller amounts further processed into tin mill products or GOES.

[1129] USITC Report, p. OVERVIEW-7.

[1130] Moreover, the evidence shows that advances in technology have blurred the former differences in hot-rolled production processes for sheet/strip and plate. The Steckel mills permit rolling to thinner gauges than a traditional reversing mill thus permitting a producer to switch production between sheet and plate. Steckel mills also allow steelmakers to coil the finished plate, as on a hot-strip mill. Moreover, the addition of temper mills to CTL lines has made heavy gauge hot-rolled interchangeable with discretely produced plate. Without the temper mill process, coils cut into lengths tend to retain memory and "snap back" or bend after the initial flattening. While plate in coils can only be produced in thicknesses up to 3/4 inch and thus can only be substituted for CTL plate up to 3/4 inch thick, this portion of the CTL plate market is large. There is evidence that some mills can produce plate in coils in gauges up to one inch. Thus, the share of the CTL plate market which can be, and is being, supplied with plates cut from coil is substantial. USITC Report, p. 40-41.

[1131] Virtually all US-produced slab is internally consumed by the domestic slab producers in their production of hot-rolled steel (sheet, strip, or plate), with large shares of hot-rolled and cold-rolled steel also internally transferred. During the year 2000, 99.4% of the quantity of domestic producers' total US shipments of slab were internally transferred, as were 66% of the quantity of domestic producers' total US shipments of hot-rolled steel, and 58.7% of the quantity of total US shipments of domestically-produced cold-rolled steel. USITC Report, pp. FLAT-1 and 3, nn. 4 and 5.

[1132] United States' first written submission, paras. 121-122.

[1133] European Communities' first written submission, para 233; *see also* Korea's first written submission, paras. 32 and 35; Japan's first written submission, para. 103; China's first written submission, para. 141; Brazil's first written submission, para. 96; Switzerland's first written submission, para. 179; Norway's first written submission, para. 197.

[1134] Appellate Body Report, *US – Lamb*, para. 94, footnote 55.

[1135] United States' first written submission, paras. 136 and 140.

ruled out a feedstock relationship between products as criterion for establishing likeness, if the products are not otherwise found to be like. Had the USITC looked at the production process, i.e., how a product is made, as opposed to an irrelevant feedstock relationship, this would have only confirmed the finding that all five products are different. The European Communities alleges that the United States itself described the production processes of all these four products and thereby admits that they are different.[1136] As is readily apparent, the production processes differ considerably and accordingly, the texture and thickness of hot-rolled and cold-rolled steel is not similar. Similarly, the specific characteristics of coated sheet are due to the specific production processes of hot-dip galvanising or otherwise coating the cold-rolled sheets to make it corrosion resistant or give it other specific qualities.[1137]

7.402 The United States stresses that contrary to the complainants' allegations[1138], the USITC's definition of CCFRS as a single like product was not based solely on the vertical integration of the domestic CCFRS producers. It is clear from the USITC's determination, that it considered the factors it has traditionally used to evaluate like products in safeguard cases, and based its decision on all of the evidence before it. The complainants fail to acknowledge, although they do not dispute, the fact that CCFRS at one stage of processing generally is feedstock for the next stage of processing, which tends to blur product distinctions until the processing reaches its final stages since steel at the earlier stages simply are feedstock for the next stage. This interrelationship between types of CCFRS at different stages of processing clearly was an important factor in the USITC's analysis and finding, and is "product-oriented". The fact that the USITC recognized that substantial quantities of earlier processed steel are internally transferred for their production of further processed steel and that these substantial internal transfers of feedstock underscore the fact that domestic producers are highly integrated does not negate the USITC's entire like product analysis.[1139] These are facts about the interrelationship of CCFRS and its manufacturing process. Contrary to the complainants' statements, the USITC appropriately considered relevant other factors[1140] including the vertical integration of the domestic producers of CCFRS in its analysis.[1141] [1142]

[1136] United States' first written submission, para. 121.

[1137] European Communities' second written submission, paras. 277-279.

[1138] Japan's first written submission, paras. 121-122; Brazil's first written submission, paras. 103-105; Korea's first written submission, paras. 45-47 and 60; European Communities' first writtensubmission, paras. 249-254; New Zealand's first written submission, paras. 4.54-4.55; China's first written submission, paras. 201-206; Brazil's first written submission, paras. 103-105 and 109.

[1139] The evidence shows that domestic producers of hot-rolled steel shipped 94.7% of US shipments of cold-rolled steel and 84.8% of coated steel in 2000. INV-Y-207 at Table X-1 (US-27). Conversely, domestic producers of cold-rolled/coated steel shipped 89.1% of US shipments of hot-rolled steel in 2000. INV-Y-207 at Table X-2 (US-27).

[1140] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20 ("In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are "like".).

[1141] As discussed above, contrary to complainants' misstatements, *US – Lamb* does not prohibit consideration of production processes and vertical integration as part of the like product analysis. The complainants ignore the Appellate Body's explicit recognition that consideration of production processes may be a relevant factor in defining like products. Specifically, the Appellate Body in *US – Lamb* added the following statement in a footnote:

We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.

Appellate Body Report, *US – Lamb*, para. 94, footnote 55; Panel Report, *Japan – Alcoholic Beverages I*, para. 5.7 (Panel thought it was important to assess "likeness", as much as possible, on the basis of

7.403 The European Communities notes that even if the USITC had consistently drawn the dividing lines between products on the basis of a feedstock relationship, such approach would be inconsistent with Article 2.1 of the Agreement on Safeguards, as clarified by the Appellate Body in *US – Lamb*. The European Communities submits that a mistake is not healed by repeating it.[1143]

Marketing channels

7.404 Brazil argues that the USITC found that there was overlap among the products in terms of channels of distribution in that the products were generally internally consumed or sold to end-users, although neither plate nor corrosion resistant steel is internally consumed in most cases.[1144] [1145]

7.405 The United States agrees that the USITC also considered the marketing channels and uses for CCFRS. The majority of CCFRS overall, and specifically for feedstocks products – slab, hot-rolled, and cold-rolled – is internally transferred. Thus, when CCFRS enters the commercial market, the primary marketing channel generally is directly to end-users.[1146]

7.406 China considers that marketing channels are not relevant criteria.[1147]

Competition

7.407 According to Japan, the USITC completely ignored the most basic principle that competition needs to exist between products found to be like. The choice of an overly broad CCFRS category – in respect of both imports and the domestic industry – made the USITC's analysis meaningless because it masked the true competitive dynamics in the market. Assume, for instance, that imports of semi-finished slab sharply increase, and sales of domestically produced corrosion-resistant steel simultaneously decline. This import increase cannot "cause … injury to domestic producers … of" corrosion-resistant steel because there would be no competitive relationship between these products in light of their wide differences in product properties and end-uses.[1148]

7.408 Similarly, Korea argues that Articles 2.1 and 4.1(c) of the Agreement on Safeguards, read as a whole, support the conclusion that an essential element of the like product analysis should relate to whether the products compete in the marketplace because this will determine the essential nature of the impact of imports on the domestic industry and whether they are causing serious injury. This essential element of "competitive effect" should have guided the USITC's analysis of like product. After all, the more attenuated the competitive effect, the less likely a causal relationship exists between increased imports of that product and serious injury. In this case, imports of hot-rolled coil do not have a comparable competitive effect on cold-rolled production and profitability, etc., as do imports of cold-rolled. This is because the two products have different physical characteristics and different end-uses and thus do not compete against each other in end-use market. The effect is even

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objective criteria, including, in particular, composition and manufacturing processes of the product, in addition to consumption habits.).

[1142] United States' first written submission, paras. 138, 140.

[1143] European Communities' written reply to Panel question No. 11 at the second substantive meeting, quoting the Appellate Body Report, *US – Lamb*, para. 90.

[1144] USITC Report, p. 44.

[1145] Brazil's first written submission, para. 102.

[1146] In 2000, the marketing channels for certain carbon flat-rolled steel, except for CTL plate, ranged from 60% to 99.6% to end-users. USITC Report, Tables FLAT 12-15 and FLAT-17. The marketing channels for CTL plate were more evenly split with 45.2% to end-users and 54.8% to distributors. Ibid., Table FLAT-13.

[1147] China's second written submission, para. 78.

[1148] Japan's first written submission, para. 80.

more attenuated between slab imports and galvanized products – i.e., one cannot make a car or any other finished product using slabs. Indeed, the actual competitive overlap of CCFRS products is marginal.[1149] New Zealand points out that the USITC acknowledged that slab "is dedicated for use in producing the next stage steel, hot-rolled steel".[1150] Slab may not, therefore, be applied to any of the uses for which other steel products may be used – it is exclusively an input good.[1151] The USITC analysis thus falls well short of establishing the "highest degree of competition" threshold for "likeness" that was spoken of in *US – Cotton Yarn*.[1152]

7.409 The United States responded that substitutability is not one of the traditional factors considered by the USITC in conducting its analysis of whether there are clear dividing lines between domestic products in order to define like product(s). The United States further added that there clearly is a competitive relationship between the imported and domestic products. The complainants have not disputed, and neither did the parties in the underlying investigation, that the imported and domestic products generally consist of the same types of steel, are interchangeable, and thus compete with each other. Moreover, within any defined like product and the corresponding specific imported product there exists a range or continuum of goods of different sizes, grades, or stages of processing. While goods along the continuum share identical or similar factors, individual items at the extremes of the continuum may not be as similar or substitutable. For example, a size 36 skirt is like a size 44 skirt, but are they substitutable? Or is size number 3 rebar substitutable for size number 18 rebar? Or are calves substitutable cattle at other stages of development (i.e., yearling or stocker cattle, feeder cattle, or fed cattle ready for slaughter)?[1153]

(iii) Relevance of other like product definitions in this case

7.410 Brazil argues that every one of the criteria used by the USITC to distinguish billets from downstream long products can also be used to distinguish slab from downstream flat products.[1154] The sole distinction put forward by the USITC was that each of the long products (i.e. hot-rolled bar, rebar and heavy structural shapes) produced from billets is made at one stage removed from the billet (i.e. there is a single rolling stage for each of the products) while for slab there are multiple additional stages of production (i.e. hot rolling, cold rolling, galvanizing) with each subsequent product also being an input into a downstream product until galvanizing. Thus, according to the United States, while hot-rolled flat products (plate and sheet) result from a single rolling stage with slab as an input, hot-rolled flat products are like slab because some hot-rolled products may also be an input into a subsequent rolling stage, cold rolling. However, again according to the United States, hot-rolled bar which, like hot-rolled flat products, results from a single rolling stage with billet as an input is not like billets because hot-rolled bar is not an input into a subsequent rolling stage. This logically leads to the anomalous result that CCFRS products one, two and three stages of processing removed from the semifinished product are determined to be "like" the semifinished product whereas long products only one stage removed from the semifinished product are not "like" the semifinished product. It also leaves unexplained why hot rolling of a billet creates a different like product when hot rolling of a slab does not. One might also ask why billets are not part of a like product category which includes wire rod (resulting from hot rolling of the billet), wire (which results from cold drawing of the wire rod) and galvanized wire (which involves application of a metallic coating to prevent corrosion). The

[1149] USITC Report, Vol. II, p. FLAT-53 (Exhibit CC-6); *Respondents' Joint Framework Brief*, pp. 22-24 (Exhibit CC-50).
[1150] USITC Report, Vol. I, p 38.
[1151] New Zealand's first written submission, para. 4.62.
[1152] New Zealand's second written submission, para. 3.47.
[1153] United States' second written submission, paras. 71-72.
[1154] Brazil's second written submission, paras. 15-20.

relationships here are virtually identical in terms of one product being the feedstock for the next and the similarity of the subsequent processing as the relationships among CCFRS products. In the end, the only distinction that the United States can find to justify different treatment of CCFRS and carbon long products is the only distinction which the Appellate Body has specifically stated is irrelevant to the determination of whether products are like each other, namely whether each product is made as part of a continuous line of production. Furthermore, even if this approach were acceptable, it does not justify any distinction between the treatment of CCFRS and stainless flat-rolled steel products, where the input/output relationship between the downstream products is identical. Finally, this approach is also of limited validity in distinguishing billets from finished long products in that it is inapplicable to the billets-wire rod-wire-galvanized wire grouping of products which have the same input to end product relationship from billets through galvanized wire as does CCFRS from slab through galvanized sheet.[1155]

7.411 Brazil further notes that the level of integration in both the production of stainless steel flat products (slab, plate, hot and cold rolled) and carbon long products (billets, hot-rolled bar, rebar, heavy structurals, and wire rod) is comparable to the level of integration in the production of CCFRS. The only difference is that virtually all stainless and the overwhelming majority of carbon long products are produced from steel made in electric furnaces, while a majority of CCFRS products are made from steel produced in blast furnaces and basic oxygen furnaces. This distinction on how the raw steel is made is not, however, relevant to the degree of vertical integration. Most producers of both stainless flat products and carbon long products, like most producers of CCFRS, are vertically integrated from the production of raw steel to the rolling of finished product.[1156] The CCFRS industry as a whole is less vertically integrated than either the stainless or long products industries. At least two producers of a full range of CCFRS finished products do not produce any slab, but purchase all of their slab requirements, almost exclusively from foreign sources.[1157] Brazil is not aware of any producers of stainless plate and sheet or of hot-rolled bars, rebars or heavy structurals that do not also produce the semifinished input product. Furthermore, with imports of carbon slab ranging as high as 7.4 million tons during the period investigated (compared to small quantities relative to domestic production of imported billets and stainless slab)[1158], it is evident that there is a substantial portion of total CCFRS production which is not vertically integrated. Nevertheless, there is no meaningful distinction between the level of vertical integration of the producers of CCFRS, billets and finished carbon long products, and stainless flat products, including stainless slab.[1159]

7.412 The United States insists that the definitions are based on the application of the like product criteria to the particular facts involved. Where the facts differ the definitions will differ. Thus, what Brazil contends are inconsistencies in where dividing lines were drawn, are differences in the underlying facts.[1160] There is a key difference between the relationship of carbon slabs with CCFRS and the relationship of carbon billets with carbon long products. CCFRS at different stages of processing has a sequential, or feedstock, relationship rather than the horizontal relationship between carbon long products. For example, 100% of carbon slab is further processed into either plate or hot-rolled steel. The sequential relationship continues with other types of CCFRS; the majority of hot-

[1155] Brazil's written reply to Panel question No. 11 at the second substantive meeting.

[1156] Brazil notes that in making like product distinctions between wire and various wire products (rope/cable/cordage and nails/staples/cloth categories), the USITC did note the limited degree of vertical integration between the producers of the upstream (wire) and downstream (various wire products) products. *Views of the Commission* – USITC Report, Vol.I, at 86-87.

[1157] Common Exhibit CC-52 from Brazil's first written submission, pp. 61-62.

[1158] Common Annex A and B from Brazil's first written submission.

[1159] Brazil's written reply to Panel question No. 12 at the second substantive meeting.

[1160] United States' written reply to Panel question No. 11 at the second substantive meeting.

rolled steel is further processed into cold-rolled steel and the majority of cold-rolled steel is further processed into coated steel. Thus, carbon slab is dedicated for processing into hot-rolled steel whereas carbon billets are not dedicated for use into a single type of long product. Instead, carbon billets are used to produce five very different products – hot-rolled bar, rebar, heavy structural shapes, rails, and wire rod. Moreover, none of these five carbon long products produced from carbon billets is further processed into one of the other five carbon long products.[1161] Therefore, carbon billets are not dedicated for use for a single type of carbon long product as occurs for carbon slab; the horizontal relationship also continues between the very different long products. There are other distinctions as well in physical characteristics and manufacturing processes. For example, carbon slabs are typically made from pig iron and not scrap metal whereas almost 100% of carbon billets are made from scrap and scrap substitutes. Thus, there is less variance in purity between slabs with greater variance between billets. All carbon slabs are refined and subject to extensive metallurgical testing. Carbon billets, on the other hand, have a wide degree of variation in quality/purity depending on the type of carbon long product that they will be used to produce. Carbon billets have less sophisticated refinement generally, but may have more extensive testing for certain end-uses. For instance, billet used for rebar has limited metallurgical testing, whereas billet used for certain kinds of specialty bar may have extensive metallurgical testing. This results in differences in the sophistication necessary for the manufacturing processes. Many United States producers of carbon billets produce other carbon long products. However, because of the horizontal relationship between carbon long products, billets may be used to make hot-rolled bar, rebar, heavy structural shapes, rails, and wire rod, but none of these five products is used to make one of the other five. Thus, the integration of the production process is not in the same fashion as the production of CCFRS.[1162]

(iv) Like product definitions used in the anti-dumping and countervailing duty contexts

7.413 Korea recalls that the USITC has never determined that two or more CCFRS products should be treated as a single like product in an anti-dumping or countervailing duty investigation, nor has the USITC found that different CCFRS products are commercially interchangeable with other CCFRS. The USITC, at least, should have explained why the extensive analyses which justified its like product determinations of flat products in past trade remedy cases did not apply to the instant case.[1163] It is instructive that the USITC came to the opposite conclusion regarding the like product in the 1992 *CCFRS Products* anti-dumping/countervailing duty case[1164] based specifically on the fact that they (hot-rolled, cold-rolled, corrosion-resistant, and plate) "differ in physical characteristics and uses" and "the different physical properties of each like product dictate particular end-uses".[1165] [1166]

7.414 New Zealand and Brazil also argue that the aggregation of slab, plate, hot-rolled steel, cold-rolled steel and coated steel into one "like product" group also represents a departure from the USITC's own treatment of these products for the purposes of anti-dumping and countervailing duty investigations. In a number of instances since 1992, the USITC consistently dealt with the discrete steel products comprising the CCFRS category as separate like products. Japan concurs in this argument. In each case the USITC has acknowledged fundamental differences amongst the products

[1161] Hot-rolled bar may be further processed into cold-finished bar, and wire rod may be further processed into wire and nails. However, these downstream products are distinct from each other and from the other products produced from billets (i.e., rebar is not used in the production of hot-rolled bar).

[1162] United States' written reply to Panel question No. 12 at the second substantive meeting.

[1163] Korea's first written submission, paras. 38-40.

[1164] *1992 Certain Flat-Rolled Products*, USITC Publication 2549, pp. 9-17 (Exhibit CC-32). (The USITC established four categories of flat-rolled products for its purposes and included investigation numbers 573-579, 581-592, 594-597, 599-609, 612-619. *See id.*, p. 3.)

[1165] *1992 Certain Flat-Rolled Products*, USITC Publication 2549, pp. 12-15 (Exhibit CC-32).

[1166] Korea's first written submission, para. 50.

in terms of physical properties, uses and interchangeability. In the present case the USITC seems to aggregate or disaggregate products at will. For example, while the USITC considered both semi-finished carbon steel (slab) and finished flat carbon steel products together in the same like product category, it decided to treat semi-finished long products (billets) and semi-finished stainless products as separate from finished products.[1167]

7.415 According to the United States, the complainants' arguments that the USITC should have defined the like product the same as it has in certain prior anti-dumping and countervailing duty investigations fails to recognize that the definitions arrived at in those cases, as in safeguard investigations, are dependent on the imports subject to the particular investigation; thus the definitions have varied.[1168] The starting point for the USITC's like product analysis is the subject imports identified as within the investigation. In the present case, the USITC began with the subject imports which included a range of certain carbon and alloy flat steel and looked for clear dividing lines between the domestic steel that corresponded to these subject imports using well-established factors. Moreover, contrary to the complainants' allegations, the USITC was not required to begin with like product definitions found by the USITC in prior anti-dumping or countervailing duty cases, that may have been appropriate definitions in different contexts based on particular statutes and record, and make an array of comparisons. The anti-dumping and countervailing duty investigations generally begin with a more narrow starting point for the scope of subject imports so the analysis frequently involves whether the domestic like product should be defined more broadly than the subject imports, i.e., it starts small and looks at whether to broaden rather than starts large and looks where to divide. The complainants also fail to acknowledge that the anti-dumping and countervailing duty investigations have a purpose that is different from that in a safeguards investigation.[1169]

7.416 Japan responds that one might argue that safeguards investigations permit a broader definition of the industry than anti-dumping and countervailing duty investigations, given that the Agreement on Safeguards contains both "like" and "directly competitive" whereas the Anti-Dumping and Subsidies Agreements contain only the word "like". However, in this case, the USITC relied only on "like" and the concept of "like" is understood to be even more narrowly construed when it is juxtaposed against directly competitive. If anything, the USITC's decision should have been narrower. Furthermore, given the discussion above demonstrating that safeguards may be applied in only the most extraordinary of circumstances, Japan takes issue with the notion that the definition of like product may be broader in the safeguards context than in the anti-dumping and countervailing duty context.[1170]

7.417 According to Korea, the stated premise of the USITC's discussion of the legal relevance of anti-dumping and countervailing duty like product determinations is that the fundamental purpose of Section 201 is to protect domestic industries. Therefore, according to the USITC, it has more discretion in defining the like product more broadly than under countervailing and anti-dumping duty provisions. The USITC's statement of the object and purpose of Section 201 is not consistent with the object and purpose of the Agreement on Safeguards. The purpose of the Agreement on Safeguards, which is to be contrasted to the purpose of a corresponding domestic law (Section 201 in this case), is not to protect the domestic industry, but to provide a framework within which a safeguard measure

[1167] New Zealand's first written submission, paras. 4.68-4.70; Brazil's second written submission, para. 12; Japan's first written submission, paras. 131-136.

[1168] United States' first written submission, para. 128, citing Japan's first written submission, para. 125-148; Korea's first written submission, paras. 34-44.

[1169] United States' first written submission, paras. 128-130.

[1170] Japan's second written submission, para. 38.

may be applied. Hence, the USITC's like product decisions are seriously compromised.[1171] [1172] Korea also argues that the USITC actually relied extensively and explicitly on its factual findings in prior anti-dumping and countervailing duty decisions regarding the products and production processes but the USITC came to directly contrary conclusions based on the same factual findings.[1173] The method of the like product analysis is actually substantially similar as well. In both cases the USITC is seeking "clear dividing lines among possible like products" and applying similar factors to the facts of each case. However, the result of like product determinations for the current Section 201 steel investigation was obviously different from those in other investigations: in the anti-dumping cases beginning in 1992 and continuing through determinations made as recently as 2002 in the case of cold-rolled steel from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela[1174], the USITC has always determined that the "clear dividing lines" existed between hot-rolled, cold-rolled, corrosion-resistant, and plate.[1175] Korea concludes that the complainants have established that there are significant inconsistencies between the United States' approach in the anti-dumping and countervailing duty context and this safeguards discussion. In fact, the ten years of consistent precedent was brought specifically to the attention of the USITC. The USITC dismissed their relevance on grounds that are not consistent with the Agreement on Safeguards. The United States also failed to offer the Panel a legal basis to exclude the relevance of those findings.[1176] Therefore, those determinations provide significant evidence of the proper like product in this case.[1177]

(v) Relevance of like product definitions in previous safeguards investigations

7.418 The United States argues that, while the complainants rely on like product definitions in certain anti-dumping and countervailing duty investigations, they ignore the similar *1984 Steel* safeguards case, which involved carbon flat steel at various stages of processing similar to those in this investigation.[1178] The USITC defined like products in a manner similar in many respects to the present safeguards case and different from contemporaneous anti-dumping and countervailing duty decisions. Specifically, in *1984 Steel*, the USITC defined nine like products, each as discrete categories of closely-related products, that were like or directly competitive with the imported articles. Three of these categories involved carbon flat products: semi-finished, which included slabs as well as ingots, blooms, billets, and sheet bars; plate; and sheet and strip, which included hot-rolled, cold-

[1171] USITC Report, Vol. I, footnotes 69, 73-76, 80-82, 84-85, 95-102, 104, 109-117, 125, 127, 129-131, 947, 949-952 (Exhibit CC-6).

[1172] Korea's second written submission, paras. 51-52.

[1173] *See e.g.*, USITC Report, footnotes 69, 73-76, 80-82, 84-85, 95-102, 104, 109-117, 125, 127, 129-131, 947, 949-952 (Exhibit CC-6).

[1174] *Certain Cold-Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela*, Invs. Nos. 701-TA-423-425 (Final) and 731-TA-964, 966-970, 973-978, 980, and 982-983 (Final), USITC Publication 3551 (November 2002).

[1175] Korea's second written submission, paras. 54-57.

[1176] United States' first written submission, paras. 85-90. The distinction made between safeguards and anti-dumping is simply the US argument that the purposes of the Agreements are different, so "like product" must be interpreted differently. *See* United States' first written submission, para. 108; USITC Report, Vol. I, pp. 30-31 (Exhibit CC-6).

[1177] Korea's second written submission, para. 60.

[1178] The 1984 Steel investigation included such carbon flat products as slab, hot-rolled, plate, as well as billets/blooms, wire rod, wire, railway-type products, bars, structural shapes, and pipes and tubes. USITC Publication 1553 at 10 (US-24).

rolled and coated steel (each of which had been defined as separate domestic like products in anti-dumping and countervailing duty investigations).[1179]

7.419 The USITC recognized in the present case that there had been a number of technological changes in the steel industry since the *1984 Steel* case. The advent of the continuous casting process for the production of slab rather than the ingot teeming process had resulted in less similarity among the semifinished products (slabs, ingots, blooms, and billets) and processes and more continuity in the production processes between slab and hot-rolled products.[1180] Moreover, the evidence demonstrated that the distinction between the production of a semifinished and hot-rolled product had been further blurred due to the increased use of electric arc furnaces that produce "thin slabs" that continue immediately into hot-rolled production. The USITC also recognized in this investigation that in defining separate like products for plate and sheet/strip, the USITC in *1984 Steel* focused in part on differences in production. However, the evidence in this investigation shows that the production of plate, similar to the production of sheet/strip, has become more continuous, as the same or similar hot-strip or Steckel mills are often used to make both. Thus, the USITC found that the production processes and equipment for plate and sheet/strip products have become similar and slab production is less distinct with more continuity in the processing to the next hot-rolling stage than at the time of the *1984 Steel* safeguards case. Contrary to the complainants' proposals that the USITC should have applied certain like product definitions from anti-dumping and countervailing duty investigations, it is clear that if any other definitions should have been taken into account it would be those made for a safeguards case under the same provisions that also had a similar diversity of products within the investigation.[1181]

7.420 Korea responds that the United States' reasoning is circular. As the United States admits, the definition of like product utilized by the USITC in Section 201 is guided by the purpose of Section 201 – which is, according to the USITC, to protect domestic productive resources.[1182] Since this "purpose" is found in the Trade Act of 1974, any "guidance" to be gained from the USITC's 1984 safeguards decision as to "clear dividing lines" would be circular. The object and purpose of the Agreement on Safeguards, as opposed to the Trade Act of 1974, provides no basis to "move" the clear dividing line between like products that has been established in ten years of anti-dumping and countervailing duty cases defining "like" product.[1183]

(vi) Separate remedy for slab

7.421 New Zealand argues that although both the USITC and the President grouped slab together with a range of other steel products, a separate remedy recommendation and a separate remedy determination were made for slab: a tariff rate quota instead of a tariff. This rather novel approach of differentiating the remedy that it applied to what are supposedly "like" products represents an implicit acknowledgement that they are not really "like".[1184] Similarly, according to China and the European Communities, a final demonstration of the unsoundness of the United States' approach is that the

[1179] USITC Publication 1553, pp. 10 and 15-23 (US-24).

[1180] USITC Report, pp. OVERVIEW-8-9. complainants' attempts to distinguish slab from CCFRS in other stages of processing fails to recognize that hot-rolled steel and cold-rolled steel also are primarily feedstocks or "semi-finished products" and the fact that technological advances have resulted in less similarity among such "semi-finished products" as slab, billets, ingots, and blooms than at the time of 1984 Steel. Japan's first written submission, paras. 81 and 114; Brazil's first written submission, para. 81; New Zealand's first written submission, paras. 4.60-4.62.

[1181] United States' first written submission, paras. 131-135.

[1182] USITC Report, Vol. I, pp. 30, 31 (Exhibit CC-6).

[1183] Korea's second written submission, para. 46.

[1184] New Zealand's first written submission, para. 4.70.

USITC Report (and the Presidential Proclamation) determine a separate remedy for slab; one of the products aggregated into the CCFRS like product category. The different remedy cannot be anything other than an acknowledgement that this product is both physically different from other products in the category, and that it also faces vastly different competitive conditions.[1185]

(b) Tin mill products

(i) General

7.422 Norway argues that the United States failed to correctly identify the domestic products which are "like or directly competitive" with the specific imported product in relation. Japan also challenged the like product determination given that the USITC failed to agree on a definition, meaning the United States failed to correlate the injury determination, like product definition, and the safeguard measure.[1186]

7.423 The United States insists that the USITC considered the facts, using long established factors and looked for clear dividing lines among the various types of certain carbon and alloy flat steel corresponding to imports subject to this investigation. The methodology employed by the USITC is unbiased and objective. The USITC's like product definitions regarding tin mill products are consistent with Articles 2.1 and 4.1 of the Agreement on Safeguards and should be upheld by the Panel.[1187]

7.424 The United States recalls that the USITC started this analysis with the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). The USITC then applied its long established factors in considering whether to analyse specific types of CCFRS separately or as a whole. After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy flat products, four Commissioners subdivided this category into three separate like products, one of which was defined as tin mill products, and two Commissioners determined that the steel in this category, including tin mill, should be defined as a single like product.[1188] [1189]

7.425 According to the United States, tin mill products are cold-rolled steel that have been coated with tin or chromium or chromium oxides.[1190] In defining tin mill products as a separate like product, Commissioner Miller found that the cold-rolled feedstock used to make tin mill products generally was further processed than was required to produce other finished products although she recognized that tin mill products shared common manufacturing processes with CCFRS and GOES.[1191]

[1185] European Communities' first written submission, para. 255; China's first written submission, para. 207.

[1186] Norway's first written submission, para. 216; Japan's first written submission, paras. 153-157.

[1187] United States' first written submission, para. 153.

[1188] Four Commissioners found clear dividing lines so as to define three separate like products within this category, and two Commissioners determined that this entire category was a single like product. Commissioners Okun, Hillman, Miller, and Koplan defined the following three separate like products: 1) certain carbon flat-rolled steel ("CCFRS"); 2) grain-oriented electrical steel ("GOES"); and 3) tin mill products. Commissioners Bragg and Devaney defined a single like product, consisting of carbon and alloy flat products (including slab, hot-rolled sheet and strip, cut-to-length plate, cold-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products).

[1189] United States' first written submission, para. 143.

[1190] USITC Report, p. FLAT-4.

[1191] USITC Report, pp. 48-49.

Commissioner Miller also found that tin mill products were overwhelmingly sold directly to end-users, were sold almost exclusively by long-term contract to those end-users[1192], and were used in the production of containers, packaging and shipping materials.[1193] She found that domestic and imported tin mill products shared the same physical attributes, generally were interchangeable, and were primarily sold to end-users under contract for the same uses.[1194] In defining a single like product for carbon and alloy flat products, including tin mill, Commissioner Bragg found that these carbon flat products share certain basic physical properties, possess a common metallurgical base, and travel through similar channels of distribution.[1195] She recognized that there was limited overlap in end-uses, but found that production was shifted among these products. In defining a single like product for all flat products, including tin mill, Commissioner Devaney found that there was a continuous manufacturing process for flat steel products. Regarding tin mill steel, he indicated that it was dedicated at the inception of production as tin mill steel and used cold-rolled steel as its feedstock.[1196]

7.426 Norway argues that on the basis of WTO jurisprudence in other cases, it can be deduced that the United States should at least have looked at the following elements: (i) the physical properties of the products; (ii) the extent to which products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.[1197]

7.427 The United States contends that Norway's allegations regarding the USITC's like product definitions involving tin mill products are based on an erroneous interpretation of what factors the USITC was either "required or not permitted" to consider in making its like product decisions.[1198] Norway fails to recognize the factors suggested by the Working Party on *Border Tax Adjustments*, with respect to tax adjustments, were for a different purpose, and that "[n]o one approach to exercising judgement will be appropriate for all cases".[1199] Thus, the USITC was not required to consider the four factors derived from the Working Party that are urged by Norway.[1200]

(ii) Like product criteria

Physical properties

7.428 Norway submits that the majority of the Commissioners defined the domestic industry as "all producers of tin mill products"[1201], thus making no distinctions between the various products included in this group. The two other Commissioners employed even broader groupings related to all sorts of flat products. In Norway's view, a flat product which is not coated with "tin" cannot be "like" another product which is so coated. The first minimum requirement is thus that the products be coated. Also, thicknesses and surfaces vary greatly depending on the end-use of the product.[1202] This is well

[1192] USITC Report, p. 48; USITC Report, Table FLAT-18.
[1193] USITC Report, Table OVERVIEW-2 and p. FLAT-4.
[1194] USITC Report, p. 49.
[1195] USITC Report, pp. 272-273.
[1196] USITC Report, pp. 36, n.65, 38, n.83, 43, n.126, 45, nn. 137 and 139.
[1197] Appellate Body Report, *EC – Asbestos*, para. 101.
[1198] Norway's first written submission, paras. 222-232.
[1199] Appellate Body Report, *EC – Asbestos*, para. 101.
[1200] United States' first written submission, para. 146.
[1201] USITC Report, Vol. 1, footnote 367. (Exhibit CC-6)
[1202] Tin mill products is the description of mainly 6 different product categories with sub-divisions, made in tin mills:
1. Electrolytic coated tinplate – single reduced cold rolled, batch-annealed steel with a tin coating

exemplified by the specific exclusions provided for in the initial request by the USTR[1203] where five categories of tin mill products are excluded from the request based on their coating (chromium), thickness, width, length and chemical composition.[1204] Further examples of the different products comprised within this group of products may be found in the later exclusions provided by the USTR, where ten different tin mill products were excluded from the United States' measures on 22 August 2002.[1205] Were one to look at flat products globally, as two Commissioners did, one would

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1a. Electrolytic coated tinplate – single reduced cold rolled, continuos-annealed steel with a tin coating.
2. Electrolytic coated tinplate – double reduced cold rolled, batch-annealed steel with a tin coating.
2a. Electrolytic tinplate – double reduced cold rolled, continuos-annealed steel with a tin coating.
3. Tin free steel (TFS) – single reduced cold rolled, batch-annealed steel with chromium coating.
3a.Tin free steel (TFS) – single reduced cold rolled, continuos-annealed steel with chromium coating.
4. Tin free steel (TFS) – double reduced cold rolled, batch-annealed steel with chromium coating.
4a. Tin free steel (TFS) – double reduced cold rolled, continuos-annealed steel with chromium coating.
5. Polymer coated steel – single reduced cold rolled, batch-annealed steel with chromium coating, covered with a polymer top coating.
5a. Polymer coated steel – single reduced cold rolled, continuos-annealed steel with chromium coating, covered with a polymer top coating.
5b. Polymer coated steel – double reduced cold rolled, batch-annealed steel with chromium coating, covered with a polymer top coating.
5c. Polymer coated steel – double reduced cold rolled, continuos-annealed steel with chromium coating, covered with a polymer top coating.
6. Black plate – single reduced cold rolled, batch-annealed steel, temper rolled with no coating.

Thickness – Gauge – of the Tin mill products is in following range:
Tinplate: 0.10 mm – 0.375 mm.
Flat rolled tinplate: 0.375 mm – 0.90 mm.

Tempergrade – hardness – of the Tin mill products is in following range:
Batch annealed: T1 – T 2 – T 3 – T 4.
Continuos annealed: T 3 – T 4 – T 5 – T 6 – T 7.

Dimensions of the Tin mill products:
Plate: Rolling width min. 600 mm – max. 1100 mm. y)
Cut length min. 485 mm – max. 1180 mm.
Coil: Width min. 600 mm – max. 1180 mm.
Slitted: Width min. 25 mm – max. 510 mm.

Different surface structure.
Bright, Light stone, Stone, Matt, or Silver

End use of Tin mill products:
Food packaging.
Technical packaging. (Paint, lacquers, oil etc.)
Beer and beverage cans.
Aerosol cans.
Closures. (Jars for jam etc.)
Non – packaging applications. (Trays, oil-filters, convenience goods etc.)

[1203] Exhibit CC-1.
[1204] United States Trade Representative's (USTR) request to the United States International Trade Commission (ITC) to initiate a safeguard investigation under Section 201 of the Trade Act of 1974, at Annex II. (Exhibit CC-1).
[1205] USTR, "List of additional products to be excluded from the Section 201 safeguards measures, as established in Presidential Proclamation 7529 of March 5, 2002", August 22, 2002, available at the USTR

see that there are stark differences in thicknesses, shape and finished stage between e.g. slabs and tin mill products.[1206]

7.429 In the United States' view, Norway's challenge is directed not only at the definition of a single like product for carbon flat products, but also to the definition of tin mill as a separate like product. Norway, on one hand, points out that tin mill products could be defined as 6 to 13 different like product categories and, on the other hand, refers to the different product exclusions requested and granted to infer that each should have been defined as a separate like product. Thus, the issue for Norway goes beyond whether the flat product is coated with "tin". Moreover, contrary to Norway's allegations, the level of product distinction considered necessary for a product exclusion does not warrant finding dozens of like products. The USITC looks for clear dividing lines in conducting its like product analysis which is far from the narrow or microscopic lines that Norway urges. While Norway alleges that there are different products within the tin mill group, it is not clear how narrow Norway would have the USITC consider the uses for the product. Norway also seems to ignore the fact that the USITC has no authority to exclude imports from those identified in the request or petition as subject to investigation.[1207]

End-use

7.430 Norway argues that the major end-uses of tin plate are the manufacture of welded cans. There are, however, considerable differences between the end-uses depending on the thickness of the tin mill plates. Oil filters for cars and soft drink cans require different thicknesses. The type of production of the buyer will thus require different types of tin mill products. In this category, as defined by the USITC and the President, chromium coated products are also included. The USITC explains, in footnote 403 of its report, that chromium coated products have a different use from tin coated products, due to differences in their surfaces. Tin-plate will be used for the can itself, because of its shinier surface (which also makes it more suitable for paint) while chromium coated plates are employed for the bottoms of cans. The USITC, in its discussion of the domestic industry producing tin mill products, does not distinguish between the different products within the group. Its brief discussion is premised on an assumption that all imports are a single article that is "like" the domestically produced products. End uses is only referred to in passing, stating that "[T]in mill products are used almost exclusively in the production of containers, such as beverage cans, packaging and shipping materials. They are unsuitable for other end-uses".[1208] Norway notes that it is, nevertheless, clear from this statement that tin mill products are not interchangeable with other flat products. Norway also points out that the procedures for exclusion request to be granted by the USTR as mandated in the Presidential Proclamation, details that the USTR will consider *inter alia* whether the product is currently being produced in the United States, whether substitution is possible and whether qualification requirements affect the requestor's ability to use domestic products.[1209] In light

website (Exhibit CC-92). This list shows that 10 different tin mill products, with specific product specifications, are excluded.

[1206] Norway's first written submission, para. 223.

[1207] United States' first written submission, para. 148.

[1208] USITC Report, Vol. I, at pp. 48-49. The citation is from p. 48, with original footnotes omitted. (Exhibit CC-6)

[1209] "Procedures for Further Consideration of Requests for Exclusions of Particular products from Actions With Regard to Certain Steel products Under Section 203 of the Trade Act of 1974, as Established in the Presidential Proclamation 7529 of March 5, 2002", Federal Register/ Vol. 67, N° 75/ 18 April 2002, p. 19307 (Exhibit CC-19).

of the exclusions granted *ex post* it would seem that the original determination of one single like product is flawed.[1210]

7.431 In applying the traditional like product factors to the general category of carbon and alloy flat steel, four Commissioners found a clear dividing line between CCFRS and tin mill products.[1211] In particular, they found that cold-rolled feedstock used to make tin mill products was further processed than required to make CCFRS steel. In addition, tin mill is used, for example, for the production of containers, packaging, and shipping materials. In contrast, CCFRS was used primarily in production for the automotive and construction industries. Tin mill steel was overwhelmingly sold directly to end users, almost exclusively under long-term contracts, whereas the majority of CCFRS was internally transferred for use in later stages of processing CCFRS.[1212]

Consumer perception

7.432 Norway submits that consumers of tin mill products, here understood as end-users of the imported products and the like domestic products, should perceive that plates of different thicknesses and with different coatings have different uses. This is not discussed by the USITC in its report.[1213]

Tariff classification

7.433 Norway submits that, in the United States, the tin mill products covered by the measure were (before the imposition of extra duties) divided into four broad customs categories (7210.11.0000; 7210.12.0000; 7210.50.0000; and 7212.10.0000).[1214] This indicates that there could be several different "like" products. The different customs classifications are not discussed by the USITC in its report in respect of tin mill products. The only reference in passing can be found in footnote 176[1215] where reference is made to the fact that the USITC did not find consideration of customs treatment to be a useful factor for the carbon and alloy flat products in this investigation. In Norway's view, the United States failed to identify the domestic products that are "like or directly competitive" to the specific imported product or products, by not making comparisons – at a minimum – against the criteria for establishing likeness acknowledged in WTO jurisprudence. The findings of the United States thus fall short of the requirement imposed by Article 2.1 of the Agreement on Safeguards that the competent authorities determine that the domestic articles, the producers of which they want to group into one domestic industry, are either a "single like product" or one or more directly competitive products compared with specific imports.[1216]

7.434 In response, the United States recalls that, as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence".[1217] The tariff classifications are interrelated with the physical properties/characteristics criterion which the USITC clearly considered and found to be an important factor in its like product definitions. The USITC exercised its discretionary judgement to determine which factors were useful, and which were not, in examining the particular facts of this investigation. While Norway seems to allege that the USITC should have defined its like products using tariff classifications, the evidence does not comport with Norway's suggestions for 6 to 13 or

[1210] Norway's first written submission, paras. 224-228.
[1211] United States' first written submission, paras. 143-144; USITC Report, pp. 48-49.
[1212] United States' written reply to Panel question No. 27 at the first substantive meeting.
[1213] Norway's first written submission, para. 229.
[1214] USITC Report, Vol. I, at p. 10 (Exhibit CC-6).
[1215] USITC Report, Vol. I, at p. 49 (Exhibit CC-6)
[1216] Norway's first written submission, paras. 230-232.
[1217] Appellate Body Report, *EC – Asbestos*, para. 102.

more like products. There are four tariff classifications at the ten-digit level and two at the four-digit level covering tin mill products.[1218]

Production processes

7.435 Norway submits that because Congress intended Section 201 to "protect the productive resources of domestic producers", rather than ameliorate unfair trade practices, the USITC has considered "both the productive facilities and processes and the markets for these products" in making its like products determination in the safeguards context, in addition to the like product factors.[1219] According to Norway, this clearly goes beyond the factors permitted by the Appellate Body is *US – Lamb* as other products produced at the same facilities should not be included when defining the domestic industry producing the like product. The six commissioners employed different groupings when considering tin mill products. Of the commissioners treating "tin mill products" as one "like product category", only one voted in favour of the measure. The two other commissioners voting in favour of imposing a safeguards measure employed broader product categories.[1220] The President, when determining that measures should be imposed on a category he termed "tin mill products", based himself on the views of three commissioners looking at a domestic industry producing: (i) tin mill products; (ii) carbon and alloy flat products; and (iii) all flat products respectively.[1221]

7.436 The United States submits that contrary to Norway's contentions, the Appellate Body in *US – Lamb* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products".[1222]

(iii) Identification of domestic producers

7.437 Norway also argues that the United States failed to appropriately define the domestic industry of the like product and therefore acted inconsistently with its obligations under Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[1223] The USITC Report does not explain who are the producers of the like product. The tables are deleted from the report.[1224] Norway requested the information of table FLAT-1 during the consultations, but no such information was forthcoming. Norway is, thus, unable to ascertain whether there, indeed, are domestic United States' producers of any specific tin mill products and is also unable to ascertain whether there indeed exists an industry injured by imports or the relevant ratios of imports to domestic production. This lack of information on the relevant domestic industry (companies and production) is a clear breach of Article 4.1(c) of the Agreement on Safeguards. When all informative tables are excluded regarding the domestic industry producing the like product, there is no way of ascertaining how the determinations are made, thus making it impossible to investigate a possible wrongdoing by the United States. As such, this is also a breach of Article 3.1 of the Agreement on Safeguards, and this information cannot be regarded as confidential information under Article 3.2. There is also a failure to ensure that only producers of domestic articles that are "like or directly competitive" to the specific imported product are grouped together in one domestic industry for the purpose of the investigation and determination. In respect of tin mill products, Norway refers to the USITC Report, Vol. 1 at

[1218] United States' first written submission, para. 149.
[1219] USITC Report, pp. 30-31.
[1220] Commissioner Bragg, employed a category of "carbon and alloy flat products" (USITC Report, p. 272) and Commissioner Devaney employed a category of "all flat products", see USITC Report, Vol. I, p. 36, footnote 65. (Exhibit CC-6)
[1221] Norway's first written submission, paras. 216, 219-221.
[1222] Appellate Body Report, *US – Lamb*, para. 94, footnote 55.
[1223] Norway's first written submission, para. 238.
[1224] See USITC Report, p. I-72 and the asterisk for table FLAT-1 in volume II.

page 72, where it is stated that an unspecified number of tin mill producers also produce a variety of other types of CCFRS, including slab, and also hot-rolled end products (slabs). There is no evidence that operating results from these parts of the firms have been singled out when addressing the grouping "tin mill products". There is, thus, a strong presumption that also for tin mill products, producers and facilities producing products that are not "like" have been included in the "domestic industry", contrary to the requirement of the Agreement on Safeguards.[1225]

7.438 The United States responds that Norway's contentions that the USITC "exclud[ed] all informative tables regarding the domestic industry producing the like product"[1226] is erroneous and grossly misleading. The essence of Norway's allegation is that because the USITC did not release confidential responses of individual producers of tin mill products, it must be assumed that the USITC did not limit its analysis to producers of tin mill products. This allegation is only relevant to the determination of Commissioner Miller, since each of the definitions of like product and corresponding domestic industry made by Commissioners Bragg and Devaney considered data for the carbon and alloy flat products and not the tin mill specific data. This complaint centres on one table (Table FLAT-1) in the USITC Report which lists individual domestic producers responding to the USITC questionnaire and provides their individual production data by type of carbon and alloy flat steel that they produce. Individual firm data provided in response to the USITC questionnaires and the firms responding to the USITC questionnaires is considered confidential business information and not publicly released. Rather, the individual firm data generally is publicly released in aggregate form as it was here. Norway ignores the fact that individual tin mill production data was combined and publicly released in aggregate form in Table FLAT-18.[1227] Contrary to Norway's allegations, the fact that the USITC has not publicly released the identity of those responding to the questionnaires or the individual producer data does not provide a "strong presumption" that products other than tin mill products were included in USITC's domestic industry analysis.[1228] Norway fails to show how release of the individual firm data would show anything more than whether the USITC can simply add correctly. The Panel need not only have to rely on the USITC's representations alone concerning the proper aggregation of appropriate data on tin mill production. Parties to the underlying safeguards investigation did not challenge the USITC's aggregation of the tin mill data, including counsel to parties that had access to the contested table along with all other confidential business information, under Administrative Protective Order.[1229] [1230]

7.439 Norway responds that the USITC Report states that an unspecified number of tin mill producers also produce a variety of other types of CCFRS, including slab and also hot-end production (slabs).[1231] The crucial importance of this integration is the failure of the United States to ensure separation of operating costs and results for tin mill products as separate from CCFRS because of the diverging "like product analyses" involved.[1232] There is no evidence that the operating results from these parts of the firms have been separated out when establishing which firms are the "producers of the like product".[1233] When this is not done, one gets an incorrect assessment of injury to the tin mill industry, as the alleged injury may be caused to other parts of the operations of these firms. This is

[1225] Norway's first written submission, paras. 233-237.
[1226] Norway's first written submission, para. 239.
[1227] USITC Report, Tables FLAT-10, FLAT-18, FLAT-26, FLAT-46, FLAT-57, FLAT-58, FLAT-59, FLAT-63, FLAT-75, FLAT-76, FLAT-78, FLAT-79, FLAT-80, and FLAT-C-8.
[1228] Norway's first written submission, para. 237.
[1229] Under US law, confidential business information is released to counsel for parties under administrative protective order.
[1230] United States' first written submission, paras. 150-154.
[1231] USITC Report, Vol. I, p. 72.
[1232] Norway's written reply to Panel question No. 20 at the second substantive meeting.
[1233] Norway's first written submission, paragraph 236.

what happened for the analyses by at least Commissioners Bragg and Devaney. Norway still cannot understand why the names of the tin mill producers (as the USITC defines the industry) are confidential (and the United States has given no explanation of why this is necessary,) and does consider that this in itself represents a breach of Article 4.1(c) of the Agreement on Safeguards. Norway also notes that whatever counsels to individual firms may or may not know[1234] is irrelevant to the United States' obligations under the Agreement on Safeguards towards other Member States to provide a report that details all relevant issues of law and fact.[1235]

7.440 Brazil adds that three of the principal producers of tin mill products – Bethlehem Steel, Weirton Steel, and US Steel are fully integrated mills producing a full range of CCFRS products, including slab.[1236] The fourth producer, Ohio Coatings, is a joint venture and, in effect, the tin mill line of vertically integrated Wheeling-Pittsburgh Steel, which produces a full range of CCFRS products and is 50% owner of Ohio Coatings.[1237] The fifth producer, US Steel-Posco is a joint venture between United States Steel Corporation and Posco of Korea, both vertically integrated producers of a full range of CCFRS products. However, US Steel-Posco is not vertically integrated. It has no raw steel making capacity, no slab production and no hot strip mill. Rather, it purchases domestic and imported CCFRS products and processes these products through cold rolling, galvanizing and tin mill lines.[1238] [1239]

7.441 The United States responds that, indeed, a number of tin mill producers also produce types of CCFRS. However, the United States does not agree with Norway's assertions that data for production of other types of steel were included in the data for tin mill products. Norway's contentions are erroneous. The essence of Norway's allegation is that because the USITC did not release confidential responses of individual producers of tin mill products, it must be assumed that the USITC did not limit its analysis to producers of tin mill products. Norway fails to recognize that the reason why this issue is only relevant to the determination of Commissioner Miller is because Commissioners Bragg and Devaney did not define tin mill as a separate like product. Thus, the fact that Commissioners Bragg and Devaney did not separate out tin mill data is because they did not find tin mill products to be a separate like product/domestic industry. They defined carbon and alloy flat steel, including tin mill, as a single domestic like product and, appropriately, looked at data for carbon and alloy flat products and not the tin mill-specific data. Norway's allegation centres on one table (Table FLAT-1) in the USITC Report which lists individual domestic producers responding to the USITC questionnaire and provides individual production data by type of carbon and alloy flat steel that each produces. Individual firm data provided in response to USITC questionnaires and the firms responding to the USITC questionnaires is considered confidential business information and not publicly released. Rather, the individual firm data generally is publicly released in aggregate form as it was here. The United States notes that it is not the only country that withholds the names of questionnaire respondents. Norway ignores the fact that individual tin mill production data was combined and publicly released in aggregate form in a number of tables, including Table FLAT-26, which includes financial data and operating results.[1240] Contrary to Norway's allegations, the fact that the USITC has not publicly released the identity of those responding to the questionnaires or the

[1234] United States' first written submission, paragraph 154

[1235] Norway's second written submission, paras. 73-75.

[1236] *See Iron and Steel Works of the World* (14th Edition), Metal Bulletin Books Ltd. (2001), pp. 647-48, 714-715 and 717-718.

[1237] Ibid. at 693.

[1238] Ibid at 716.

[1239] Brazil's written reply to Panel question No. 20 at the second substantive meeting.

[1240] USITC Report, Tables FLAT-10, FLAT-18, FLAT-26, FLAT-46, FLAT-57, FLAT-58, FLAT-59, FLAT-63, FLAT-75, FLAT-76, FLAT-78, FLAT-79, FLAT-80, and FLAT-C-8.

individual producer data does not provide a "strong presumption" that products other than tin mill products were included in the USITC's domestic industry analysis, nor may any presumption, strong or otherwise, be drawn.[1241] The United States submits that this complainant fails to show how release of the individual firm data would show anything more than whether the USITC can correctly tally the individual company information. In the USITC's questionnaire, domestic producers were clearly instructed to provide separate data for tin mill. Each domestic producer was required to certify the truthfulness of its questionnaire responses. The Panel need not rely solely on the USITC's representations concerning the proper aggregation of appropriate data on tin mill production. Parties to the underlying safeguards investigation had access to all of the individual company data; this included counsel to parties that had access to the contested table along with all other confidential business information, under administrative protective order.[1242] None of them challenged the USITC's aggregation of individual company data on tin mill material. The USITC is confident that the tin mill data provided in the USITC Report does not include data for other types of steel.[1243]

(c) Welded pipe

(i) General

7.442 Korea and Switzerland argue that for the category of welded pipe products, the USITC acknowledges that "welded pipe encompasses a range of products, including both commodity and speciality products"[1244], but analysed neither the various types of welded tubular products nor the different end-uses of those where "the various forms of welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas and other fluid".[1245] It declined to identify specific products by pointing to: (i) the common physical properties and characteristics of those products; (ii) their common end-use; (iii) the customs classification; and (d) consumer perceptions.[1246]

7.443 The United States insists that the USITC considered the facts present in this investigation using long established factors and looked for clear dividing lines among the various types of certain carbon and alloy pipe and tube subject to this investigation. The methodology employed by the USITC is unbiased and objective. The USITC's definition of certain welded pipe as a single like product is consistent with Articles 2.1 and 4.1 of the Agreement on Safeguards and should be upheld by the Panel.[1247] The USITC started this analysis with the range of steel broadly categorized as certain carbon and alloy pipe and tube, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy pipe and tube, the USITC found clear dividing lines so as to delineate four separate like products.[1248] The USITC found that domestic certain welded pipe was like the corresponding

[1241] Norway's first written submission, para. 237.

[1242] Under US law, confidential business information is released to representatives for parties, usually outside counsel and economic consultants, under administrative protective order.

[1243] United States' written reply to Panel question 20 at the second substantive meeting.

[1244] USITC Report, Vol. I, p. 383.

[1245] USITC Report, Vol. I, pp. 154-155 (emphasis added) (Exhibit CC-6).

[1246] Korea's first written submission, paras. 61; Switzerland's first written submission, paras. 207-208.

[1247] United States' first written submission, para. 171.

[1248] Four Commissioners found clear dividing lines and defined four separate certain carbon and alloy pipe and tube like products from this category, and two Commissioners divided this category into three separate like products. Commissioners Okun, Hillman, Miller, and Koplan defined the following four separate like products: 1) welded pipe, other than OCTG ("certain welded pipe"); 2) seamless pipe, other than OCTG; 3)

imported certain welded pipe.[1249] The USITC applied its long established factors in considering whether there existed clear dividing lines between specific types of welded pipe.[1250] The USITC found that certain welded pipe included tubular products that have a weld seam that runs either longitudinally or spirally along the length of the product. Welded pipe is used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. Thus, it is used to transport liquids at or near atmospheric pressure rather than for high pressure containment.[1251] The various types of welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[1252] Welded pipe is generally produced on electric resistance weld (ERW) mills. The USITC found that the various forms of welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas, and other fluids at or near atmospheric pressure.[1253]

7.444 The European Communities submits that the United States has not adequately responded to the specific arguments why the products grouped as certain tubular products were not like due to their different physical properties and functions. On pages 147 and 148 of the USITC Report, the USITC did not do more than asserting that "there are four domestic industries producing articles like the corresponding imported articles subject to investigation within the tubular products category". The other reference, on page 158, after a discussion as to whether the domestic industry producing FFTJ (*sic*) should be defined as a separate industry, the USITC simply repeated its previous conclusion that "there are four domestic industries producing articles like or directly competitive with the corresponding imported articles subject to investigation within the tubular products category", although with a puzzling extension to the broader concept of "directly competitive" products without any supportive analysis between pages 147 and 157. This is neither a sufficient like nor directly competitive product analysis, because it is not based on a reasoned consideration of all relevant criteria as laid out above. Specifically, as can be learned from Chapter 73 of the HS, which is contained in exhibit CC-105, internationally agreed customs classifications at the four and six-digit level separate welded pipe on the basis both of size and function.[1254] This and all the arguments made by Korea and Switzerland in this respect, which the European Communities adopts, further corroborates that the products bundled as welded pipe are not "like or directly competitive".[1255]

7.445 The United States submits that no importance should be attached to the reference to "directly competitive" with respect to the USITC's consideration of welded tubular products. The USITC clearly made a finding for each of the four tubular products on the basis of a like product analysis and not on the basis of a directly competitive product analysis.[1256] Moreover, there is a footnote to this

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OCTG, welded and seamless; and 4) fittings, flanges, and tool joints. Commissioners Bragg and Devaney defined the following three separate like products: 1) carbon and alloy welded tubular products (including welded tubular other than OCTG and welded OCTG); 2) carbon and alloy seamless tubular products (including seamless tubular other than OCTG and seamless OCTG); and 3) carbon and alloy fittings, flanges, and tool joints.

[1249] USITC Report, p. 147, footnote 893. This issue was not disputed in the underlying proceeding.

[1250] USITC Report, pp. 147-157.

[1251] USITC Report, p. TUBULAR-2.

[1252] Certain welded pipe used in the movement of oil and gas is produced to standards set by American Petroleum Institute (API), while many other forms of certain welded pipe are produced to standards set by the American Society for Testing and Materials (ASTM) and the American Water Works Association (AWWA).

[1253] United States' first written submission, paras. 156-157

[1254] Paras. 73.05 and 73.06.

[1255] European Communities' second written submission, paras. 283-285.

[1256] USITC Report, p. 147.

sentence in which the USITC explicitly states that it did not make findings on the basis of a directly competitive product analysis.[1257] The USITC's findings on the basis of a like product, and not directly competitive product, analysis for each of these four like products is clearly demonstrated in its discussion, its findings section and the noted footnote. The summation sentence which refers to "domestic industr[ies] producing … article[s] like or directly competitive with … [the] imported article[s]"[1258] merely recites the United States' statutory language.[1259] The United States believe that, in spite of the inadvertent inclusion of "directly competitive", that it is clear that the USITC's findings were on the basis of a like product analysis.[1260]

7.446 The European Communities, Japan, Korea and Norway also submit that no significance should be attached to the mentioned reference. The European Communities notes that the assertion on page 157 of the USITC Report that imported welded pipe, fittings and flanges and domestic ones are "directly competitive" has been explained as "clerical error".[1261]

7.447 The United States submits that complainants who challenge the like product definition for certain welded pipe do not agree on what the definition should have been; Korea seems to propose two like products based on size and Switzerland seems to propose three like products based on function.[1262] [1263]

(ii) Like product criteria

General

7.448 Korea submits that the USITC rejected arguments that LDLP (16 inches or over) should be treated as a separate like product.[1264] The USITC analysis failed to address the key product characteristics of LDLP versus other welded pipe and their different applications (end-uses). Instead, just as with CCFRS, the USITC focused on the common United States' production facilities and "continuum" of production by United States producers for its like product determination while rejecting the utility of Customs classification as well as the like product determination in the concurrent anti-dumping and countervailing duty investigations of LDLP from Japan and Circular Welded Non-Alloy Pipe from China. The Appellate Body in *US – Lamb* rejected this "continuum" of production approach[1265] where, as here, the products are fundamentally different.[1266] [1267]

[1257] USITC Report, p. 147, footnote 893.

[1258] USITC Report, p. 157.

[1259] See Trade Act of 1974, § 202(c)(4), 19 USC. § 2252(c)(4).

[1260] United States' written reply to Panel question No. 22 at the second substantive meeting.

[1261] European Communities', Japan's, Korea's and Norway's written replies to Panel question No. 22 at the second substantive meeting.

[1262] *Korea's* first written submission, paras. 41-44; Switzerland first written submission, paras. 209-225. *See* the discussion in section VII.D.1(c).

[1263] United States' first written submission, para. 104.

[1264] While arguments could have been made that other products within the USITC's welded category were also separate like products, these other products in the welded category were much smaller in quantity than LDLP and, in large part, appeared to follow similar demand patterns as the largest component, standard pipe.

[1265] Appellate Body Report, *US – Lamb*, para. 90.

[1266] Moreover, the record does not even support the conclusion that there was an overlap in production. According to the USITC, "[o]f the seven firms that reported the capability to produce welded large diameter line pipe in 2000, [only] three of those firms also indicated that they produced smaller sizes of welded pipe in 1998." USITC Report, Vol. I, p. 155, footnote 952 (Exhibit CC-6).

[1267] Korea's first written submission, paras. 61-63.

7.449 Switzerland contends that, if the USITC had actually applied its traditional methodology and applied, at least, the criteria of end-use, customs classification and physical properties, it would have come to the conclusion that the category of welded tubular products as it was defined could not serve as a basis in order to identify like or directly competitive products because it bundled together too many different products.[1268]

Physical properties

7.450 The United States argues that the USITC considered arguments that it should find that large diameter line pipe (pipe 16 inches or over in outside diameter) was a separate like product from other welded pipe.[1269] The evidence showed that while welded large diameter line pipe generally is made on mills designed to make large pipe, these mills also are capable of producing other types of large diameter pipe, such as pipe for water transmission, piling, and structural members.[1270] A substantial portion of welded large diameter line pipe is made by the ERW process[1271], which is the process used to make virtually all types of certain welded pipes.[1272] Moreover, many of the firms that produce welded large diameter line pipe also produce other welded pipe that is less than 16 inches in outside diameter. Large and small diameter welded pipe also share common physical characteristics, particularly a weld seam that has an effect on its uses relative to other tubular products such as seamless pipe. Based on this evidence, the USITC found large and small welded pipe to be part of a continuum of certain welded pipe and saw no reason to define large diameter line pipe separately from other certain welded pipe.[1273] An important factor in the USITC's finding of a clear dividing line between certain welded pipe and other tubular products was the physical characteristic of the welded seam. All welded pipe, large and small, share the common physical characteristic of a weld seam that runs either longitudinally or spirally along the length of the product and that has an effect on the pipe's uses relative to other tubular products such as seamless pipe. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. The USITC found that welded pipe ranging from small to large shared similarities in physical characteristics, uses, marketing channels, and production processes as discussed above to be part of a continuum of certain welded pipe and saw no clear dividing lines to define separate like products within this continuum.[1274]

7.451 Switzerland submits that the USITC considered that all the pipes belonged to the same category. However, pipes are made out of very different and subtle chemical compositions of steel, depending on the purpose of their use. The difference is due to the diversity of the alloys (aluminium, boron, etc.) added to the steel. There are approved norms indicating the tolerance of the various chemical components possibly entering into the composition of the steels. These various nuances in composition have precise consequences namely on the resistance, the elongation, the harden ability

[1268] Switzerland's second written submission, para. 55.
[1269] Prehearing Brief of European Steel Tube Association (September 12, 2001), pp. 3-6 (US-30).
[1270] USITC Report, p. 154, citing *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, pp. I-5-6 (March 2001) (US-29).
[1271] In 2000, 45.6% of domestic welded large diameter line pipe was produced by the ERW process as compared to 54.4% by the SAW process. *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, Table 1-2, p. I-14 (March 2001) (US-29). ERW pipe is normally produced in sizes from 2 3/8 inches through 24 inches outside diameter. Id. at I-5.
[1272] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Publication 3316, p. CIRC-I-19 (July 2000) (US-31).
[1273] United States' second written submission, para. 90.
[1274] United States' second written submission, para. 91.

and the cold forming of steels. In other words, the different and very subtle compositions of steels are determinant in characterising their quality, and therefore the quality of the products made of them.[1275]

7.452 Korea rejects the United States' argument that that welded non-OCTG pipe has a "weld" so it was treated as a single like product. Korea submits that this is at best a perfunctory analysis.[1276] The other two products in the pipe and tube category, OCTG and pipe fittings, also have a weld but they were treated as separate like products by the USITC in the same investigation. The United States refers to this as a deciding factor but do not explain its lack of significance for "welded" OCTG which was grouped with seamless OCTG as a single like product.[1277] [1278]

7.453 Switzerland recalls that the USITC Report only mentions that the physical differences begin with the chemistry of the steel in the billet or hot-rolled strip, and continue through the forming and finishing process. It also says that seamless pipes are more reliable, and that pipe used in OCTG applications must meet higher standards than pipe used in line pipe, which in turn must meet higher standards than so-called standard pipe.[1279] Switzerland considers that this analysis is too vague and that it does not reflect the importance that the United States claims the USITC did give to this factor. Switzerland submits that the USITC did not analyse the common properties and physical characteristics of the products it compared in depth enough and therefore could not draw any conclusion in this respect.[1280]

End-use

7.454 Korea submits that the USITC itself said in the introductory section describing its like product determination that there were grounds to distinguish the five like products in the tubular category as follows: "Most pipe is made to standards that reflect its intended use, and this affects the physical properties of the pipe.... Pipe used in OCTG applications must meet higher standards than pipe used in line pipe, which in turn must meet higher standards than so-called standard pipe.[1281] Yet, the USITC did not reach the obvious conclusion that these major distinctions in end-use should have resulted in a separate like product for LDLP as well.[1282] [1283]

7.455 Korea points out that LDLP is primarily used in the transmission of oil and gas so that demand for LDLP correlates with changes in oil and gas prices and the level of activity in the energy sector more generally (*i.e.*, investment in large-scale pipeline projects).[1284] In contrast, the remaining products in the non-OCTG welded pipe category (standard pipe being the largest component) tend to track general economic conditions.[1285] As a consequence, demand trends for line pipe depend on the level of activity in the energy sector while the demand for other tubular products tends to move in line

[1275] Switzerland's first written submission, para. 209.
[1276] United States' first written submission, para. 157; United States' written reply to Panel question No. 148 at the first substantive meeting.
[1277] United States' written reply to Panel question No. 148 at the first substantive meeting; United States' written reply to Korea's question No. 1(d) at the first substantive meeting.
[1278] Korea's second written submission, paras. 75-76.
[1279] USITC Report, Vol. I, p. 151
[1280] Switzerland's second written submission, paras. 62-63.
[1281] USITC Report, Vol. I, p. 151 (Exhibit CC-6).
[1282] Korea's second written submission, paras. 71-72 and 84.
[1283] USITC Report, Vol. I, p. 149 (footnote omitted; emphasis added) (Exhibit CC-6).
[1284] *Joint Respondents' Prehearing Brief for Welded Other*, p. 33 (Exhibit CC-78); *Joint Respondents' Posthearing Brief for Welded Other*, Exhibit 1 – pp. 24-25, 29-30, 35-37, 40-45 (Exhibit CC-79).
[1285] USITC Report, Vol. II, p. TUBULAR-43 (Exhibit CC-6).

with general economic conditions.[1286] The USITC actually acknowledged the "recent increase in demand for large diameter line pipe" and projected "growth due to rising demand for pipeline projects" in the context of its threat of injury analysis but completely failed to address these separate demand conditions and applications in the like product analysis.[1287] In fact, demand was falling for standard pipe at the end of the investigation period but increasing for large diameter line pipe.[1288] Commissioner Okun, in her separate remedy recommendation specifically referenced "the diverse nature of demand … in particular the divergent trends in demand for pipeline projects and for other applications".[1289] Therefore, the USITC was aware of these important distinctions between LDLP and other welded pipe. It simply ignored those differences for purposes of their like product analysis.[1290]

7.456 Switzerland also argues that, contrary to what the USITC said, welded tubular products (other than OCTG) can be divided into three large categories: the "pipes" whose finality is to conduct fluids (e.g. oil carried by pipelines); the mechanical tubes used for mechanical purposes (e.g. scaffoldings); and the precision tubes intended to conduct forces and used by the automotive industry (e.g. assembled camshafts, shock absorbers, etc.). In addition, precision tubes falling under the category of welded tubular products (other than OCTG) are intended to conduct forces and used by the automotive industry. They have a different end-use as other products falling in the above-mentioned categories as their purpose is not to convey steam, water, oil, gas and other fluids. They are of high quality because of their chemical properties and because also of the precision of their manufacturing. The consistency of that quality is determinant for security reasons.[1291] Switzerland adds that some of the tubes are indeed used to conduct fluids (e.g. oil carried by pipelines), while others are precision tubes intended to conduct forces and used by the automotive sector (e.g. camshafts used in internal combustion engines to actuate valves at precise timing intervals). Although hydraulic fluids also go through precision tubes, this is just a mechanism to convey forces and not the end-use of such tubes, the end-use being to make for instance a car work. On the contrary, tubes for the purpose of the conveyance of water, oil or gas have as their end-use the conveyance of such fluids for instance to consumers.[1292]

7.457 In the United States' view, Switzerland seems to contend that the USITC should have separated certain welded pipe into at least three separate like products, primarily by function or use – pipes used to conduct fluids, mechanical tubes used for mechanical purposes, and precision tubes intended to conduct forces and used by the automotive industry.[1293] However, it also seems to argue that separate like products should have been defined by tariff classification (40 like products)[1294],

[1286] USITC Report, Vol. II, p. TUBULAR-43 (Exhibit CC-6) ("Demand for tubular products will depend on both general economic conditions, as increased production and construction spurs demand for seamless and welded, and conditions in the somewhat counter-cyclical oil and gas industry, as increased energy prices spur increased drilling, extraction, and refining (and thus demand for both OCTG and line pipe)").

[1287] USITC Report, Vol. I, p. 166 (Exhibit CC-6).

[1288] USITC Report, Vol. I, p. 166 (Exhibit CC-6) (ITC acknowledging the increase in demand for large diameter line pipe and the projections for continued growth but noting that overall demand for the category stabilized, when both standard and line pipe products are viewed together).

[1289] USITC Report, Vol. I, "View of Vice Chairman Deanna Tanner Okun on Remedy", p. 482 (Exhibit CC-6).

[1290] Korea's first written submission, paras. 66-68.

[1291] Switzerland's first written submission, paras. 210-219.

[1292] Switzerland's second written submission, para. 56.

[1293] Switzerland's first written submission, para. 210.

[1294] Switzerland's first written submission, paras. 220-223.

different physical properties such as different chemical composition[1295], specific use in the automotive industry, particularly for precision tubes (8)[1296], and consumer perceptions (8).[1297] [1298]

7.458 Switzerland contends that the USITC considered that all welded tubular products (other than OCTG) are used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. In reality, however, the USITC grouped into this category also products which are used as precision tubes to convey forces – e.g. in cars – which are products very different from the ones mentioned by the USITC. If products so different are bundled together, the standard of likeness becomes impossible to apply.[1299]

7.459 The United States insists that the USITC found that certain welded pipe included tubular products that have a weld seam that runs either longitudinally or spirally along the length of the product. Certain welded pipe is used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. Thus, it is used to transport liquids at or near atmospheric pressure rather than for high pressure containment.[1300] The various types of certain welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[1301] Certain welded pipe is generally produced on electric resistance weld (ERW) mills. The USITC found that the various forms of certain welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas, and other fluids at or near atmospheric pressure.[1302]

7.460 Korea notes that the end-use of LDLP determined that the demand was more similar to OCTG (oil and gas demand) than the other welded pipe (general economic trends). The USITC record confirms that demand for LDLP was based on its distinct use for the movement of oil and gas and the demand trends were distinct.[1303] [1304] Korea submits that the United States does not deny that LDLP does not compete with other welded pipe due to differences in specifications and use.[1305] In fact, a critical factor for finding welded and seamless OCTG as single like product was that they both "compete with each other" and are "often used interchangeably".[1306] Yet, this factor was ignored for LDLP. The United States seeks to avoid the question on competition by referring to the physical

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[1295] Switzer*l*and's first written submission, para. 209.

[1296] Switzerland's first written submission, paras. 211-219. For example, they discuss eight types of precision tubes used in the automotive industry which they seem to imply should have been defined as separate like products. Based on their descriptions, it is evident that many of these precision tubes contain hydraulic fluid; the carrying of fluids, however, was used as a factor to allege that "pipes" could be distinguished as a separate like product.

[1297] Switzerland's first written submission, paras. 224-225.

[1298] United States' first written submission, para. 169.

[1299] Switzerland's second written submission, para. 53.

[1300] USITC Report, p. TUBULAR-2.

[1301] Certain welded pipe used in the movement of oil and gas is produced to standards set by American Petroleum Institute (API), while many other forms of certain welded pipe are produced to standards set by the American Society for Testing and Materials (ASTM) and the American Water Works Association (AWWA).

[1302] United States' second written submission, para. 89.

[1303] USITC Report, Vol. I, p. 166 (Exhibit CC-6). Accord *Certain Welded Large Diameter Line Pipe From Japan*, USITC Publication 3464, pp. 14-15 (Exhibit K-8).

[1304] Korea's second written submission, paras. 85-86.

[1305] United States' replies to questions from other Parties, para. 44.

[1306] USITC Report, Vol. I, p. 152 (Exhibit CC-6).

characteristics – "welded seam" – as an important factor. As noted, welded-OCTG also has a welded seam, so Korea does not see that this can qualify as a "clear dividing line".[1307]

Consumer perception

7.461 Switzerland submits that having very different end-uses, consumers would perceive precision tubes intended to conduct forces and used by the automotive industry as different from tubes used for the purpose of conveyance of steam, water, oil, gas and other fluids.[1308]

Tariff classification

7.462 Korea argues that the USITC never analysed whether HS classifications could provide a useful starting point for the analysis of whether LDLP should be considered a separate like product. In fact, HTS categories 7305.11-7305.19 apply only to LDLP.[1309] This distinction between the HS classifications of line pipe and the HS classifications of the other welded pipe confirms a significant difference in the products themselves and should have been considered by the USITC. The USITC ignored other significant evidence in the record and its own precedent which demonstrated that there are significant differences in the products.[1310] The USITC acknowledged that pipe used in line pipe applications must meet higher standards than "so-called standard pipe"[1311] and that the distinct physical characteristics of each product reflect their distinct use.[1312] [1313] Korea adds that the difference in tariff classifications reflects the fact that the large diameter *line* pipe which is included in this investigation (small diameter line pipe imports are subject to a separate safeguards case and thus are not subject to this investigation) is produced to completely different specifications.[1314] [1315]

7.463 Similarly, Switzerland argues that the USITC also rejected the use of the customs classifications of tubular products as not "useful" because of the large number of HTS categories. With respect to pipe and tube, the USITC correctly noted that "the (non-OCTG) welded pipe in this investigation includes standard pipe and pipe used primarily for mechanical, line, pressure, and

[1307] Korea's second written submission, paras. 87-88.

[1308] Switzerland's first written submission, para. 224.

[1309] Small diameter line pipe was excluded from the case since safeguard measures already applied to that product. (Exhibit CC-1, Annex II.)

[1310] Joint Respondents' Prehearing Brief for Welded Other, pp. 9-10 (Exhibit CC-78); Joint Respondents' Posthearing Brief for Welded Other, Exhibit 1 – pp. 29-30 (Exhibit CC-79) (suggesting in response to USITC questions that data should have been collected separately on at least two like products in Category 20); USITC Report, Vol. II, p. TUBULAR-43 (Exhibit CC-6) (noting that "[s]ome respondent welded importers divide the welded market into large diameter welded for line pipe (which they estimate as 20-30% of the US welded market) and other welded, generally standard pipe").

[1311] USITC Report, Vol. I, p. 151 (Exhibit CC-6) (the USITC cited this same factor as a basis for treating OCTG as a separate like product than other tubular products).

[1312] Standard pipe is pipe "ordinarily used for low-pressure conveyance of air, steam, gas, water, oil, or other fluids used for mechanical applications. It is used primarily in machinery, buildings, sprinkler systems, irrigation systems, and water wells *rather than in pipe lines* or utility distribution systems. It may carry fluids at elevated temperatures which are not subject to external heat applications. It is usually produced in standard diameters and wall thicknesses to ASTM . . . specifications." USITC Report, Vol. I, p. 149, n. 912 (Exhibit CC-6) (quoting the American Iron and Steel Institute (AISI) definition of standard pipe) (emphasis added). "AISI defines line pipe as pipe 'used for the transportation of gas, oil, or water generally in a pipeline or utility distribution system. It is produced to API . . . and AWWA (American Water Works Association) specifications.'" USITC Report, Vol. I, p. 149, n. 912 (Exhibit CC-6).

[1313] Korea's first written submission, paras. 64-66.

[1314] USITC Report, Vol. I, p. 149 (footnote omitted; emphasis added) (Exhibit CC-6).

[1315] Korea's second written submission, para. 84.

structural purposes".[1316] As respondents in opposition to import relief further specified, the USITC's welded pipe category included circular welded standard pipe[1317], LDLP, structural pipe, square and rectangular pipe, and piling pipe.[1318] The category also included mechanical tubing and boiler tubing, which accounted for a small percentage of the imports.[1319] LDLP, the second largest single import component of USITC Category 20, after circular welded standard pipe, accounted for approximately 30% of world imports of Category 20 in interim 2001 and is easily identified.[1320] The LDLP products were easily segregated from the rest of the welded category based on the USITC's concurrent anti-dumping investigation of that industry.[1321] A breakdown of the HTS numbers covering LDLP products subject to the 201 investigation, and the correlating import statistics for LDLP, were placed on the record early in the investigation by Joint Respondents in opposition to relief.[1322] These figures formed the basis for a variety of separate analyses of the vastly different market forces affecting the large diameter line pipe industry. Yet, the USITC rejected the use of customs classification as relevant to the segregation of LDLP from other circular welded pipe and tube. Switzerland submits that the lack of any analysis of tariff classification runs counter the guidance provided by the Appellate Body in *EC – Asbestos* where it clarified that customs classifications provide important indications for the like-product determination which must be considered. The existence of many different classifications is no excuse for not considering them at all for the purpose of the like product determination. To the contrary, this suggests that the products concerned are not alike.[1323]

7.464 The United States submits that Korea and Switzerland mistakenly contend that the primary basis for the USITC's like product definitions should have been tariff classification. They focus on the products of interest to them in arguing that tariff classifications would have permitted the USITC to segregate these types of certain welded pipe. Under their approach, the USITC would arguably have had to define separate like products for each of the 40 classifications using the ten-digit level, despite similarities in physical characteristics, uses, marketing channels, and production processes for the continuum of certain welded pipe.[1324] The Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence".[1325] In spite of the complainants' contentions, the USITC clearly considered all of the evidence pertinent to defining the appropriate like product. The tariff classifications are interrelated with the physical properties/characteristics criterion which the USITC clearly considered and found to be an important factor in its like product definitions. In particular, the physical characteristic of the welded seam was an important factor in the USITC's definition of certain welded pipe as a single like product. The USITC exercised its discretionary judgement to

[1316] USITC Report, Vol. I, p. 149.

[1317] None of the tariff classifications within the welded pipe group included welded line pipe of an outside diameter that does not exceed 406.7 millimeters (16 inches), which was covered by Section 201 relief on line pipe.

[1318] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September 2001), p. 9.

[1319] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September, 2001), p. 9.

[1320] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September 2001), p. 10.

[1321] Certain Welded Large Diameter Line Pipe from Japan, Inv. No. 731-TA-919 (Final), Publication 3464 (November 2001).

[1322] Joint Respondents' Prehearing Brief in Opposition to Import Relief for Welded Tubular Products Other than OCTG (Category 20) (11 September 2001), Exhibit CC – 78.

[1323] Switzerland's first written submission, paras. 220-223.

[1324] The two tariff classifications using the 4-digit level – 7305 and 7306 – for certain welded pipe are also used for seamless pipe and thus do not provide a clear dividing line.

[1325] Appellate Body Report, *EC – Asbestos*, para. 102.

determine which factors were the most pertinent in examining the particular facts of this investigation. The USITC clearly found the physical characteristics factor to be useful but, given the large number of tariff classifications, found tariff classifications not to be useful because they provided no clear dividing lines between products.[1326]

7.465 Switzerland responds that the cumbersomeness of a methodology, however, cannot be used as an argument for not applying it. If the United States chose to investigate on a very large number of steel products, the fact that the investigation becomes very extensive because of the large number of different products involved, is not a reason not to use a certain methodology. This is all the more so, as the criterion of customs classification is not only used by the USITC but is a fundamental criterion to be used according to the Appellate Body. The assertion that tariff classifications were not useful because they provided no clear dividing lines between the products[1327] is not correct as the customs classification provides several dividing lines, for instance between products used for oil or gas pipelines and other products. Such a customs classification supports the conclusion found using the end-use criteria, i.e. that products used to convey oil or gas are different from other tubular products. the HS tariff classifications contained in Chapter 73 differentiates welded pipe at the four digit level and even more at the six digit level.[1328] [1329] It is clear therefore, that this product (welded pipe) is not a single product but is further defined by size and/or use and thus the United States should have at least followed the clear distinctive lines set by the HS.

7.466 The European Communities notes that United States failed to rebut the Swiss and Korean argument that the primary basis for distinguishing the many different products bundled together should have been tariff classifications by claiming that the ten-digit level contains too many different entries.[1330] As can be learned from Chapter 73 of the HS[1331], internationally agreed customs classifications at the four and six-digit level separate welded pipe on the basis both of size and function.[1332] This further corroborates that the products bundled as welded pipe are not "like or directly competitive".[1333]

Production processes

7.467 Switzerland submits that the USITC used the vertical integration of the industry and the common production processes to aggregate the five different products into one category. More particularly, Switzerland contends that the USITC paid "particular attention" to the "sharing of productive processes and facilities" which "is a fundamental concern in defining the scope of the domestic industry under Section 201".[1334] Moreover, the USITC considered itself to be required "to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of Section 201, protection of the productive resources of domestic producers".[1335] Switzerland insists that the United States ignored the guidance given in *US – Lamb* and, again, relied on "productive facilities" rather than on "the product" itself.[1336] According to Switzerland, it is simply irrelevant, under the Agreement on Safeguards, that there is a continuous line

[1326] United States' first written submission, paras. 167-168.
[1327] United States' first written submission, para. 168
[1328] Exhibit CC-105 a
[1329] Switzerland's second written submission, paras. 58-60.
[1330] United States' first written submission, para. 167.
[1331] Exhibit CC-105
[1332] The European Communities refers to paras. 73.05-73.06.
[1333] European Communities' second written submission, paras. 283-285.
[1334] USITC Report, Vol. I, pp.30 and 151
[1335] USITC Report, Vol. I, p. 31
[1336] Switzerland's second written submission, paras. 66-69.

of production between the input product and the end-product … producers of these products, if it cannot be established otherwise that these input products are like products.[1337]

7.468 Switzerland contends that the USITC explains that it traditionally establishes the "likeness" on the basis of the five characteristics: physical properties of the product, its customs treatment, its manufacturing process, its uses, and the marketing channels through which the product is sold.[1338] However, for this specific case, the USITC used a different methodology, as it "focused [its] analysis in this investigation primarily on the degree to which the products in question are produced in common production facilities and using similar production processes"[1339] [1340] The USITC paid "particular attention" to the "sharing of productive processes and facilities" which "is a fundamental concern in defining the scope of the domestic industry under Section 201".[1341] Moreover, the USITC considered itself to be required "to define like or directly competitive in a manner that reflects the realities of the market and at the same time accomplishes the fundamental purpose of Section 201, protection of the productive resources of domestic producers".[1342] Switzerland insists that the United States ignored the guidance given in *US – Lamb* and, again, relied on "productive facilities" rather than on "the product" itself.[1343] Korea further argues that the United States has failed to acknowledge that OCTG is also made by the same producers who make standard pipe[1344], but it is no more "like" standard pipe than line pipe is. The United States also does not explain how shared production facilities was an important factor for treating LDLP as other welded but not for treating OCTG as a single like product with all other welded pipe made in the same production facilities in its answers to questions.[1345] [1346]

7.469 In the United States' view, the complainants mistakenly challenge the USITC's consideration of production processes in determining "like product" on the basis of the Appellate Body Report in *US – Lamb*. Contrary to the complainants' contentions the Appellate Body in *US – Lamb* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products".[1347]

7.470 The United States submits that the specific allegations raised by Korea and Switzerland regarding the USITC's certain welded pipe like product definition are based on their erroneous interpretation of what factors the USITC was either "required or not permitted" to consider in making its like product definitions.[1348] The complainants can identify nothing in the Agreement on Safeguards addressing what factors may or may not be considered in determining like products. They instead assert that the USITC was bound to use the four factors suggested by the Working Party on *Border Tax Adjustments.* These factors, which were suggested for use in border tax adjustments, were for a different purpose, and the Appellate Body has recognized that "[n]o one approach to exercising

[1337] Switzerland's first written submission, para. 226-233.
[1338] USITC Report Vol. I p. 30.
[1339] USITC Report, Vol. I, p. 151
[1340] Switzerland's second written submission, paras. 54, 65.
[1341] USITC Report, Vol. I, pp. 30 and 151
[1342] USITC Report, Vol. I, p. 31
[1343] Switzerland's second written submission, paras. 66-69.
[1344] Korea's written reply to the Panel question No.148 at the first substantive meeting, noting that five to eight producers of "welded other" pipe also make welded-OCTG in contrast to only three of the seven producers of LDLP which manufacture "welded other;"; United States' replies to questions from other Parties, para. 47, referring to "*many*" *producers of* LDLP which also produce other welded.
[1345] United States' replies to questions from other Parties, para. 44.
[1346] Korea's second written submission, paras. 75-76.
[1347] Appellate Body Report, *US – Lamb*, para. 94, n.55.
[1348] Switzerland's first written submission, paras. 207-233.

judgement will be appropriate for all cases".[1349] Thus, the USITC was not required to consider these four factors.[1350]

7.471 Korea reiterates that welded OCTG is just like all other pipe in the other welded category has a weld and is produced by the same producers. The United States does not deny this. This is very significant because the USITC's principal and overriding considerations in treating LDLP as a single like product with non-OCTG pipe is the common production facilities and the existence of a "weld".[1351] Thus, clearly, these characteristics do not create a "clear dividing line" between OCTG, LDLP, or other welded pipe. Instead, the United States says that the USITC relied on the outside "finishing operations" which are sometimes used after the OCTG has been produced to distinguish OCTG. However, the USITC opinion is clear that the critical aspect of this distinction was the physical attributes conferred by this additional processing and not the mere (separate) process itself.[1352] [1353]

Marketing channels

7.472 Switzerland stresses that this factor is used by the USITC, although it is not used in the traditional WTO approach regarding like products. The USITC, however, seems not to apply this factor, even if it recognizes that the channel of distribution for the various pipe and tube products tends to be specialized depending on the market served. Some distributors specialize in certain forms of pipe, other in certain products sold primarily to the construction industry for use in HVAC (heating, ventilating, and air conditioning) and other piping systems that allow for the transmission of water, steam, oil, gas, and chemicals in commercial and residential structures, including high-rise structures.[1354] In the case of welded pipe other than OCTG the USITC indicated that although large pipe is more likely than small diameter pipe to be sold directly to end-users, there is substantial overlap in the channels of distribution of all welded pipe. The USITC said in its report that specialty tubes that require more heat-treatment or testing are often sold directly to end-users.[1355] If the marketing channels were to be part of the methodology used to determine likeness, in this case the proper application of this criterion would have supported what has been shown thus far, namely that many different products were unduly bundled and therefore no proper analysis of likeness could take place.[1356]

Other factors

7.473 Korea also argues that the USITC's aggregation of large diameter line pipe and standard pipe is in direct conflict with its findings that OCTG should be a separate like product from the rest of the tubular category. The USITC specifically cited as one of the bases for its determination that OCTG is a separate like product from other pipe and tube the fact that "OCTG products and other pipe and tube products are sold into different markets and *demand is driven by different economic factors*".[1357] In particular, the USITC explained, "[d]emand for OCTG products is driven primarily by the level of oil

[1349] Appellate Body Report, *EC – Asbestos*, para. 101.
[1350] United States' first written submission, para. 159.
[1351] USITC Report, Vol. I, pp. 154-155.
[1352] It is also worth noting that the distinction the United States makes between "production facilities" and the "finishing operations" is a false distinction. The OCTG is produced before it goes to the finishing operations. USITC Report, Vol. I, p. 148.
[1353] Korea's second written submission, paras. 82-83.
[1354] USITC Report, Vol. I, p. 150.
[1355] USITC Report, Vol. II, TUBULAR-39
[1356] Switzerland's second written submission, para. 64.
[1357] USITC Report, Vol. I, p. 154 (emphasis added).

and gas exploration, while demand for other products is driven primarily by the overall level of activity in the general economy, which do not necessarily coincide and can, in fact, move in opposition to one another".[1358] As demand for LDLP is similarly driven by activity in the oil and gas sector, and not by the level of activity in the general economy, it too should have been treated as a separate like product in the USITC's analysis of injury and remedy. At the very least, the differences in applications and demand factors between LDLP and other welded pipe should have been considered by the USITC in determining whether LDLP should have been segregated from the other carbon tubular products.[1359]

(iii) Definitions proposed by the complainants

7.474 The United States points out that both Korea and Switzerland challenge the USITC definition of certain welded pipe as a single like product, but that each complainant has different proposals for what the appropriate definitions should have been. Korea contends this single like product should have been divided into at least two like products, primarily by diameter size, and Switzerland contends it should have been divided into at least three like products, primarily by function.[1360]

7.475 Switzerland responds that it argued that the precision tubes were incorrectly grouped in the same category of products as large diameter welded pipe for the conveyance of steam, water, oil, gas and other fluids. In making this argument, Switzerland did not at all propose that the category of welded pipe/tubular products be subdivided into three categories. Switzerland mentioned the three different tubes as examples, in order to explain the differences of the products bundled together in the category of welded tubular products and to show that the United States grouped together products which are so different that they should not have been grouped together. Switzerland is of the view that it is not its task to propose what the proper category should be and that the Panel need not decide which breakdown of categories presented in the complainants' submissions is most appropriate.[1361]

7.476 Korea insists that it is not arguing for a like product division for welded pipe based on diameter size, as the United States incorrectly asserts.[1362] This is a convenient but inaccurate characterization of Korea's like product argument for welded pipe. Korea maintains that LDLP should have been considered a separate like product from other welded pipe. The basis for that like product distinction is not the size of the pipe but rather the distinct physical characteristics and the distinct end-uses of the two products.[1363]

(iv) Relevance of like product definitions used in the anti-dumping and countervailing duty contexts

7.477 The United States submits that the complainants' arguments[1364] fail to recognize that the like product definitions in anti-dumping and countervailing duty investigations, as in safeguard investigations, are dependent on the imports subject to that particular investigation and thus the definitions have varied.[1365] The starting point for the USITC's like product analysis is the imports identified as within the investigation by the President's request. In the present case, the USITC began with the subject imports which included a range of welded and tube and looked for clear dividing

[1358] USITC Report, Vol. I, p. 154 (Exhibit CC-6).
[1359] Korea's first written submission, paras. 69-70.
[1360] United States' first written submission, para. 158.
[1361] Switzerland's second written submission, paras. 46-47.
[1362] United States' first written submission, para. 104.
[1363] Korea's second written submission, para. 69.
[1364] *See* paras. 7.448 and 7.463 above.
[1365] Korea first written submission, paras. 41-44.

lines between the domestic steel pipe and tube products that corresponded to these subject imports, using well-established factors. The anti-dumping and countervailing duty investigations generally begin with a more narrow starting point for the scope of subject imports so the analysis frequently involves whether the like product definition should be defined more broadly than the subject imports, i.e., it starts small and looks at whether to broaden rather than starts large and looks where to divide. The complainants also fail to acknowledge, as discussed above, that the anti-dumping and countervailing duty investigations have a purpose that is different from that in a safeguards investigation.[1366] The USITC considered and rejected the argument that should have defined at least two like products – certain welded large diameter pipe (16 inches or over) ("LDLP") and other welded pipe in making its like product definition in this safeguard investigation. The USITC did not have before it in either of these anti-dumping investigations the issue of a scope of subject imports that included both of these types of certain welded pipe as it did in this safeguard investigation and thus did not decide to treat them as separate domestic like products in a single investigation. Rather the USITC defined separate domestic like products in two separate investigations; each like product definition was coextensive with the narrow scope of imports subject to investigation.[1367] The USITC did not consider whether it was appropriate to broaden the like product to include other types of certain welded pipe that did not correspond to the subject imports in either of these anti-dumping cases. In this investigation, the USITC considered arguments that it should find that large diameter line pipe (pipe 16 inches or over in outside diameter) was a separate like product from other welded pipe.[1368] The evidence showed that while welded large diameter line pipe generally is made on mills designed to make large pipe, these mills also are capable of producing other types of large diameter pipe, such as pipe for water transmission, piling, and structural members.[1369] A substantial portion of welded large diameter line pipe is made by the ERW process[1370], which is the process used to make virtually all types of certain welded pipes.[1371] Moreover, many of the firms that produce welded large diameter line pipe also produce other welded pipe that is less than 16 inches in outside diameter. Large and small diameter welded pipe also share common physical characteristics, particularly a weld seam that has an effect on its uses relative to other tubular products such as seamless pipe. Based on this evidence, the USITC found large and small welded pipe to be part of a continuum of certain

[1366] United States' first written submission, paras. 161-162

[1367] Contrary to Korea's allegations, the "ITC did not treat LDLP as a like product with standard pipe" in *Certain Welded Non-Alloy Steel Pipe from China* because it was not part of the scope of investigation in that anti-dumping case; the issue of whether to include LDLP in the domestic like product also was not raised by any parties to that investigation nor was it considered by the USITC. *Circular Welded Non-Alloy Steel Pipe from China, Indonesia, Malaysia, Romania, and South Africa*, Investigation Nos. 731-TA-943-947 (Preliminary), USITC Publication 3439, pp. 3-5 (July 2001) (US-28); *Circular Welded Non-Alloy Steel Pipe from China*, Investigation No. 731-TA-943 (Final), USITC Publication 3523, pp. 3-5 (July 2002) (CC-80); *see also Certain Welded Large Diameter Line Pipe From Japan and Mexico*, Inv. Nos. 731-TA-919-920 (Preliminary), USITC Publication 3400, pp. I-5-6 (March 2001) (US-29); *Certain Welded Large Diameter Line Pipe From Japan*, Inv. No. 731-TA-919 (Final), USITC Publication 3464 (November 2001) (CC-81).

[1368] Prehearing Brief of European Steel Tube Association (September 12, 2001), pp. 3-6 (US-30).

[1369] USITC Report, p. 154, citing *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, pp. I-5-6 (March 2001) (US-29).

[1370] In 2000, 45.6% of domestic welded large diameter line pipe was produced by the ERW process as compared to 54.4% by the SAW process. *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, Table 1-2, p. I-14 (March 2001) (US-29). ERW pipe is normally produced in sizes from 2 3/8 inches through 24 inches outside diameter. Id. at I-5.

[1371] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Publication 3316, p. CIRC-I-19 (July 2000) (US-31).

welded pipe and saw no reason to define large diameter line pipe separately from other certain welded pipe.[1372]

(d) FFTJ

7.478 In the view of the European Communities, the USITC did not show that imported flanges are like domestically produced fittings, although the USITC explicitly recognized the heterogeneity of fittings, flanges and tool joints, and that this "category contains a mix of *products*".[1373]

7.479 The United States submits that neither the European Communities nor any other complainant provides further arguments to the Panel on this like product definition.[1374]

7.480 The European Communities further submits that the USITC has not done what is its essential obligation under WTO law and its own self-set task: to compare the domestic products with the imported products and to determine whether these are like in accordance with Articles 2.1 and 4.1(c) of the Agreement on Safeguards. Instead, the USITC only attempts to explain why it groups together different domestic products into a bundle that "consists of about one-third flanges, one-third butt-weld pipe fittings, and one-third other products".[1375] However, it does not establish that all the elements it bundles together are like the imported products. Even in its irrelevant attempt to justify the bundling of a heterogeneous group of domestic products, the USITC misapplied its own self-set criteria. First, the USITC did not even consider tariff classifications and concessions. However, fittings and flanges are subject to different customs treatment even at the six-digit level and subject to different concessions. Second, the different classifications reflect well-known different physical properties of fittings and flanges, which were equally not mentioned by the USITC. As illustrated by the two photos attached as Exhibit CC-104, fittings are made from pipes by cutting and forming them.[1376] They do not contain holes as flanges do. These holes are necessary to disassemble flanges. This directly leads to the third point, the different *uses* of both products. The USITC essentially relied on some "common use" argument by claiming that "fittings, flanges, and tool joints are all used to join or cap pipe". However, this broad statement fails to take account of different end-uses of fittings and flanges. The USITC itself acknowledged that flanges are used to join pipe in non-permanent connections, and are designed to facilitate the disassembly of lengths of pipe.[1377] Butt-weld-pipe fittings, by contrast, are used to create a permanent joint.[1378] Because of their different technical properties (flanges contain holes and fittings do not), fittings and flanges are not even substitutable. Finally, if the USITC was entitled to look at common production processes (*quod non*), even the production processes for flanges and fittings only confirm the distinctions between these products. The USITC itself had to acknowledge that flanges are produced by forging carbon steel billets. Fittings, by contrast are made from pipes by cutting and forming them.[1379] The USITC's assertion that these processes are similar because they typically incorporate "heat-treating, machining, beveling, and washing"[1380] raises the question why it then has not included also knives and forks in its product mix.[1381]

[1372] United States' first written submission, paras. 163-166.
[1373] USITC Report, Vol. I, pp. 175 and 179.
[1374] United States' first written submission, para. 114, footnote 139.
[1375] USITC Report, Vol. I, pp. 156 and 157.
[1376] USITC Report, Vol. I, p. 148.
[1377] USITC Report, Vol. I, p. 150.
[1378] USITC Report, Vol. I, p. 150.
[1379] USITC Report, Vol. I, p. 148.
[1380] USITC Report, Vol. I, p. 157.
[1381] European Communities' written reply to Panel question No. 146 at the first substantive meeting.

7.481 The European Communities submits that the United States does not attempt to rebut the European Communities' specific claims that the bundling of FFTJ was not justified.[1382] The USITC's determination is the conclusion made before the reasoning (and unsupported by the subsequent reasoning) that "there are four domestic industries producing articles like the corresponding articles subject to investigation within the tubular products category … (fittings, flanges, and tool joints)".[1383] The second reference provided by the USITC then directly contradicts this statement by stating that "purchasers of fittings and flanges reported that imported and domestically produced fittings and flanges produced to the same grade and specification are used in the same applications"[1384], thereby confirming the acknowledgement given by the USITC elsewhere that this is a heterogeneous product mix.[1385] The United States also concedes that there are even separate markets for fitting and flanges.[1386] [1387]

7.482 The European Communities notes that the United States did not respond to the specific claim that the products bundled as "FFTJ" were not even "like" each other. Thus, all determinations based on such imported product "FFTJ" and the domestic industry producing "FFTJ" should be found incompatible with the Agreement on Safeguards.[1388]

F. INCREASED IMPORTS

1. Introduction

7.483 Brazil and Japan argue that the United States failed to meet the threshold requirement of increased imports under Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX(a) of the GATT 1994.[1389] Similarly, China and Switzerland believe that the condition of increased imports was not fulfilled.[1390] Korea affirms that the USITC's analysis of increased imports for flat-rolled and tin mill products was not consistent with Articles 2, 3 and 4 of the Agreement on Safeguards as well as Article XIX of the GATT 1994.[1391] New Zealand claims that the United States has failed to comply with the requirement of Article 2.1 of the Agreement on Safeguards that there be an increase in imports before a safeguard measure is imposed.[1392]

7.484 The European Communities submits that the United States has not demonstrated that the steel products covered by its safeguard measures are "being imported … in such increased quantities" as required by Article 2.1 of the Agreement on Safeguards. The USITC applied a methodology that plainly ignores the conditions set by Article 2.1 of the Agreement on Safeguards, as clarified by the Appellate Body. The USITC has committed essentially three methodological errors rendering all its conclusions on the existence of increased imports for each individual product flawed and inconsistent

[1382] United States' first written submission, para. 114, which does not respond to the specific claims in the European Communities' first written submission, paras. 218, 230 and European Communities' reply to Panel question 146.

[1383] USITC Report, Vol. I, p. 147.

[1384] USITC Report, Vol. I, p. 175.

[1385] See references in European Communities' first writtensubmission, paras. 218 and 230.

[1386] United States' written reply to Panel question No. 149 at the first substantive meeting.

[1387] European Communities' second written submission, para. 286.

[1388] European Communities' second written submission, para. 286; European Communities' written reply to Panel question 22 at the second substantive meeting.

[1389] Brazil's first written submission, para. 117; Japan's first written submission, para. 175.

[1390] China's first written submission, para. 210; Switzerland's first written submission, para. 244; Norway's first written submission, para. 250; Norway's second written submission, para. 81.

[1391] Korea's first written submission, para. 71.

[1392] New Zealand's first written submission, para. 4.93.

with Article 2.1 of the Agreement on Safeguards. Thus, it (i) fails to consider intervening downward trends, in particular at the sensitive end-point of the investigation as reflected in the most recent data available for 2001, (ii) it generally fails to calculate and consider the trends in imports over the entire period of investigation, and (iii) it only aims at finding a "simple increase" without considering and establishing through a reasoned and adequate explanation that such increase was sufficiently recent, sudden, sharp and significant. The European Communities therefore considers that the United States has not demonstrated that the steel products covered by its safeguard measures are "being imported … in such increased quantities … as to cause or threaten to cause serious injury" to its domestic industry, as required by Article 2.1 of the Agreement on Safeguards.[1393]

7.485 In Japan's view, perhaps the most glaring deficiency of the United States' safeguard measures is that they were imposed even though steel import volumes were declining. Imports of all subject flat-rolled steel products (whether aggregated or separated, and including tin mill products) have declined since 1998 or 1999, depending on the product, both absolutely and as a percentage of domestic production. These declines are even more pronounced for steel imports from countries actually subject to the safeguard measures. Because the Government of the United States did not demonstrate a "recent", "sudden", "sharp", and "significant" increase in import volume for these products, its steel safeguard measures on flat-rolled products – grouped or separated – are inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1:1(a) of the GATT 1994. The same is true for other products subject to the relief.[1394]

7.486 In response, the United States asserts that the requirement of "increased imports" of the Agreement on Safeguards was satisfied.

2. The Legal Standard

(a) Recent increase

7.487 The European Communities submits that a safeguard measure may only be taken if there is an extraordinary surge in imports ("such increased quantities and under such conditions"). Moreover, a safeguard measure may only be taken if that product continues "being imported" in such increased quantities.[1395]

7.488 The European Communities, Japan, Korea, Switzerland and Norway emphasize that, as the Appellate Body has clarified in *Argentina – Footwear (EC)*[1396], the use of the present tense "is being imported" in Article 2.1 of the Agreement on Safeguards means that competent authorities must show a sharp and significant increase in imports which continues until the very recent past.[1397] In interpreting this requirement, WTO panels have focused on the last one to three years.[1398] Norway and Switzerland add that allowing a WTO Member to take a decision on whether to adopt safeguards measures by ignoring available data from the most recent past would disregard the extraordinary nature of safeguard measures, which must be taken into account when "construing the prerequisites

[1393] European Communities' first written submission, paras. 282-290; European Communities' second written submission, paras. 142-147.

[1394] Japan's first written submission, para. 176.

[1395] European Communities' first written submission, para. 143.

[1396] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

[1397] European Communities' first written submission, para. 271; Japan's first written submission, paras. 184-185; Korea's first written submission, para. 71; Norway's first written submission, para. 256; Norway's second written submission, para. 87; Switzerland's first written submission, para. 238.

[1398] Panel Report, *Argentina – Footwear (EC)*, paras. 8.160 and 8.162; Panel Report, *US – Wheat Gluten*, paras. 8.32 and 8.33; Panel Report, *US – Line Pipe*, para. 7.204.

for such actions".[1399] Similarly, Brazil and Japan argue that the present tense in Article 2.1 of the Agreement on Safeguards – "such product *is being imported*" (emphasis added) – indicates that the increase in import volume must be in the present, that is to say, as of the time of the safeguards investigation, and not in the past.[1400]

7.489 The United States argues that the Agreement on Safeguards does not specify how long the period of investigation in a safeguards investigation should be, or whether or how that period should be segmented for purposes of analysis.[1401]

7.490 As regards the question of how "recent" the increase in imports must be, the United States argues that the Appellate Body's statement that the investigation period must be the recent past must be read in the light of other findings. The Appellate Body Report in *US – Lamb* made clear that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.[1402] *US – Lamb* involved a determination of threat of serious injury, which by definition is future oriented, and 21 months as the length of the investigation period was deemed too short. Presumably, therefore, the Appellate Body would accept a considerably longer period of investigation for a serious injury determination. The United States submits that the complainants also attempt to downplay the panel report in *US – Line Pipe*[1403], which states that it is not necessary to find that imports are still increasing in the period immediately preceding the competent authority's determination, or up to the very end of the period of investigation.[1404] If the Agreement on Safeguards prevented the application of a safeguard measure any time that imports abated, however slightly, after an increase, Members would have to commence safeguard proceedings immediately after detecting an increase in imports. This likelihood would create a major disincentive against waiting to see whether the domestic industry could cope on its own.[1405]

7.491 In response, China submits that the United States is trying to create confusion between the requirement, on the one hand, to give specific attention to the most recent imports and, on the other hand, the requirement to consider trends in imports rather than making an end-point comparison.[1406] Japan, Korea, China, New Zealand and Brazil contend that reliance on *US – Lamb* is misplaced. In that case, the Appellate Body was not examining increased imports, but the appropriate period for assessing the state of the domestic industry with regard to threat of serious injury.[1407] [1408]

7.492 The United States responds that the complainants draw an artificial distinction. Import data are part of the overall data to be assessed by competent authorities. If the question of the temporal focus of data evaluation did not encompass import data, the Appellate Body would not have referred in the *US – Lamb* Report to its discussion of increased imports in *Argentina – Footwear (EC)*.[1409] [1410]

[1399] Norway's first written submission, para. 256; Switzerland's first written submission, para. 246.
[1400] Brazil's first written submission, para. 121; Japan's first written submission, para. 180.
[1401] United States' first written submission, para. 174.
[1402] Appellate Body Report, *US – Lamb*, para. 137.
[1403] Panel Report, *US – Line Pipe*, para. 7.207.
[1404] United States' first written submission, paras. 182-190.
[1405] United States' written reply to Panel question No. 40 at the first substantive meeting, para. 82.
[1406] China's second written submission, para 92.
[1407] Appellate Body Report, *US – Lamb*, paras. 137-138.
[1408] Japan's second written submission, para. 84; Korea's first written submission, para. 96; China's second written submission, para. 96; New Zealand's second written submission, para. 3.63; European Communities' first written submission, para. 172.
[1409] Appellate Body Report, *US – Lamb*, para. 138, footnote 88.

7.493 The European Communities, Japan, Korea, Norway, New Zealand and Brazil further argue that in *US – Line Pipe*, the Panel was confronted with a slight and brief decrease in the absolute level of imports at the very end of the investigation period, imports which remained at high levels and continued to increase in relative terms.[1411] [1412] Thus, *US – Line Pipe* does not in anyway diminish the Appellate Body's interpretation of the timing of the increased imports – *i.e.*, that they must be recent. Rather, *US – Line Pipe* stands for the proposition that a modest and short decline in imports at the end of the period of investigation, that started in the last half year of the five and a half year period, does not exclude a finding that imports "remain" at "such increased quantities" if such finding is based on an explicit analysis of intervening decreasing trends and supported by a reasoned and adequate explanation.[1413] This does not mean, as the United States implies, that any increase in imports at any time during the period of investigation, no matter how remote in time and even if followed by a significant and continuing decline, satisfies the requirement of increased imports.[1414] The increase in imports was fully 30 months in the past by the time the United States initiated its safeguard investigation, hardly what one would term "immediately after detecting an increase in imports".[1415]

(b) Evaluation of trends

7.494 The European Communities, Japan, Korea and China further point out that the Appellate Body has also made clear that there is an obligation to evaluate trends in imports over the entire period of investigation, rather than simply comparing end-points. Where imports have declined "continuously and significantly", a product is no longer "being imported in such increased quantities" and the purpose of the safeguard remedy to address an urgent situation is not met.[1416] [1417] Norway and Switzerland submit in summary that an increase in imports should be evident both in an "end-point-to-end-point comparison and in an analysis of the intervening trends over the period".[1418] [1419]

7.495 According to the United States, the complainants also misconstrue the Appellate Body finding in *Argentina – Footwear (EC)* regarding trends in imports over the period of investigation. The Appellate Body addressed trends in order to show that consideration of end points alone was insufficient, and that an examination of intervening points must be made. The Appellate Body did not state that a comparison of the end points of a period of investigation is entirely irrelevant or impermissible. The United States also notes that Article 4.2(a) of the Agreement on Safeguards requires an evaluation of "the rate and amount of the increase in imports," and thus trends do not trump the amount of imports. The Appellate Body also did not state that trends must show a constant increase in imports or an increase that lasts for the entire period of investigation.[1420]

[1410] United States' second written submission, para. 104.

[1411] Panel Report, *US – Line Pipe*, paras. 7.210 and 7.213.

[1412] Norway's first written submission, para. 245; Norway's second written submission, para. 88.

[1413] European Communities' first written submission, paras. 175-180; Korea's first written submission, para. 104; New Zealand's second written submission, para. 3.64.

[1414] Japan's second written submission, para. 85; Brazil's second written submission, paras. 48-50.

[1415] Brazil's second written submission, para. 60.

[1416] Panel Report, *Argentina – Footwear (EC)*, para. 8.162, confirmed in Appellate Body Report, *Argentina – Footwear (EC)*, para 129.

[1417] European Communities' first written submission, paras. 272-274; Japan's first written submission, para. 186; Korea's first written submission, para. 72; China's first written submission, paras. 88-89.

[1418] Panel Report, *Argentina – Footwear (EC)*, para. 8.157.

[1419] Norway's first written submission, para. 246; Norway's second written submission, para. 89; Switzerland's first written submission, para. 239.

[1420] United States' first written submission, para. 178-180.

7.496 Japan responds that there must be some examination of the relative trends in imports over the period of investigation in terms of their nature, extent, and magnitude vis-à-vis the recent imports. It is similar to the point the Appellate Body made in *US – Lamb* regarding serious injury – that the real significance of short term trends at one point in a period of investigation "may only emerge when these short term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation".[1421] Japan and New Zealand submit that the point is to consider trends in context, in comparison with longer-term trends. Undertaking such an analysis is separate from the issue of causation, which concerns the "effect" of the increase.[1422]

7.497 With regard to the relative importance of trends and of recent imports, the European Communities argues that the most recent imports are part of an overall trend. However, as clarified by the Appellate Body, the most recent import trends should be the focus of safeguard determinations on the increased imports requirement contained in Article 2.1 of the Agreement on Safeguards. Overall trends over a longer period of time are particularly important to determine whether the first prong of the increased imports analysis, i.e., "such increased quantities", is met. GATT and WTO jurisprudence require an "abnormal development in the imports of the product in question"[1423], or as the Appellate Body has put it an "unforeseen" or "unexpected" or "sudden, sharp and significant" increase in imports.[1424] As argued by the European Communities, to establish this, the competent authorities are obliged to: (i) identify the rate and amount of imports over a longer period; and (ii) to compare the recent developments to previous import developments and to show that an abnormal increase took place. The USITC failed to consider these essential issues, but contended itself with "any increase" in imports. The European Communities submits that this has already been explicitly ruled out by the Appellate Body in *Argentina – Footwear (EC)*.[1425] Recent imports are decisive to establish that a product continues "being imported" in such increased quantities. The Panel's report in *US – Line Pipe* did not contradict the unambiguous obligation clarified by the Appellate Body to consider any intervening trend and in particular the sensitive end points of an investigation. The USITC did not even do what was required by the Panel in *US – Line Pipe*, that is, to establish for all products through a reasoned and adequate explanation imports that have at least remained at recently, sharply and suddenly increased levels. Instead, the United States invoked a passage of the Panel's report in *Argentina – Footwear (EC)*, allegedly rejecting the argument of the European Communities that only a "sharply increasing trend in imports at the end of the investigation can satisfy this requirement" and adding that there might be a "temporary downturn", which would nevertheless not invalidate a finding of increased imports.[1426] According to the European Communities, the first reference is irrelevant, because the United States has (far from establishing that imports continue increasing in the interim 2001 period) not even demonstrated that imports remained at sharply increased levels although the most recent interim 2001 data confirmed a steady and significant decline. Even if temporary and insignificant declines do not necessarily exclude a finding that a product is being imported at increased levels, the existence of more than a half-year downward trend requires an explanation why such trend is only considered temporary and insignificant. The USITC did not do so for any of the products. This is particularly glaring, since for many of those products

[1421] Appellate Body Report, *US – Lamb*, para. 138.

[1422] Japan's second written submission, para. 91; New Zealand's second written submission, paras. 3.61-3.62.

[1423] *US – Fur Felt Hats*, para. 4.

[1424] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[1425] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[1426] United States' second oral statement, para. 37, referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.165.

countervailing duty and anti-dumping orders were in place, therefore making such trends predictable.[1427] [1428]

7.498 Japan submits that there are both a temporal element and a comparative element embodied in the "increased imports" requirement. As interpreted by the Appellate Body in *Argentina – Footwear (EC)*, the temporal element requires that increased imports must be "sudden and recent".[1429] The comparative element requires a comparison: "between recent import trends … and import trends over the entire period of investigation". [1430] This is why the Appellate Body emphasized that an authority must examine recent imports and imports over the entire period of investigation.[1431] China submits that, on the one hand, only the consideration of trends allows determinations as to whether the evolution of imports meets the requirements of Article 2.1 of the Agreement on Safeguards and Article XIX of GATT 1994. In this regard, the requirement to consider trends is of a methodological nature. On the other hand, among the different trends, specific attention should be granted to the most recent ones in order to determine whether they showed an increase in imports that was recent. In this regard, the requirement to consider recent imports is rather of a qualitative nature.[1432] Norway asserts that the trend confirming that there actually is a recent, sudden, sharp and significant increase in imports, of the magnitude required by the Agreement on Safeguards, must continue until the very recent past. When the trend in the recent past is a decrease in imports, the condition for imposing a safeguard measure no longer exists. As such, the importance of a confirming trend in the very recent past has a very high importance.[1433] New Zealand submits that both trends and recent imports have been recognized as important in *Argentina – Footwear (EC)*, which also confirmed that a simple comparison of end-points will not suffice.[1434] In the present case, the requirement of a "recent" increase in imports was not satisfied because in the most recent period (interim 2001), imports actually decreased by 40%. Moreover, this was simply an acceleration of the downward trend in imports since 1998.[1435]

7.499 Korea argues that the primary focus must be recent imports. The Appellate Body in *Argentina – Footwear (EC)* stated in its report that "it is necessary for the competent authorities to examine recent imports, and not simply trends in imports".[1436] It further stated that "the investigation period should *be* the recent past".[1437] Trends are relevant to the relationship between increased imports, on the one hand, and causation on the other, in accordance with Article 4.2 of the Agreement on Safeguards. The United States refers to the Panel in *Argentina – Footwear (EC)* as authority for the proposition that the Panel rejected the EC's argument that imports had to be "sharply increasing" at the end of the period. However, the United States is referring to the Panel analysis of increased imports in *Argentina – Footwear (EC)* where the Appellate Body specifically commented that "the Panel's interpretation of [the increased imports] requirement [is] somewhat lacking".[1438] [1439]

[1427] USITC Report, Vol. II, Table OVERVIEW-3.
[1428] European Communities' written reply to Panel question No. 14 at the second substantive meeting.
[1429] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1430] Japan's second written submission, para. 82.
[1431] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1432] China's written reply to Panel question No.14 at the second substantive meeting.
[1433] Norway's written reply to Panel question No.14 at the second substantive meeting.
[1434] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[1435] New Zealand's written reply to Panel question No.14 at the second substantive meeting.
[1436] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1437] Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130.
[1438] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1439] Korea's written reply to Panel question No. 14 at the second substantive meeting.

7.500 Korea also notes that the United States relies heavily on the analysis of the increased imports requirement in the Panel report in *US – Line Pipe*.[1440] Korea fundamentally disagrees with the analysis of the Panel in that case. Korea submits that it is important to recall that the Panel in *US – Line Pipe* interprets a fundamental modification of the Appellate Body's holding in *Argentina – Footwear (EC).* The Panel in that case concluded that the Appellate Body's reliance on the phrase "is being imported" had to be considered in light of the rest of the sentence, which referred to "increased" (as opposed to "increasing") imports (*i.e.*, "in such increased quantities"). To the Panel, this "supported" an interpretation that imports could have increased in the recent past rather than the "present" as long as they remained at high levels. First, Korea does not agree that the phrase "is being imported" can mean anything other than that the increase must be present. After all, the Appellate Body specifically found that "it is necessary for the competent authorities to examine recent imports, and not simply *trends* ... during any ... period of several years". (emphasis added) The Appellate Body holding that the increase also had to be sudden, sharp, and significant bolsters this interpretation since those terms conform to the emergency nature of safeguards. Nor does Korea read the use of the *adjective* "increased", which clearly modifies "imports" and denotes a greater quantity, as somehow modifying the present tense of "is being imported". Finally, such a reading does not clarify what the adjective "increased" refers to (relative to what time period?) as opposed to the Appellate Body ruling that makes clear that the increase must be recent (*i.e.*, the "present tense") and not in the past. It is also significant that in *US – Line Pipe*, the Panel states that the temporary nature of the decrease was a factor in its analysis of the imports in that case since "a temporary change in the behaviour of the imports may not be sufficient to reverse an overall trend".[1441] In the present case of flat-rolled, however, there was solid evidence that these declines in imports were not temporary because they were directly the result of the anti-dumping and countervailing duties margins at high levels on hot-rolled.[1442] In fact, the six-month decline in imports in the interim period for line pipe contrasts with the two and one-half-year decline in flat-rolled imports in the present case. One final comment on the panel in *US – Line Pipe*. That Panel cited to the Appellate Body in *US – Lamb* as authority. However, the Appellate Body was addressing a separate question in that case of relative importance of domestic industry threat data over the period. The Appellate Body properly concluded in that case that, given the extraordinary nature of safeguard relief, the United States had to consider data during any time in the period that called into question whether the data actually demonstrated a threat of serious injury.[1443] Korea submits that this finding is not at all inconsistent with the Appellate Body holding in *Argentina – Footwear (EC)* that the condition of "increased imports" must be "present". Korea argues that the United States' tactic is to try to diminish the significance of *Argentina – Footwear (EC),* but that decision is consistent with each and every subsequent decision by the Appellate Body concerning the Agreement on Safeguards, including *US – Lamb*. In every case, the Appellate Body has interpreted strictly the provision of the Agreement on Safeguards in light of the extraordinary nature of these actions. It is fundamental that increased imports must exist and must be present, or emergency action is no longer justified.[1444] [1445]

7.501 Finally, regarding trends and recent imports, in Korea's view, the United States implies that, for the complainants, the existence of an independent increased imports requirement excludes consideration of the relationship between increased imports and causation and serious injury. Korea submits that, in fact, it does not and the complainants have not made such a claim. The Agreement on Safeguards requires both a separate quantitative and qualitative analysis of increased imports and, if

[1440] United States' second written submission, para. 92.
[1441] Panel Report, *US – Line Pipe*, footnote 182 (in para. 7.210).
[1442] Korea's first written submission, paras. 81, 89-93; Korea's second written submission, para. 120.
[1443] Appellate Body Report, *US – Lamb*, paras. 136-138.
[1444] Korea's written reply to Panel question No. 14 at the second substantive meeting.
[1445] Korea's written reply to Panel question No. 14 at the second substantive meeting.

imports have increased, an analysis of the relationship between increased imports and causation and serious injury. The United States asserts that it is not possible or reasonable to analyse increased imports separate and apart from causation.[1446] Korea argues that that is contradicted by the language of Article 2.1 and by the Appellate Body precedents: In fact an analysis of "recent", "sudden", and "significant enough" explain the context, extent, and nature of the increase. In *Argentina – Footwear (EC)*, the Appellate Body found *no* increased imports and questioned why the panel had bothered to analyse causation.[1447]

7.502 Brazil would not categorically state that trends are more important than recent imports in an analysis of increased imports or vice-versa. Brazil submits that trends are obviously important because Article 2.1 specifies that imports must be increasing in order to impose safeguard measures and whether or not imports are increasing depends on the trend in imports. Trends are also important because they provide context for determining whether the increase in imports is sudden, sharp and significant. It is difficult, for example, to see how a uniform and gradual increase in imports over a 66-month investigative period could be sudden or sharp, although it might be significant. Thus, the increase must be viewed in the context of trends over the period of investigation. At the same time, recent imports are necessarily important in light of the fact that Article 2.1 refers to increased imports in the present tense – "is being imported". Recent imports, of course, must also be looked at in the broader context. Thus, in *US – Line Pipe* a brief decline in the absolute level of imports at the end of the period of investigation was not important in the broader context because imports remained at high levels and, even in the most recent period, continued to increase relative to domestic production.[1448] The importance of the most recent period would also seem to depend on how long that period is (three months, six months, one year) and whether it continued a trend or reversed a trend and, if so, how decisively. In other words, how important the most recent period is may depend on the particular facts of the period in question and the context.[1449]

7.503 The United States submits that the complainants' insistence on the importance of recent data, to the point of excluding trend analysis, is misplaced and overlooks a significant amount of Appellate Body and panel analysis indicating that both trends and recent imports must be considered. According to the United States, in *Argentina – Footwear (EC)*, the Appellate Body found that "it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the last five years".[1450] In *US – Lamb*, the Appellate Body cited the language from *Argentina – Footwear (EC)* but then found that, "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 ... . [I]n conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period".[1451] Finally, the Panel in *US – Line Pipe* found 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".[1452] Both Appellate Body and panel reports endorse the idea that a competent authority must consider both trends throughout the period of investigation and recent imports. The panel in *US – Line Pipe* went on to reject Korea's claim that the USITC's finding of increased imports was inconsistent with Article 2.1.[1453] The USITC applied precisely the

[1446] United States' second oral statement, para. 38.
[1447] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.
[1448] Brazil's first written submission, paras. 49-50.
[1449] Brazil's written reply to Panel question No.14 at the second substantive meeting.
[1450] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[1451] Appellate Body Report, *US – Lamb*, para. 138.
[1452] Panel Report, *US – Line Pipe*, para. 7.208.
[1453] Panel Report, *US – Line Pipe*, para. 7.214.

same analysis in its steel determinations as in its line pipe determination, namely, considering both trends and recent imports in its analysis.[1454] [1455]

(c) Rate and amount of the increase

7.504 Brazil and Japan claim that the competent authorities are required, under Article 4.2(a), to evaluate "the rate and amount of the increase in imports in absolute and relative terms". In order to be meaningful, this provision by necessity requires that imports have a positive rate of increase – that is, an acceleration.[1456] If the rate at which imports have increased has declined, either absolutely or relatively, there cannot possibly be serious injury as envisioned by Article 4.2(a).[1457]

7.505 The United States objects to Japan's and Brazil's assertion that imports must be increasing at an accelerating pace.[1458] The dictionary definition of "rate" adduced by Japan as "speed of movement, change, etc.; rapidity with which something takes place" does not necessarily require an acceleration in the amount by which imports increase.[1459] The "rate" of an increase in imports can be stated by observing that imports increased by a certain percentage from one year to the next.[1460] The United States submits that, more importantly, Article 4.2(a) does not require an accelerating rate of increase.[1461]

(d) "Sharp" and "significant" increase

7.506 The European Communities argues that in addition to the above qualitative requirements for "increased imports", the Appellate Body has made clear that there is a quantitative criterion: the increase must be "sharp" and "significant". According to the European Communities, Japan and Norway, this requirement is derived from the expression "in such increased quantities" where "such" clarifies that not any increase is sufficient.[1462] The Agreement on Safeguards does not specify which particular rate of increase is sufficient to meet the requirement of a sharp and significant increase, but it obliges the competent authorities to correctly evaluate the trends in imports over a longer period. On the basis of a proper evaluation of such trends, panels can review whether import surges are sufficiently sharp and significant.[1463] China adds that the WTO standard is much higher than the simple demonstration of imports in increased quantities required by United States law.[1464]

7.507 China and Switzerland recall that safeguard measures are measures of extraordinary nature. These "emergency measures" do not allow a finding on increased imports where there has been such a

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[1454] Contrary to Korea's assertion at the second panel meeting, the panel in *US – Line Pipe* specifically endorsed the USITC's finding that subject imports had increased *absolutely* despite a recent decline in import volume. Panel Report, *US – Line Pipe*, para. 7.210.

[1455] United States' written reply to Panel question No.14 at the second substantive meeting.

[1456] *New Shorter Oxford English Dictionary* at 2481 (1993) (defines "rate" as "speed of movement, change, etc.; rapidity with which something takes place").

[1457] Brazil's first written submission, para. 123; Japan's first written submission, para. 182.

[1458] Japan's first written submission, para. 182

[1459] United States' first written submission, para. 181.

[1460] The word "rate" is defined as "a fixed relation (as of quantity, amount, or degree) between two things." *Webster's Third New International Dictionary*, p. 1884.

[1461] United States' first written submission, para. 218.

[1462] European Communities' written reply to Panel question No. 37 at the first substantive meeting; Japans' written reply to Panel question No. 37 at the first substantive meeting; Norway's first written submission, para. 83.

[1463] European Communities' first written submission, paras. 275-277.

[1464] China's first written submission, para. 223.

steady and gradual increase of imports over a longer period that the domestic industry could have adjusted to.[1465] New Zealand and Norway add that a "steady increase" could very well be the natural and foreseeable consequence of tariff concessions.[1466]

7.508 Brazil and Japan add that the increase in import volume must be "such" as – *i.e.*, sufficient – to cause or threaten serious injury to the domestic industry producing the like or directly competitive product. It would therefore be insufficient to find a minor increase in imports even if there were a causal link between imports and the industry's injury (*e.g.*, a price-related impact with no concomitant volume-related impact). Rather, the increase itself must be big enough to cause the damage.[1467]

7.509 New Zealand affirms that a Member wishing to impose safeguard measures thus faces a high threshold when making determinations with respect to increased imports. A competent authority must analyse the trend in imports over the period of investigation to establish that there is a sharp and sudden increase. It must also examine the direction of the most recent imports – any sharp sudden increase needs to have occurred in the "very recent past". Finally, it must consider the significance of any increase – both in quantitative and qualitative terms.[1468]

7.510 China and Japan also point out that the panel must asses whether the USITC explicitly demonstrated that increases in imports have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[1469]

7.511 According to the United States, the Agreement on Safeguards does not set out absolute standards for how recent, sudden, sharp or significant an increase in imports must be. Indeed, the Agreement on Safeguards contains none of those descriptive terms. The Appellate Body's use of those terms can only have been intended to provide a shorthand exposition of the requirement that increased imports must ultimately be found to be enough to cause serious injury or threat to the relevant domestic industry.[1470]

7.512 New Zealand submits that the United States seems determined to divert attention from the "recent", "sudden", "sharp" and "significant" references of the Appellate Body. These references seem to disappear in the United States argumentation, replaced with an emphasis that imports must simply be "enough" with none of the adjectives employed by the Appellate Body to describe what really informs the test. The United States casts no real light on how the USITC could, on any reasonable basis, have arrived at a determination of increased imports. It is clear from the rapidity with which the United States follows its statement that there is no absolute standard[1471] to determine increased imports, with a statement that "an increase in either absolute or relative import levels alone" may suffice[1472], that the United States continues to be attached to the notion that "any increase" meets the standard.[1473]

[1465] China's first written submission, para. 216; Switzerland's first written submission, para. 249.

[1466] New Zealand's written reply to Panel question No. 42 at the first substantive meeting; Norway's written reply to Panel question No. 42 at the first substantive meeting.

[1467] Brazil's first written submission, para. 122; Japan's first written submission, para. 181..

[1468] New Zealand's first written submission, para. 4.76.

[1469] China's first written submission, para. 220; Japan's first written submission, para. 185.

[1470] United States' first written submission, para. 216.

[1471] United States first written submission, para 216.

[1472] Ibid, para. 217.

[1473] New Zealand's first written submission, para. 3.70.

7.513 The United States argues that the complainants misconstrue or ignore the Appellate Body and panel reports addressing the "increased imports" requirement of the Agreement on Safeguards. They misconstrue the Appellate Body's report in *Argentina – Footwear (EC)* by arguing that an increase in imports must be recent, sudden, sharp, and significant, according to some absolute standard. It is clear that there are no such absolute standards for how recent, sudden, sharp or significant the increase in imports must be. As the Appellate Body said, it is not a "mathematical or technical determination".[1474] The Appellate Body was very clear – the imports must be recent enough, sudden enough, sharp enough, and significant *enough* to cause or threaten serious injury. These are questions that are answered as competent authorities proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury/threat and causation). These analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry.[1475] The United States notes that Article 4.2(a) of the Safeguards Agreement (which the Appellate Body was interpreting when it spoke of "recent enough, sudden enough, sharp enough, and significant enough") encompasses the entire investigative responsibility of competent authorities under the Safeguards Agreement. The United States adds that the fact that the drafters of the Agreement on Safeguards did not intend to impose a specific "increased imports" standard is reinforced by a comparison with Article 5 of the Agreement on Agriculture, in which the drafters laid out specific numeric standards for measuring increased imports and setting specific measures for each level of imports.[1476]

7.514 The European Communities and Japan respond that they have not argued that a quantitative analysis is a purely mathematical or technical determination according to some absolute numerical standard. Rather, such determination should be made on a case-by-case-basis, by carefully analysing import trends in the most recent period and by contrasting them with trends in earlier parts of the investigation period.[1477] Japan adds that a competent authority must not declare that increased imports exist, for example, simply because imports have increased by some negligible amount over the period of investigation. There are quantitative and qualitative judgments to be made regarding the existence, as opposed to the effect, of increased imports.[1478] New Zealand adds that a "mathematical or technical determination" is in fact at the heart of the United States approach to "increased imports". Behind the United States position that "there is no minimum quantity by which imports must have increased; a simple increase is sufficient" is the notion that "any increase" can suffice.[1479]

7.515 Japan and Brazil respond that the qualitative and quantitative requirements concerning increased imports should be viewed within the context of the purposes of safeguard measures – that is "emergency action" against a product. The word "emergency" is defined as "a situation, especially of danger or conflict, that arises unexpectedly and requires urgent action; a condition requiring immediate treatment"[1480], implying something that has happened quickly or suddenly.[1481] Since the increase in imports is supposed to be causing serious injury, this would seem to imply more than an insignificant or small increase. While this aspect ultimately relates to the issue of causation, Korea and Brazil argue that it remains a threshold issue separate from the issue of causation; it concerns the extent of the increase rather than the effect of the increase.[1482] In contrast, the United States attempts

[1474] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[1475] United States' first written submission, para. 177.
[1476] United States' second written submission, para. 96.
[1477] European Communities' first written submission, para. 149; Japan's second written submission, para. 90.
[1478] Japan's first written submission, para. 90.
[1479] New Zealand's second written submission, para. 3.67.
[1480] The New Shorter Oxford English Dictionary (1993) at 806.
[1481] Japan's second written submission, para. 87.
[1482] Korea's first written submission, para. 91; Brazil's first written submission, paras. 52-53.

to collapse the "increased imports" requirement with the separate "causation test".[1483] According to New Zealand, the United States in effect says that the increased import requirement simply forms part of the causation analysis required under Article 4.2(b) of the Agreement on Safeguards. But there is no support to be found for this assertion in the law.[1484]

7.516 The United States responds that, on the contrary, the United States recognizes that the Agreement on Safeguards contains a separate "increased imports" requirement. However, unlike the complainants, the United States does not invest this requirement with more significance than is warranted by the text of the Agreement on Safeguards. This separate "increased imports" requirement is satisfied, in the first instance, by any increase in imports, absolute or relative to domestic production. However, this does not mean that ultimately "any increase will do". As competent authorities consider the other conditions necessary for imposition of a safeguard, they determine as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, sharp enough, and significant enough to cause or threaten serious injury.[1485] The United States submits that for each of the products for which the United States applied a safeguard measure, the USITC found that the pertinent domestic industry was seriously injured or threatened with serious injury and found the requisite causal link between the increased imports and that injury or threat. This analysis, taken as a whole, established that the increases in imports were "recent enough, sudden enough, sharp enough, and significant enough"[1486] to cause serious injury or the threat of serious injury.[1487]

7.517 The United States also argues that the complainants seek to support their position that the increased imports requirement encompasses temporal, quantitative and qualitative conditions that are independent of the causation analysis by pointing to the fact that the Appellate Body addressed the question of increased imports as "a stand-alone issue" in *Argentina – Footwear (EC)*.[1488] The fact that the Appellate Body organized its Report in *Argentina – Footwear (EC)* in a certain way (i.e., with subheadings entitled "Increased Imports", "Serious Injury", and "Causation" – all under the heading of "Interpretation and Application of Articles 2 and 4 of the Agreement on Safeguards") does not detract from the fact that the Appellate Body was interpreting Article 2.1, which encompasses the entire investigative responsibility of competent authorities under the Agreement on Safeguards.[1489]

7.518 Korea submits that the reason emergency action is permitted under the Agreement on Safeguards is that the unforeseen and sudden increase in imports is still occurring – *i.e.*, the need for emergency action is still present.[1490] Korea also argues that high volume imports having a significant presence in the market, if they are not suddenly and sharply increasing, either absolutely or relatively, cannot serve as a basis for concluding that an "emergency" exists caused by the imports. There is nothing extraordinary about import levels *per se*.[1491]

7.519 The European Communities submits that the term "in such quantities" read contextually with "as a result of unforeseen developments" and "emergency action", requires some extraordinary and unexpected increase in import volumes which must be established by comparing recent import

[1483] Korea's first written submission, para. 90.
[1484] New Zealand's second written submission, paras. 3.60-61.
[1485] United States' second written submission, para. 93.
[1486] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[1487] United States' second written submission, para. 94.
[1488] Japan's written reply to Panel question No. 36 at the first substantive meeting.
[1489] United States' second written submission, para. 97.
[1490] Korea's first written submission, para. 93.
[1491] Korea's first written submission, para. 110.

volumes against those in earlier parts of the investigation period.[1492] China argues that the United States attempts to create confusion between the requirement that a product is being imported in increased quantities, on the one hand, and the requirement that the increased imports cause or threaten to cause serious injury, on the other. According to the European Communities, China and Norway, the Appellate Body has clearly stated, in *Argentina – Footwear (EC)*, that there are three separate conditions to be met for the application of safeguard measures[1493], hence the increased imports requirement should be subject to separate analysis and determination.[1494] The European Communities adds that the analysis of whether there is a substantial and genuine link between increased imports and serious injury is qualitatively something different than showing an abnormal import development.[1495]

7.520 Japan adds that a comparison is required, not so much to determine the effect of increased imports in a causal sense, but to determine the existence of increased imports in light of the relative trends in imports. The comparison is made between recent import trends, which are at the heart of the increased imports inquiry, and import trends over the entire period of investigation. It serves as a litmus test to determine if an emergency exists and, therefore, if emergency action is required.[1496]

7.521 The European Communities and Switzerland further argue that the more gradual and steady or otherwise "normal" and foreseeable an increase in imports becomes, the higher is the burden for a WTO Member wishing to take a safeguard measure to analyse import volumes and explain to its trading partners why it considers that their exports have increased more than expected.[1497]

3. Requirement of reasoned and adequate explanation

7.522 Korea adds that, at a minimum, Articles 2.1 and 4.2(a) of the Agreement on Safeguards required the USITC to explain and reconcile its conclusion that imports had increased with the fact that imports were declining.[1498]

4. Case-specific arguments

(a) Consideration of 2001 data

(i) Full-Year 2001 data

7.523 The European Communities, China[1499], Norway[1500] and Switzerland[1501] further argue that the USITC ignored import trends in the most recent past, i.e. 2001. The import data for the full year of 2001 were available when the USITC updated its Report and completed its determination in February 2002, but there is no explanation why the USITC did not use this information about crucial developments, i.e. import decreases, in the "very recent past". These data are relevant for determining

[1492] European Communities' first written submission, para. 156; European Communities' written reply to Panel question No. 4 at the second substantive meeting.
[1493] Appellate Body Report, *Argentina – Footwear (EC)*, para.92.
[1494] European Communities' first written submission, paras. 157-160; China's first written submission, paras. 83-85; Norway's second written submission, paras. 81-82.
[1495] European Communities' first written submission, para. 160.
[1496] Japan's second written submission, para. 82.
[1497] European Communities' first written submission, para. 166; Switzerland's first written submission, para. 76.
[1498] Korea's first written submission, para. 73.
[1499] China's first written submission, para. 231.
[1500] Norway's first written submission, para. 255-256.
[1501] Switzerland's first written submission, para. 247.

whether a product still "is being imported …".[1502] In any event, according to the European Communities and Japan[1503], the full year data for 2001 were available to the President when he took the decision to impose the safeguard measures.[1504] They had to be taken into account even if they had not been available to the USITC[1505] and, according to Brazil, the European Communities and New Zealand[1506], they confirmed the decreases already present in interim 2001[1507], and showed that they were no temporary phenomenon.[1508]

7.524 According to the United States, fundamental legal and practical considerations should lead the Panel to reject the complainants' attempts to expand the period of investigation to encompass full-year 2001 data that are not on the record of the USITC's investigation that began in early July 2001. The United States submits, first, that to the extent that the complainants are suggesting that the USITC should have relied on full-year 2001 data without giving interested parties an opportunity to comment on those updated data, the complainants' position is directly at odds with Article 3.1 of the Agreement on Safeguards.[1509]

7.525 The United States points out that if the USITC had updated the import data to include full-year 2001 figures, it would also have had to update all the data in the record, including data concerning injury and causation because increased imports must be examined in the context of their effects on the domestic industry. By the time that this could have been accomplished, full-year 2001 data would no longer be the most current. Thus, the complainants' proposed use of full-year 2001 data would have required an endless process of updating data that would preclude any final decision in a safeguards investigation. The United States submits that it is obvious that competent authorities must be permitted to set the end of a period of investigation at a point that will permit them to gather, compile and analyse not only import data but also information concerning the condition of the domestic industry and the overall market environment. It is also clear that in setting the end of the period of investigation at 30 June 2001, the USITC was gathering the most recent information it could.[1510]

7.526 The United States adds that the complainants are also wrong in suggesting that, even if the USITC could not, the President should have taken into account full-year 2001 data. Such an approach would sever the connection between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure. This would be inconsistent with the fundamental premise of the Agreement on Safeguards that a measure should only be taken following a proper investigation by a Member's competent authorities.[1511]

(ii) Interim 2001 data

7.527 New Zealand sees no need to rely on 2001 full-year data to make its case. Annualized 2001 import volume data based on the interim 2001 data[1512] recorded in the USITC Report should have

[1502] European Communities' written reply to Panel question No. 38 at the first substantive meeting; Norway's written reply to Panel question No. 38 at the first substantive meeting.
[1503] Japan's written reply to Panel question No. 38 at the first substantive meeting.
[1504] European Communities' first written submission, para. 284-286.
[1505] Japan's written reply to Panel question No. 39 at the first substantive meeting.
[1506] New Zealand's written reply to Panel question No. 38 at the first substantive meeting.
[1507] European Communities' written reply to Panel question No. 39 at the first substantive meeting.
[1508] Brazil's written reply to Panel question No. 38 at the first substantive meeting.
[1509] United States' first written submission, para. 202-204.
[1510] United States' first written submission, paras. 205-206.
[1511] United States' first written submission, para. 207.
[1512] Interim 2001 data divided by first half interim 2000 data multiplied by full year 2000 data.

indicated to the USITC by the middle of 2001 the sharply decreasing trend in import volumes and market share.[1513] These annualized trends were, as it turned out, almost exactly matched by the full year 2001 data which was available at the time the two Supplementary Reports were made by the USITC.[1514] [1515]

7.528 Similarly, the European Communities notes that the United States accepts that full year 2001 data was available to the USITC when it considered for the first time whether non-FTA imports had increased, i.e., in February 2002. However, the United States denies that the Second Supplementary Report was a "determination" within the meaning of Article 2.1 of the Agreement on Safeguards and submits that the USITC's determination for the purpose of the Panel's review were the determinations on pages 1, 17 and 18 of the original USITC Report issued on 22 October.[1516] The European Communities submits that even if the Panel agreed with the United States that full year 2001 data was not available when the USITC made its "determination", the use of "full year 2001" data is not "critical" to the complainant's case. The European Communities built its case on the lack of proper consideration of the most recent import data available, be it interim 2001 or full year 2001. Upon "clarification" by the United States that only the USITC Report from October 2001 forms the relevant determination, the graphs illustrating the import trends provided by the complainants in common Annex A to the first written submission were revised so as to strictly reflect only annualized interim 2001 data that was available to the USITC at the time of the original report in October 2001. The European Communities explains that annualizing the interim 2001 data does not mean to "double" them.[1517] The European Communities annualized the interim 2001 data according to the following formula: annualized interim 2001 = (interim 2001/interim 2000) x full year 2000. The European Communities submits that this approach fully preserves the USITC's assumption of seasonal fluctuations and essentially compares interim 2001 data with interim 2000 data, as was done by the USITC during the investigation, while allowing to fit the resulting trend onto a yearly graph and therefore to discern an overall trend.[1518]

7.529 Brazil submits that the 2001 data points can be represented in various ways. Given that the United States had full 2001 data while it was both still considering whether to impose safeguard measures and obtaining additional information from the USITC, one could rely on actual 2001 data. In the alternative, one could construct a surrogate for full year 2001 data in various ways, including deriving the second half of 2001 based on actual first half 2001 data adjusted by the ratio of first and second half 2000 data. Brazil submits that what is important is not how it is done, but why. The objective is to determine how import levels during the first half of 2001, the interim period, compared with import levels during the entire period of investigation. Because import levels for 1996, 1997, 1998 and 1999 are only provided based on annual levels, in order to measure the magnitude of interim 2001 imports, it is necessary to convert these imports into a full year equivalent basis in order to put interim 2001 import levels in the proper context.[1519]

[1513] New Zealand's first written submission, Figures 2 and 3 (p. 50).

[1514] Compare New Zealand's first written submission, Figure 2 (p. 50) with the European Communities' first written submission, Figure 5 (para 299).

[1515] New Zealand's first written submission, para. 3.71.

[1516] The European Communities disagrees with the United States and submits that because the October 2001 USITC Report only analyzed imports from all sources, the determination violates the parallelism principle. See European Communities' second written submission, paras. 40-51, 186.

[1517] United States' oral statement at the second substantive meeting, para. 41; European Communities's second written submission, para. 188; European Communities's written reply to Panel question No. 16 at the second substantive meeting.

[1518] European Communities' written reply to Panel question No. 16 at the second substantive meeting.

[1519] Brazil's written reply to Panel question No. 16 at the second substantive meeting.

7.530 According to the United States, interim data was available to the USITC in the course of the investigation, and interim data was used by the USITC. The United States submits that no complainant has been able to show that a competent authority is required to do more than the USITC did in gathering or using the most recent and complete data set available at the time the determinations were made. Interim data for 2001 should be compared to interim data for 2000, while interim data should be segregated from full-year data. With regard to the argument by the European Communities that "annualizing" interim data would preserve the proportionate relationship between interim 2000 data and interim 2001 data while allowing them to be placed on the same chart as annual data, the graphic representation would suggest that the "annualized" 2001 data were comparable to full year 1996, 1997, 1998, 1999, and 2000 data, the United States submits that that is simply not the case.[1520]

7.531 While the USITC gathered data for the first half of 2001 (interim 2001), in the European Communities' and Switzerland's view, it did not properly consider them.[1521] Whenever the interim 2001 data showed a decrease, the weight was given to the 1996-2000 development. This general approach could not, in itself, demonstrate that imports are "being imported" in increased quantities.[1522]

7.532 The United States argues that the complainants' criticism that the USITC failed to give enough weight to interim 2001 import data when these showed a decrease in imports is unfounded. An exclusive focus on import data in interim 2001 would disregard the annual data in preceding years, and the trends examined must cover the entire period of investigation.[1523]

7.533 The European Communities further submits that the USITC's approach does not explicitly analyse the intervening decreasing trends discernible from 2001 data and does not give an adequate and reasoned explanation why such development would still justify a determination that imports remain at "such increased quantities". Instead, the USITC did nothing more than describing the 2001 interim data or stating that despite the decrease in the interim data, the statutory criterion was still satisfied.[1524]

7.534 China contends that it was not possible for the USITC to consider the very last portion of the period of investigation when determining trends in imports because the amount of imports for a half-year period cannot be compared to the amount of imports for a full-year period. It would also be false to assume that a trend in imports can be determined for the very last portion of the period of investigation by comparing interim 2001 with interim 2000. China submits that this comparison can only reveal whether the amount of imports during the first half of 2001 was more or less important than the amount of imports 12 months earlier, but not what happened between the two periods and how imports fluctuated over the period of the last 18 months, which would be necessary in order to determine a trend. Hence, the USITC did not give most recent imports all the importance that they deserved.[1525] China notes that it is not suggesting that the United States should have disregarded the 2001 data. Indeed, the 2001 data constitute the most recent data and China is of the opinion that the USITC should have given proper attention to the most recent trends which, for most of the products, as for instance CCFRS, show a clear declining trend. However, China is of the view that the United

[1520] United States' written reply to Panel question No. 16 at the second substantive meeting.
[1521] United States' written reply to Panel question No. 16 at the second substantive meeting.
[1522] European Communities' first written submission, para. 280, 287; Switzerland's first written submission, para. 247.
[1523] United States' first written submission, para. 196.
[1524] European Communities' first written submission, para. 182; European Communities's second written submission, paras. 169-182.
[1525] China's first written submission, para. 227-231.

States should have considered the full year data for 2001, since the final determinations were made after the end of 2001 at a time were full-year data for 2001 were available. In doing so, the United States would have allowed to analyse the overall trend and to verify the USITC's assumption of seasonal fluctuations, which is used to justify the comparison between interim 2000 and 2001 data.[1526]

7.535 The European Communities also argues that the 2001 data (full year or interim) constitute the most recent data and are decisive to determine whether products "are being imported" at increased quantities. The European Communities considers that the USITC failed to give proper weight to the interim 2001 data.[1527] Brazil submits that the interim 2001 data is extremely important for two reasons. First, it confirms that the downward trend in CCFRS imports begun in 1999 continued and, in fact, accelerated, toward the end of the period of investigation. Second, it confirms that CCFRS imports at the end of the period of investigation had reached the lowest level of the entire investigation period. Given that interim 2001 was the most recent period investigated by the USITC, Brazil sees no basis for ignoring the import levels during this period. Furthermore, since the period encompassed a full six months and the declines during the period followed declines in imports during the immediately preceding semi-annual period, the sharp decline shown in CCFRS imports during the interim period cannot be considered either temporary or an aberration.[1528] Korea notes that the fact that 2001 is "interim" does not prevent a direct comparison of imports relative to production – the percentages are directly comparable. Moreover, the fact that the period is six months in length does not prevent a meaningful analysis of the import data *per se*. In the case of flat-rolled, the interim data is particularly telling.

(b) Period of investigation

7.536 The European Communities and Norway[1529] argue that the choice of 1996 as a base year apparently served the purpose of disguising significant and steady decreases in imports for eight of the ten product groups since a peak in 1998 or later. With very few exceptions, the USITC does not rely on the trends over the years between 1996 and 2001.[1530] [1531] New Zealand argues that the USITC manifestly failed to consider trends throughout the period of investigation.[1532] China adds that the USITC's approach, in line with its tradition, of considering import trends over the most recent five and a half-year period prevented the USITC from considering fully the most recent imports.[1533]

7.537 The United States argues that the complainants' assertion that the USITC selected 1996 as a base year in order to achieve a particular result has no merit. The USITC followed its established practice in safeguards investigations of using a period of investigation of five years plus whatever interim period is available.[1534] The United States also rejects China's assertion that the USITC's period of investigation prevented the USITC from "considering fully the most recent imports"[1535] The

[1526] China's written reply to Panel question No. 15 at the second substantive meeting.
[1527] European Communities's first written submission, para. 284 and 287; European Communities' written reply to Panel question No. 15 at the second substantive meeting.
[1528] Brazil's written reply to Panel question No. 15 at the second substantive meeting.
[1529] Norway's first written submission, para. 254.
[1530] The only two exceptions are the findings on certain tubular products, and certain carbon alloy fittings and flanges, the only products for which the 2001 data did not reveal a manifest decrease in imports and therefore supported the predetermined conclusion. USITC Report, Vol. I, pp. 157 and 171.
[1531] European Communities' first written submission, paras. 280 and 283.
[1532] New Zealand's first written submission, para. 4.78.
[1533] China's first written submission, paras. 224 and 226.
[1534] United States' first written submission, para. 194.
[1535] China's first written submission, para. 226.

period of investigation must be long enough to draw appropriate conclusions regarding the state of the domestic industry.[1536]

7.538 China responds that the methodology of investigating the last five and a half years does not allow meaningful conclusions to be drawn as far as the assessment of increased imports is concerned.[1537]

7.539 The United States objects to the view that the USITC's practice of reviewing imports over a five-year period precludes the USITC from considering trends within that period, including recent trends in imports, as directed by the Appellate Body in *Argentina – Footwear (EC)*.[1538] As an initial matter, the panel in *US – Line Pipe* has already upheld the USITC's use of a five-year period of investigation because it allows an analysis of recent trends in imports, consistent with the Appellate Body's rulings.[1539] Moreover, the record demonstrates that for each of the ten measures at issue in this proceeding, the USITC in fact examined trends within the five-year period, including recent trends in imports.[1540]

7.540 The complainants respond that the United States has misunderstood them. The complainants contest the failure to properly consider intervening trends and the failure to show that where, unusually, imports did increase, this was extraordinary and unexpected.[1541]

(c) Method of analysis of increased imports

(i) Quantitative analysis required?

7.541 The European Communities claims that the United States was not entitled to content itself with finding a "simple increase" in imports as opposed to a sudden, sharp and significant or otherwise extraordinary surge in imports. The complete lack of a quantitative analysis particularly affects the two exceptional cases where imports had increased (tubular products and fittings and flanges). The USITC should have explained why imports should have been considered to have increased sharply and significantly enough, as opposed to merely gradually, so as to cause or threaten to cause serious injury to the domestic industry. [1542] New Zealand argues that the USITC manifestly failed to place any weight on the extent to which increased imports have been "recent enough, sudden enough, sharp enough, or significant enough both quantitatively and qualitatively" to justify a positive determination.[1543] Norway and Switzerland also point to a flaw in the USITC's methodology affecting the findings concerning all products resulting from the lack of a quantitative analysis. Nowhere has the USITC demonstrated that an alleged increase of imports was sharp and substantial.[1544]

7.542 The United States argues that the complainants' position that the USITC failed to engage in an adequate "quantitative analysis" of the import data is unfounded. Competent authorities are not required to analyse the import data in every possible permutation when the data speak for themselves.

[1536] United States' first written submission, para. 195.
[1537] China's second written submission, para. 100.
[1538] Appellate Body Report, *Argentina – Footwear (EC)*.
[1539] Panel Report, *US – Line Pipe*, para. 7201.
[1540] United States' second written submission, para. 25.
[1541] European Communities' second oral statement "Scope and Standard of Review" on behalf of the complainants, para. 16.
[1542] European Communities' first written submission, paras. 288-289.
[1543] New Zealand's first written submission, para. 4.78.
[1544] Norway's first written submission, paras. 252, 259; Switzerland's first written submission, para. 249.

The USITC described the import data in a clear and straightforward manner and, accordingly, acted in conformity with the Agreement on Safeguards. The United States submits that the complainants erroneously support their arguments by focusing only on the "Increased Imports" section for each product in the USITC Report. This section, however, must be read together with the "Serious Injury" and "Substantial Cause" sections, to evaluate the USITC's determination that a product is "being imported … in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry".[1545]

7.543 In counter-response, Korea submits that the USITC completely failed to conduct a quantitative and qualitative analysis showing that import surge was of such a *nature* as to cause serious injury or threat thereof.[1546] For the counter-responses of the European Communities, see sections F.2.(b) and (d).

(ii) End-point analysis

7.544 The European Communities, Norway[1547] and Switzerland[1548] contend that the USITC applied an erroneous methodology for evaluating increased imports, rendering all findings on increased imports inconsistent with Article 2.1 of the Agreement on Safeguards. The USITC's methodology as applied in this case only aimed at finding a "simple increase" in imports at some point during the investigation period without considering whether such increase was sufficiently recent, sudden, sharp and significant.[1549] Korea argues that this basically turns the "increased import" requirement into a mere "import" requirement.[1550] The European Communities, New Zealand, Norway and Switzerland argue that the USITC failed to focus on the most recent past and to find a sudden and recent increase, but rather based its determinations on an end-point-to-end-point comparison of import data from 1996 and 2000.[1551] [1552]

7.545 The United States claims that for each of the ten steel products with respect to which it has taken a safeguard measure, the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were imports in such increased quantities, and under such conditions, as to cause or threaten serious injury to the domestic industry.[1553]

7.546 According to the United States, the complainants' claims that the United States made methodological errors are without merit. First, the USITC did not engage in a simple-end point analysis of comparing import data in 1996 with import data in 2000, and it did not fail to consider intervening movements or trends in imports over the entire period of investigation. The USITC considered trends in imports over the entire period of investigation for each product, often stating the

[1545] United States' first written submission, para. 198-199.
[1546] Korea's first written submission, para. 106.
[1547] Norway's first written submission, para. 250.
[1548] Switzerland's first written submission, para. 250.
[1549] European Communities' first written submission, para. 143.
[1550] Korea's first written submission, para. 98.
[1551] USITC Report, Vol. I, pp. 49, 71, 91, 101, 109, 157, 171, 205, 213, and 234.
[1552] European Communities' first written submission, paras. 280, 282-283; New Zealand's first written submission, para. 4.78; Norway's first written submission, paras. 252-254; Switzerland's first written submission, paras. 243, 245.
[1553] United States' first written submission, paras. 221, 232, 246, 255, 266, 276, 288, 302, 317.

absolute and relative imports for each year of the period of investigation and for the interim periods.[1554]

7.547 The European Communities responds that the United States misconstrues its claim as attacking the end-point-to-end-point analysis as opposed to the USITC's failure to systematically consider import trends. The United States has not indicated where the USITC has systematically calculated and compared the rate and amount of annual developments in accordance with the Articles 2.1 and 4.2 of the Agreement on Safeguards as interpreted by the Appellate Body. Such analysis is the basis for adequately considering intervening trends at the sensitive end points of the period of investigation and whether import volumes are abnormal.[1555]

(d) Consideration of decline in imports

7.548 Norway adds that the investigation period in *Argentina – Footwear (EC)* was 1991-1995, and the Appellate Body rejected the analysis presented by Argentina, as it did not adequately consider the steady and significant decline in imports beginning in 1994.[1556] Norway submits that this is the same situation as that in the present case, with increases for most product groupings from 1996-1998, and steady and significant declines in 1999, 2000 and interim 2001.[1557] Korea adds that the Appellate Body in *Argentina – Footwear (EC)* clarified that an increase in imports at one point in the investigation period cannot justify a safeguard measure if there has been a steady and significant decline ever since.[1558] [1559]

(e) Aggregation of products

7.549 The European Communities and Norway criticize the USITC's findings on increased imports because the safeguard measures applied by the United States are based on data relating to broader categories of products than those to which safeguard measures apply.[1560]

5. Measure-specific argumentation

(a) CCFRS

7.550 The European Communities considers that the United States violated its obligations under Articles 2.1, and 3.1 of the Agreement on Safeguards by imposing safeguard measures on plate, hot-rolled steel, cold-rolled steel, coated steel and slabs despite a recent, sharp and significant decrease in imports both as a single bundle, or "Certain Flat Steel, other than Slabs", or with respect to each separate product.[1561]

7.551 The United States argues in response that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that

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[1554] United States' first written submission, para. 193.

[1555] European Communities' first written submission, paras. 272-274 and 289; European Communities' second written submission, paras. 190-192.

[1556] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[1557] Norway's second written submission, para. 93.

[1558] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 128-129.

[1559] Korea's first written submission, para. 101.

[1560] European Communities' first written submission, para. 290; Norway's first written submission, para. 260.

[1561] European Communities' first written submission, para. 293.

there were imports of CCFRS in such increased quantities, and under such conditions, as to cause serious injury to the domestic industry.[1562]

(i) Aggregation

7.552 The European Communities submits that the United States has not explained why the evidence underlying the increased import determination has been provided on the basis of the "imported product" entitled "Carbon & Alloy Flat Products" as identified by President Bush[1563], although data was collected for seven different sub-groupings. Equally contradictory is the fact that the analysis and findings concerning increased imports in the USITC Report were based on one CCFRS product, while the increased imports determination by contrast, was based on five different product groupings.[1564] [1565] Brazil, China, the European Communities and New Zealand argue that no matter how the USITC aggregates the five different flat products, under no circumstances has it demonstrated a recent, sudden, sharp and significant increase in imports for the five products plate, hot-rolled steel, cold-rolled steel, coated steel and slabs neither as a single bundle, nor for "Certain Flat Steel, other than Slabs", nor for each separate product.[1566]

7.553 Similarly, Korea argues that the USITC's analysis of increased imports is flawed because it is not based on the proper like product for the five flat-rolled products. The USITC should have analysed imports of (1) slabs, (2) hot-rolled steel, (3) cold-rolled steel, (4) coated steel, and (5) plate as individual like products. However, even if "flat-rolled" products are analysed as a single like product, imports of flat-rolled steel have not increased suddenly, sharply, or recently.[1567] According to Korea, the USITC's erroneous like product analysis obscured the fact that cold-rolled, coated, and plate – even an end-point-to-end-point analysis – showed no absolute or relative increase in imports within the meaning of the Agreement on Safeguards. The entire increase in the end-to-end point comparison for certain flat-rolled was due to a moderate increase, over five years, of hot-rolled and slab, but both had declined significantly in the period preceding the USITC's decision.[1568] New Zealand argues that products falling within the certain carbon flat-rolled category were not, either separately or in aggregate, being imported in the increased quantities contemplated by the Agreement on Safeguards as a condition for the application of a safeguard measure. The USITC's determination in this matter is manifestly flawed.[1569] China adheres to the arguments made by other complainants with regard to the product included in the category of certain flat steel, taken separately.[1570]

7.554 In addition, the European Communities points out that it is not for the complainants or the Panel to analyse increased imports separately in respect of the individual product groups for which the two safeguard measures applying to "Certain Flat Steel" are imposed. Nevertheless, according to the European Communities, Brazil and New Zealand, it can be demonstrated that even when considered separately, there is no basis for concluding that imports of these product groups have increased

[1562] United States' first written submission, para. 221.
[1563] USITC Report, Vol. II, Table Flat 3.
[1564] USITC Report, Vol. I, p. 1
[1565] European Communities' first written submission, para. 196.
[1566] China's first written submission, paras. 245-246.; European Communities' first written submission, para. 293; Brazil's first written submission, para. 133; New Zealand's first written submission, para. 3.69.
[1567] Korea's first written submission, para. 74.
[1568] Korea's first written submission, paras. 88-89.
[1569] New Zealand's first written submission, para. 4.77.
[1570] China's first written submission, para. 250.

recently, suddenly, sharply and significantly. Instead, both in absolute and in relative terms, they showed a sharp decrease.[1571]

7.555 New Zealand points out that total import volumes for plate decreased 52% between 1996 and 2001 and the ratio of imports to domestic production dropped 20% during the same period. Imports of cold-rolled steel increased slightly in absolute terms during the period of investigation, but there has been a significant and sustained downward trend since 1998. The quantities of imports relative to domestic production remained almost constant between 1996 and 2000, but decreased by approximately 30% between 1998 and 2000. Imports of coated steel have declined steadily and significantly since 1999, and the 2001 data reveals an overall decrease in imports in both absolute and relative terms since 1996. Import trends for slab show that although there was an increase in imports in 1999 and 2000, in 2001 imports decreased by 25% as compared with those two previous years and by 10% if compared to 1996.[1572]

7.556 Brazil adds that on the basis of full-year 2001 data, each of the individual flat-rolled products also continued to decline.[1573] Cold-rolled products were the only exception, due to an anti-dumping investigation in 2000 which artificially drove imports down.[1574]

7.557 The United States responds that the complainants raise arguments about the import data for items for which a separate injury determination was not made.[1575] Given the USITC's like product determinations, the USITC was not required to make separate increased import determinations for slab or corrosion-resistant steel, and the trends for those products are not relevant to whether the USITC's analysis of the increase in imports for certain carbon flat-rolled steel was consistent with Article 2.1.[1576]

7.558 Korea also claims that the USITC's investigation of increased imports for flat-rolled products falls far short of the reasoned and adequate explanation of how the underlying facts support its determination as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards. The USITC had an obligation to explain its conclusion that imports increased in light of the data which directly conflicts with that conclusion.[1577]

(ii) "Increased imports" within the meaning of the Agreement on Safeguards?

7.559 Japan and New Zealand argue that the USITC acknowledged, but ignored, the fact that import volume declined 40% between the first half of 2000 and the first half of 2001.[1578] [1579] China, the European Communities and Korea[1580] point out that, at the time the President of the United States took his decision, the full year 2001 data were available and confirmed that imports had even fallen to levels below 1996.[1581] Since the most important increase occurred in 1998, three years before the

[1571] European Communities' first written submission, paras. 305-308; Brazil's first written submission, paras. 134-135; New Zealand's first written submission, para. 4.87.
[1572] New Zealand's first written submission, paras. 4.88–4.92
[1573] Brazil's first written submission, paras. 139-143.
[1574] Brazil's first written submission, para. 144.
[1575] Brazil's written reply to Panel question No. 41 at the first substantive meeting.
[1576] United States' second written submission, para. 107.
[1577] Korea's first written submission, para. 87.
[1578] Korea's first written submission, paras. 49-50.
[1579] Japan's first written submission, para. 190; New Zealand's first written submission, para. 4.83.
[1580] Korea's first written submission, para. 82.
[1581] China's first written submission, para. 241; European Communities' first written submission, para. 298.

imposition of the safeguard measures, and was immediately followed by an important decline, China and Korea believe that increased imports were certainly not recent enough. They also were not sharp and significant enough.[1582]

7.560 Korea submits that imports of flat-rolled declined by roughly 18% between 1998 and 1999. Imports then remained at 1999 levels in 2000, showing a statistically insignificant increase (0.3%). Imports then proceeded to decline to their lowest point in the period in the first six months of 2001. Korea submits that it is the complainants' position that a statistically insignificant increase in imports in 2000 is not an "increase" for purposes of the Agreement on Safeguards when analysed both quantitatively and qualitatively. Those imports were preceded by a deep decline and followed by a deeper decline.[1583]

7.561 The United States affirms that the USITC found that imports of CCFRS increased both on an absolute and a relative basis. The USITC focused its analysis on the surge in imports of CCFRS in 1998, the effects of that surge (which continued to reverberate throughout the remainder of the period of investigation) and on the continuation of imports at elevated levels in 1999 and 2000. In absolute terms, imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000. In 1998 there was a rapid and dramatic increase, with imports rising to 25.3 million short tons, an increase of 37.5% over 1996 levels. While the volume of imports declined in 1999 and 2000, it remained significantly higher in those years than at the beginning of the period of investigation.[1584] On a relative basis, imports rose from the equivalent of 10.0% of domestic production in 1996 to 10.5% in 2000.[1585] [1586]

7.562 The European Communities also argues that the relative import finding is as flawed as the determination for actual imports.[1587] The European Communities, China and Korea submit that in addition to ignoring the steady and significant decline since 1998, a 0.5% increase in the ratio in five years is, also in Korea's and China's view[1588], simply not sharp and significant enough to cause or threaten to cause serious injury.[1589] According to Brazil, this increase is nominal at best.[1590] China asserts that the relative increase during 1998 was quickly compensated the following year when imports were back to normal. Ever since, imports in relative terms remained at levels which were very close to those of 1996 and 1997.[1591]

7.563 As regards the degree of the relative increase in imports, the United States points out that an increase in either absolute or relative import levels alone may satisfy Article 2.1 of the Agreement on Safeguards.[1592]

7.564 In counter-response, Korea submits that if the language in *Argentina – Footwear (EC)* is to mean something (*e.g.*, how much is "enough?")[1593], then absolute and relative increases must be put

[1582] China's first written submission, para. 247; Korea's first written submission, paras. 77-78.
[1583] Korea's written reply to Panel question No. 14 at the second substantive meeting.
[1584] USITC Report, pp. 49-50.
[1585] USITC Report, p. 50.
[1586] United States' first written submission, paras. 208-210.
[1587] European Communities' first written submission, paras. 300-302.
[1588] Korea's first written submission, paras. 84-85; China's second written submission, para. 107.
[1589] China's second written submission, para. 107; European Communities' first written submission, paras. 300-302; Korea's first written submission, paras. 84-85.
[1590] Brazil's first written submission, para. 132.
[1591] China's first written submission, paras. 242, 248.
[1592] United States' first written submission, para. 217.
[1593] United States' first written submission, para. 216.

into context. The USITC, however, has not done so.[1594] In fact imports as a percentage of production have declined for the last two and a half years of the period of investigation and imports relative to production at the end of the period is the lowest of the entire period.[1595]

(iii) The USITC's method of analysis

Trends

7.565 The European Communities recalls the USITC finding that imports increased "from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent".[1596] The USITC also acknowledged that the "volume of imports declined in 1999 and 2000" from the peak in 1998[1597], and that this decrease continued, given that imports "declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001".[1598] The European Communities, Korea and Japan contend that the USITC ignored the general methodology of evaluating trends, suggested by the Appellate Body in *Argentina – Footwear (EC)*, and that the situation for flat steel products closely resembles the one already ruled out in that case as a sudden and recent increase in imports.[1599] China adds that if the USITC believed that the decreasing trend of imports did not prevent it from finding that there were increased imports pursuant to Article 2.1 of the Agreement on Safeguards, it had to give a reasoned and adequate explanation to support this finding and it did not do so by simply stating that imports were still "significantly" higher in 1999 and 2000 than in 1996.[1600]

7.566 The United States also rejects the assertion that the import trends in *Argentina – Footwear (EC)* were the same as those for CCFRS in this case. In *Argentina – Footwear (EC)*, there was a steady decline in imports for two years, following an increase earlier in the period of investigation.[1601] Thus, it was possible to discern a declining trend. In this case, by contrast, there was a three-year increase in imports, with a dramatic surge in 1998, followed by a decline in imports from 1998 to 1999, but then there was levelling off and even a slight increase in 2000, which is no clear declining trend.[1602] The United States submits that import levels in 1999 and 2000 remained well above pre-surge levels and in fact rose slightly between 1999 and 2000. According to the United States, this hardly constitutes a steady decline; rather, this pattern meets the definition of "is being imported in such increased quantities" as that phrase was interpreted by the panel in *US – Line Pipe*.[1603] [1604]

[1594] Korea's first written submission, para. 118.
[1595] Korea's first written submission, para. 119.
[1596] USITC Report, Vol. I, p. 49.
[1597] USITC Report, Vol. I, p. 50.
[1598] USITC Report, Vol. I, p. 49.
[1599] European Communities' first written submission, paras. 294-297; Korea's first written submission, para. 80; Japan's first written submission, paras. 195-196.
[1600] China's first written submission, para. 244.
[1601] The data in *Argentina – Footwear (EC)* were as follows:

	1991	1992	1993	1994	1995
Total imports (million pair)	8.86	16.63	21.78	19.84	15.07
Relative Imports	12%	22%	33%	28%	25%

Source: Panel Report, *Argentina – Footwear (EC)*, paras. 8.151 and 8.273.

[1602] United States' first written submission, para. 215.
[1603] Panel Report, *US – Line Pipe*, para. 7.207.
[1604] United States' second written submission, para. 105.

7.567 The European Communities, Japan, Korea and Brazil respond that there is no basis to conclude that imports had only temporarily and recently declined and remained at sharply increased levels, the basis for the finding of increased imports endorsed by the Panel in *US – Line Pipe.* The data show a sustained 30-month period of decline, ending with imports at the lowest level during the entire five and a half year period investigated by the USITC.[1605] While one can argue the nuances of *Argentina – Footwear (EC), US – Line Pipe* and *US – Lamb,* in fact there are no nuances in the import data. The only increase in imports was a distant memory by the time the USITC initiated its investigation.[1606] Brazil adds that the United States has determined that CCFRS is being imported into the United States in increased quantities despite the fact that imports are not only at the lowest level during the entire period of investigation, but also substantially below the peak of 1998, and have declined sharply over the last three semi-annual periods. Put simply, there is no factual support for a determination of increased imports of CCFRS.[1607]

7.568 Japan adds further that the declining trend in the most recent period is even more pronounced for flat-rolled steel imports actually subject to the safeguard measure - i.e. without the free trade area and developing countries which were ultimately excluded from the measure. Japan argues that when one removes excluded developing countries from the import trend analysis, it becomes even more clear how unjustifiable the USITC's increased imports decision really was. Flat-rolled steel imports remained constant, approximately 13.5 million tons in every year but 1998, before declining sharply in 2001. Even under the USITC's flawed comparison of 1996 to 2000, flat-rolled steel imports actually subject to the safeguard measure increased an insignificant 253,884 tons, or 1.9%, for combined flat-rolled products, and declined as a share of US production. The same pattern holds true for hot-rolled, cold-rolled, and plate. Slab and corrosion-resistant steel imports reached their peak in 1999, before declining slightly in 2000 (corrosion-resistant steel imports declined from 1.43 million tons to 1.37 million tons), and then declining sharply in 2001. Obvious beginning-to-end decreases were masked (such as with plate) by selection of the overly broad "flat" like product determination. Moreover, the decreases are all the more apparent once excluded countries are removed from the analysis. Absent imports from Canada and Mexico – both countries which shipped significantly high volumes of flat products in every year between 1996 and 2000, but were excluded from the remedy (in violation of the principle of parallelism, as shown below) – and imports from developing countries – whose shipments rose from nearly zero to significant numbers later in the period of investigation – most perceivable increases no longer exist. Indeed, while imports actually subject to the safeguard measure show no trend of import increase to satisfy the requirement set forth under the Agreement on Safeguards and Article XIX:1 of GATT 1994, the absolute volume increase in flat-rolled imports from excluded developing countries over the 1996 to 2000 period was eight times the increase from countries subject to the relief, yet they are not subject to the relief, because the United States excluded them under Article 9.1 of the Agreement on Safeguards. [1608]

End-point analysis

7.569 Brazil[1609], China[1610], the European Communities, Japan[1611], Korea[1612] and New Zealand[1613] assert that the USITC compared the end points of 1996 and 2000 and made its increased imports

[1605] Japan's second written submission, para. 97; Korea's first written submission, para. 114; Brazil's first written submission, paras. 54-55; European Communities' second written submission, para. 200.
[1606] Brazil's first written submission, para. 58.
[1607] Brazil's written reply to Panel question No. 14 at the second substantive meeting.
[1608] Japan's first written submission, paras. 205-206.
[1609] Brazil's first written submission, paras. 129, 132.
[1610] China's first written submission, paras. 243-244.
[1611] Japan's first written submission, paras. 190, 195.
[1612] Korea's first written submission, paras. 76, 78.

finding although it had to recognize that the trends in the most recent period from 1998 to the first half of 2001 evidenced a steady and continuous fall in imports. The European Communities, Japan, Korea and New Zealand consider that even an end-point-to-end-point analysis for 1996-2000 only yields a very modest increase of 13.7% over a five-year period, which is a not a "sharp", "sudden" or "significant" increase.[1614] Moreover, the absolute increase of 2.66 million tons between 1996-2000 was entirely accounted for by the increase in imports of hot-rolled coil – 2.84 million tons – that were subject to anti-dumping and countervailing duty investigations in 1998 and 2000.[1615] [1616] Korea adds that the USITC failed to properly note that hot-rolled accounted for the vast majority of the volume increase in 1998 and the minor "increase" end-point to end-point was a function solely of hot-rolled and slab imports. In fact, if imports of hot-rolled coil and slab are separated out of total imports of flat-rolled, total imports were 6.8 million short tons in 1996, 6.9 million short tons in 1999, and 6.1 million short tons in 2000.[1617] Japan adds that the increase could not have been "significant" when it represented a mere 0.5% increase in imports as a share of production, especially when 38% of the increase consisted of slab imported by the domestic industry itself.[1618]

7.570 In response to Japan's argument that the increase in CCFRS imports was not significant because 38% of it consisted of slab, much of which was imported by the domestic industry, the United States stresses that this argument is based on a simple end-points comparison. Japan's argument also is premised on the erroneous assumption that imports by the domestic industry should not be "counted".[1619] The United States also argues that it is patently untrue that the USITC relied only on an end-points analysis, comparing import levels in 1996 with those in 2000. It did not rely exclusively on such observations to evaluate the increased imports. The USITC quite clearly considered intervening years, focusing on the surge in imports in 1998, and the continuation of imports at elevated levels in 1999 and 2000.[1620]

(iv) Consideration of 2001 data

7.571 The European Communities, Brazil, China[1621] and New Zealand argue that the USITC ignored the most recent 6-month period in its investigation, the first half of 2001. If the first half of 2001 is used as the end point, imports of flat-rolled products, both absolute and relative, are significantly below 1996 levels.[1622] Brazil and China[1623] affirm that the data from the full year 2001 confirm that the sharp decline in flat-rolled imports continued in the second half of 2001. As a percentage of domestic production, imports in 2001 were lower than at any point during the 1996-2001 period, more than 2 percentage points below 2000 and almost two percentage points below 1996. Remarkably, imports in 2001 were 10.5 million tons below peak 1998 levels and 3.5 million tons below 1996 levels.[1624] New Zealand points out that the United States has itself recognized the

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[1613] New Zealand's first written submission, paras. 4.81, 4.84.

[1614] European Communities' second written submission, para. 199; Japan's first written submission, para. 195; Korea's first written submission, para. 76; New Zealand's first written submission, para. 4.85-4.86.

[1615] *Respondents' Joint Prehearing Brief on Hot-Rolled Steel*, Inv. No. TA-201-73 (11 September 2001) ("*Respondents' Joint Prehearing Brief on Hot-Rolled*"), Exhibit 4 (Exhibit CC-52) ("subject" hot-rolled imports increased from 1.75 million tons in 1996 to 4.59 million tons in 2000).

[1616] Korea's first written submission, para. 76.

[1617] Korea's first written submission, para. 117.

[1618] Japan's first written submission, para. 195.

[1619] United States' first written submission, para. 219.

[1620] United States' first written submission, para. 214.

[1621] China's first written submission, paras. 240-241, 246.

[1622] Brazil's first written submission, para. 132; New Zealand's first written submission, para. 4.84.

[1623] China's first written submission, paras. 238-239.

[1624] Brazil's first written submission, paras. 137-138.

importance of interim 2001 data, explaining that the USITC gathers data for the interim period "so that it will have information available to it on the most current period possible".[1625] The problem is that, having gathered the most recent available data, the USITC ignores its significance. Among other things, this data showed that imports of CCFRS had declined by 40% and demand by 14.9%. Proper attention to this data should have indicated to the USITC that an increased imports finding could not be made, and that increased imports could not have been the cause of alleged serious injury to the domestic industry.[1626]

(v) Consideration of decline in imports

7.572 Korea asserts that the USITC's analysis ignored the reason why imports declined – prevailing anti-dumping and countervailing duty orders. In this case, the USITC was well aware of the reason that imports declined and why that trend would continue for the foreseeable future.[1627]

7.573 The United States rejects Korea's contention that the USITC ignored the reason for the decline in imports of CCFRS after 1998, namely anti-dumping and countervailing duty cases, and affirms that the USITC addressed this in its analysis of causation.[1628]

(b) Tin mill products

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.574 Brazil and, based on the import data relevant to the four commissioners who considered tin mill products separately, China, Japan and Norway assert that the requisite sharp, recent, sudden, and significant increase was not present, and the affirmative injury finding for tin mill products was unjustified.[1629]

7.575 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determinations of three USITC Commissioners that there were increased imports of tin mill, or in the case of Commissioners Bragg and Devaney, of tin mill as part of a like product encompassing certain carbon and alloy flat products.[1630]

7.576 Norway responds that, with regard to Commissioners Bragg and Devaney, according to the figures presented by the United States, there is an increase from 1996 to a peak in 1998, but thereafter a sharp decrease in 1999 which continues in 2000 – and with a new sharp decrease in interim 2001. Norway submits that this is clearly a "steady and significant decline" in the "recent past", with full year 2001 ending even lower than 1996.[1631]

7.577 The European Communities and Norway recall that the USITC made an increased imports finding for tin mill products although it explicitly acknowledged that after a "peak level of 698,543 short tons" in 1999, imports "declined to 580,196 short tons in 2000" and were another "11.1 percent

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[1625] United States' first written submission, para 197; United States' written reply to Panel question No. 50 at the first substantive meeting, para 95.

[1626] New Zealand's written reply to Panel question No. 15 at the second substantive meeting.

[1627] Korea's first written submission, para. 81.

[1628] United States' first written submission, paras. 209-220.

[1629] Brazil's first written submission, para. 257; China's first written submission, para. 289; Japan's first written submission, paras. 209-210; Norway's first written submission, paras. 263, 272, 273.

[1630] United States' first written submission, para. 232.

[1631] Norway's second written submission, para. 94.

lower" in interim 2001 than in interim 2000.[1632] The USITC also recognized that the ratio of imports to domestic production had decreased from "20.1 percent during the import volume peak in 1999" to "17.4 percent in 2000".[1633] The USITC finally disclosed that the official import data used in its discussion "overstate the imports subject to this investigation" due to prior product exclusions.[1634] [1635]

7.578 China and the European Communities argue that the only increase of imports during the review period was a surge in 1999, which is not recent enough to justify a safeguard measure.[1636] In addition, China and Norway point out that, subsequently, anti-dumping measures have led to a substantial reduction of tin mill imports[1637], which the USITC completely ignored.[1638] Under no circumstances can the United States claim that tin mill products continue being imported at increased quantities until the very recent past. On the contrary, since 1999, actual imports of tin mill products have declined sharply – by over 20%.[1639]

7.579 According to the European Communities, at the time the President of the United States took his decision to impose safeguard measures, full 2001 year data was available and confirmed that imports of tin mill products had even receded back almost to pre-1998 levels.[1640] The European Communities submits that, similarly, the ratio of imports to domestic production has seen a steady and continuous decline since 1999 through the year 2000 and into the interim 2001.[1641] Brazil and Japan confirm this observation for the imports from sources covered by the measure, particularly non-NAFTA countries, which are the imports that matter given the requirement of parallelism between injury and remedy.[1642] China, the European Communities and Norway assert that such a situation, that is a significant and steady decrease in imports since a midterm high both in actual numbers as well as in relation to domestic production, has already been ruled out in *Argentina – Footwear (EC)*.[1643]

7.580 The European Communities and Korea also argues that there was also no relative increase in tin mill imports. The ratio of imports to domestic production peaked at a record 20.1% in 1999 reflecting Weirton's business decision.[1644] This, however, can only be regarded as a temporary occurrence, mostly instigated by the US domestic industry's own business decisions. Imports relative to production sharply decreased to the 17% range in the year 2000 and in interim 2001.[1645] Again, this does not satisfy the "qualitative" increase requirement.[1646]

[1632] USITC Report, Vol., I, p. 71.
[1633] USITC Report, Vol.; I, p. 72.
[1634] USITC Report, Vol.; I, p. 71, footnote 370.
[1635] European Communities' first written submission, para. 359; Norway's first written submission, para. 265.
[1636] China's first written submission, para. 293.
[1637] China's first written submission, para. 288; Norway's first written submission, para. 267.
[1638] Norway's first written submission, para. 97.
[1639] European Communities' first written submission, para. 360.
[1640] European Communities' first written submission, para. 361.
[1641] European Communities' first written submission, para. 363.
[1642] Brazil's first written submission, para. 257; Japan's first written submission, para. 209.
[1643] European Communities' first written submission, para. 363; China's first written submission, para. 287; Norway's first written submission, para. 268.
[1644] USITC Report, Vol. I, p. 72 (Exhibit CC-6).
[1645] *Steel*, Inv. No. TA-201-73, USITC Publication 3479 (December 2001), *Volume II: Information Obtained in the Investigation (Carbon and Alloy Steel Flat, Long and Tubular Products*) (USITC Report, Vol. II), Table FLAT-10, p. FLAT-14 (Exhibit CC-6).
[1646] Korea's first written submission, para. 129.

7.581 In response to the allegation that the USITC failed to show that the increase in imports that did occur was sharp, recent, sudden and significant, the United States reiterates that the complainants are applying an incorrect standard because Article 2.1 of the Agreement on Safeguards speaks of whether there were imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury," and not whether imports were sharp, recent, sudden and significant in the abstract.[1647]

(ii) The USITC's method of analysis

7.582 China, Korea and Norway assert that the USITC's end points comparison and a comparison between the first year of the period of investigation with the 1999 peak demonstrate an increase in imports, but that such an analysis does not consider the trends in imports.[1648]

7.583 The United States asserts that there is no merit to the argument that the USITC relied only on an end-points analysis, comparing import levels in 1996 with those in 2000. Commissioners Bragg and Miller discussed import levels during the period of investigation, and in the interim periods, and quite clearly focused on the increases in imports that occurred within the period of investigation.[1649] [1650]

7.584 Korea and China argue that the United States should not be able to rely on the analysis of Commissioners Bragg and Devaney, since their analysis of increased imports was not based on tin mill products, but on "certain carbon and alloy flat products including tin mill". Grouping tin mill products with other products in a wide group of products ("certain carbon and alloy flat products") prevented those Commissioners from making any useful analysis as far as tin mill products alone are concerned.[1651] However, China also notes that the analysis of the import trends for tin mill "as part of a like product encompassing certain carbon and alloy flat products" also shows a clear declining trend from 1999 to 2001.[1652] [1653]

(iii) Requirement of reasoned and adequate explanation

7.585 China, the European Communities, Korea and Norway also argue that the temporary 1999 surge in imports was stimulated by a temporary business decision of the United States domestic industry, more particularly, Weirton's decision to shut down a blast furnace and rely on imported slabs.[1654] The European Communities argues that if a one-time high in import levels was caused by an exceptional business decision, the competent authorities would need to explain how they can rely on it although this condition is no longer given.[1655] Brazil and Korea add that it is relevant that the very industry seeking import relief brought about, and benefitted from significant parts of the

[1647] United States' first written submission, para. 228.

[1648] China first written submission, paras. 288, 290; Korea's first written submission, paras. 95, 98; Norway's first written submission, para. 268.

[1649] USITC Report, pp. 71-72 (Commissioner Miller); and p. 279 (Commissioner Bragg).

[1650] United States' first written submission, para. 229.

[1651] Korea's second written submission, paras. 122-123; China's second written submission, para. 126.

[1652] United States' first written submission, para.223.

[1653] China's second written submission, para. 127.

[1654] European Communities' first written submission, para. 364; China's first written submission, para. 292; Korea's first written submission, para. 96; Norway's first written submission, paras. 269 and 271.

[1655] European Communities' written reply to Panel question No. 43 at the first substantive meeting.

increase.[1656] It would be ironic if a producer decided to increase imports and then turned around to use that very increase as the basis for pursuing a safeguard action.[1657]

7.586 With regard to the complainants' argument that the surge in tin mill imports in 1999 occurred in part because of Weirton's shutting down a blast furnace, the United States rejects the notion that imports by the domestic industry should not be "counted" as increased imports.[1658] The Agreement on Safeguards does not treat imports that are attributable to domestic producers any differently than other imports. Moreover, safeguards proceedings involve decisions about entire industries, not about individual producers; and industries do not make such business decisions.[1659]

7.587 In response, Norway insists that if imports enter to replace a shortfall in domestic production, this is a qualitative factor which is directly relevant to the issue of causation as well. Disregarding these important elements in respect of the increase in imports, makes the whole increased import analysis by the United States in breach of Article 2.1.[1660] Korea adds that given the import changes and the facts underlying such changes at issue, the competent authorities were under a particularly strong obligation to make an assessment, both quantitatively and qualitatively, as to the nature of the increase in imports. The USITC did not conduct such an assessment.[1661] China submits that the increase in imports ceased in 2000, i.e. 18 months before the measure was taken. An increase in imports that occurred 18 months ago and was followed by a decline in those imports cannot be considered as being "recent enough" and "sudden enough".[1662]

7.588 The United States responds that the complainants do not divulge the reason for their certainty that an increase which occurred 18 months ago is "insignificant". In fact, no such basis exists. Neither Article XIX nor the Agreement on Safeguards specifies a period beyond which an increase in imports is "insignificant". Certainly the Appellate Body in *Argentina – Footwear (EC)* did not attempt to draw a line beyond which an increase in imports would be *per se* insignificant.[1663]

7.589 In the light of the intervening trends and other alternative explanations, the European Communities and Norway assert that the USITC did not provide an adequate and reasoned explanation why it could consider that imports continued being imported at sharply and recently increased levels in the most recent past.[1664]

7.590 According to the United States, the assertion that the USITC failed to give adequate weight to the decline in imports since 1999 is irrelevant to the extent that it is based on the views of USITC Commissioners making negative determinations. Among the affirmative determinations, only Commissioner Miller relied on the import data which the complainants cite, that is import data for tin mill alone. She recognized that, after surging in 1999, import volumes declined between 1999 and

[1656] Korea's written reply to Panel question No. 43 at the first substantive meeting.
[1657] Brazil's written reply to Panel question No. 43 at the first substantive meeting.
[1658] United States' first written submission, para. 230.
[1659] United States' written reply to Panel question No. 43 at the first substantive meeting, para. 89.
[1660] Norway's second written submission, para. 97.
[1661] Korea's first written submission, para. 128.
[1662] China's second written submission, para. 125.
[1663] United States' second written submission, para. 99.
[1664] European Communities' first written submission, para. 365; Norway's first written submission, para. 273.

2000, and between the interim periods, and she explained why these declines were not decisive in her causation analysis.[1665] [1666]

7.591 Norway responds that the figures of Commissioner Miller (which are also a misrepresentation as her figures include increases in excluded products[1667]) show an increase from 1996 to a peak in 1999, with a sharp decrease in 2000 and further declines in interim 2001. Norway submits that there is also here clearly a "steady and significant decline" in the "recent past".[1668]

(iv) Relevance of the like product definition

7.592 Korea and Norway argue that the United States cannot lump together findings of increased imports with respect to distinct like product groupings – flat-rolled and tin mill – to support a finding of increased imports of the more narrow like product – tin mill. The requirement of like product is fundamental to a finding of increased imports. A mix and match approach as adopted by the United States suggests that any combination of legal findings, even if they are inconsistent, is insufficient and presents a clear violation of the Agreement on Safeguards.[1669] The Appellate Body made clear in *US – Line Pipe* that legally consistent decisions with respect to the requirements of the Agreement on Safeguards (serious injury and threat of serious injury) are permitted.[1670] However, legally inconsistent decisions based on different definitions of imported products are not.[1671]

(c) Hot-rolled bar

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.593 China and the European Communities contend that the USITC failed to determine and justify that the increase in imports was recent enough, sudden enough, sharp enough and significant enough.[1672] In China's view, the USITC also addressed the wrong question when it stated that imports showed a dramatic and rapid increase in 2000, since "rapid and dramatic" is much less explicit than "recent, sudden, sharp and significant enough"[1673] and was not the vocabulary chosen by the Appellate Body[1674], who has the mandate of clarifying the provisions of the WTO Agreement.

7.594 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports. The USITC noted that imports were higher, both in absolute terms and relative to United States production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from 1999. While imports declined in the interim period comparison, the ratio of imports to United States production in interim 2001 was higher than that for

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[1665] The European Communities claims that the ratio of imports to domestic production declined in interim 2001. European Communities' first written submission, para. 362. In fact, relative import levels were higher in interim 2001 (at 17.7%) than in interim 2000 (when they were 17.1%). USITC Report, p. 72 footnote 373.

[1666] United States' first written submission, para. 231.

[1667] See USITC Report, Vol. 1, at footnote 370 (Exhibit CC-6).

[1668] Norway's second written submission, para. 94.

[1669] Korea's first written submission, para. 123; Norway's second written submission, para. 94.

[1670] Appellate Body Report, *US – Line Pipe*, paras. 168-170.

[1671] Korea's first written submission, para. 124.

[1672] European Communities' first written submission, paras. 315-316; China's first written submission, para. 255.

[1673] China's written reply to Panel question No. 45 at the first substantive meeting.

[1674] China's first written submission, para. 255.

the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.[1675] [1676]

7.595 In response to China's and the European Communities' contention that there are neither facts nor explanations justifying a determination that hot-rolled bar is being imported at recently, sharply and significantly increased quantities, the United States points out that first, the import data which the USITC analysed on a year-to-year basis show substantial increases. As the *US – Line Pipe* Panel explained, it is not necessary to find that imports are still increasing up to the very end of the period of investigation.[1677] Second, the appropriate consideration under the Agreement on Safeguards is not whether imports have increased "recently, sharply and significantly" in the abstract. The USITC satisfied the standard set out in Article 2.1 of the Agreement on Safeguards when it first focused on increased imports and subsequently found injury and a causal link.[1678]

7.596 The European Communities responds that the United States cannot rely on the ruling of the Panel in *US – Line Pipe* in its defence. The Panel in that case only upheld the increased imports finding given that there was an explicit finding that import levels *remained* at increased levels which the USITC has not demonstrated.[1679]

7.597 China further argues that the increase in imports of hot-rolled bar was not recent because the sharpest increase, both in absolute and relative terms, occurred in 1998, and the USITC also failed to recognize a decline in imports that started in 2000 and lasted until the end of the period of investigation.[1680]

7.598 As regards China's argument regarding a decline in imports that "started in 2000 and lasted until the end of the period of investigation", the United States rejects this attempt to carve up the investigation period to achieve a desired result. The United States further submits that the Agreement on Safeguards does not specify how the period of investigation should be broken down.[1681] With regard to the argument that increased imports were not recent, China overlooks the fact that imports were at their highest level (both in absolute and relative terms) in 2000; and that there were significant increases in the last year-to-year comparison from 1999 to 2000.[1682]

7.599 China responds that a sharp increase that occurred in 1998 cannot be considered as being "recent" anymore and subsequent imports cannot be characterized as being "sharp".[1683]

(ii) Consideration of 2001 data

7.600 The European Communities asserts that the USITC acknowledged but disregarded a sharp decrease both in absolute terms and relative to domestic production in the first half of 2001, that is the most recent and decisive part of the investigation period.[1684] By the time the President imposed the safeguard measures, the available full 2001 year import data revealed a 32% decrease in imports

[1675] China's first written submission, para. 255.
[1676] United States' first written submission, paras. 235 and 246.
[1677] Panel Report, *US – Line Pipe*, para. 7.204.
[1678] United States' first written submission, paras. 239-241.
[1679] European Communities' second written submission, para. 203.
[1680] China's first written submission, paras. 258-262.
[1681] United States' first written submission, para. 244.
[1682] United States' first written submission, para. 245.
[1683] China's first written submission, para. 114.
[1684] USITC Report, Vol. I., p. 92.

compared to 2000.[1685] Even if the 2.6 percentage difference between 1999 and 2000 could be seen as a recent increase, it was certainly neither sharp nor significant, but part of a slight and gradual increase at steps between 1.1 and 2.6%, which was then compensated in interim 2001 when the ratio fell back to 24.6%.[1686]

7.601 The United States rejects the European Communities' argument based on full-year 2001 data, because full-year 2001 data were not, and should not be, considered. [1687]

(iii) The USITC's method of analysis

7.602 China argues that the USITC failed to evaluate the rate and amount of increased imports in absolute and relative terms, and to consider trends, and that it was not enough for the USITC to simply state the import data for each year of the period of investigation.[1688]

7.603 The United States disagrees with China on the question whether it was not enough for the USITC to "simply state the import data for each year without evaluating the rate and amount of increased imports in absolute and relative terms". The USITC noted where the imports increased and where they decreased. The United States submits that the Agreement on Safeguards does not require that competent authorities characterize the data in certain ways. It also does not require competent authorities to intone specific terminology not contained in the Agreement.[1689] Since under Article 3.2 of the DSU, a dispute settlement report cannot add to a Member's obligations under the covered agreement, the Appellate Body's use of a particular phrase cannot obligate competent authorities to use the same phrase.[1690]

(d) Cold-finished bar

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.604 The European Communities notes that the alleged recent surge in imports was a one-year micro-development immediately compensated for by a decrease in 2001. By the time the President of the United States took his decision, the full 2001 data was available and demonstrated that the declining trend, that was already signalled by the interim 2001 data, proved to be a steady and significant decrease in imports back to levels even below 1998.[1691]

7.605 The United States rejects the European Communities' characterization of the data on absolute import levels as "a one-year micro-development immediately compensated by a decrease in 2001". First, full-year 2001 data were not, and should not be, considered, for reasons previously articulated by the United States. Second, it is simply not accurate to call a 33.6% increase in imports in one year, that follows on the heels of increases in two out of the preceding three years, "a one-year micro-development".[1692]

7.606 In relation to relative imports the European Communities considers that there is no justification why a mere 6% increase in the ratio between imports and domestic production could be

[1685] European Communities' first written submission, paras. 311-312.
[1686] European Communities' first written submission, para. 315.
[1687] United States' first written submission, paras. 239-241.
[1688] China's first written submission, paras. 253, 254 and 256.
[1689] United States' first written submission, para. 242.
[1690] United States' written reply to Panel question No. 45 at the first substantive meeting, para. 91.
[1691] United States' first written submission, paras. 319-320.
[1692] United States' first written submission, para. 252.

seen as a sudden, sharp and significant surge in imports that is capable of causing injury to a domestic industry, in particular, since actual imports already showed a manifest decrease.[1693]

7.607 As regards relative import levels, the United States insists that the 6.7 percentage point increase in relative import levels from 1999 to 2000 (from 17.0 to 23.7%) was, in fact, very significant. The United States submits that the European Communities' attempt to discount this increase by pointing to a decline in absolute import levels is unpersuasive, given that an increase in either absolute or relative import levels alone may satisfy Article 2.1 of the Agreement on Safeguards.[1694]

7.608 The European Communities responds that the United States has effectively admitted that the absolute import levels were not sufficient and that it solely relies on the relative import developments. Therefore, the European Communities asks the Panel to find that imports did not increase in actual numbers.[1695] As to relative imports, the United States did not explain why the mere 6% increase in relative imports in 2000 (out of a one-year dip in 1999) combined with the countertrend in actual imports in 2001 could still justify a finding of cold bar being imported in extra-ordinarily increased quantities; and the European Communities asks the Panel to dismiss the relative increased imports finding for this product.[1696]

(ii) Requirement of reasoned and adequate explanation

7.609 The European Communities asserts that the facts and explanations provided by the United States authorities do not justify a determination that cold-finished bar is being imported in recently, sharply and significantly increased quantities.[1697]

7.610 The United States argues that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of cold-finished bar.

(e) Rebar

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.611 China and the European Communities argue that the facts and explanations provided by the USITC do not justify a determination that rebar is *being* imported at recently, sharply and significantly increased quantities.[1698]

7.612 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record supported the USITC's determination with respect to increased imports. The USITC analysed the surge in imports in 1999 and the continued high levels of imports in 2000 in the context of their ability to cause serious injury. China's argument that the USITC failed to determine whether the increase in imports of rebar was "recent enough, sudden enough, sharp enough and significant enough" is premised on an incorrect standard.

[1693] European Communities' first written submission, para. 321.
[1694] United States' first written submission, para. 254.
[1695] European Communities' first written submission, para. 207.
[1696] European Communities' second written submission, para. 208.
[1697] European Communities' first written submission, para. 322.
[1698] China's first written submission, para. 268; European Communities' first written submission, para. 328.

7.613 The United States further stresses that the USITC recognized that imports had declined between 1999 and 2000, and between the interim periods, and it explained why these declines were not decisive to its analysis. Competent authorities are not required to articulate an intricate trends analysis.[1699]

7.614 In response, China insists that, under the Agreement on Safeguards, as interpreted by the Appellate Body in *Argentina – Footwear (EC)*, import data must be characterized in a certain way, i.e. as being "sudden enough, sharp enough, recent enough and significant enough".[1700]

7.615 China and the European Communities argue that the USITC failed to take into account the decline in rebar imports in 2000 and 2001.[1701] Taking a safeguard measure despite a significant decrease in imports would be tantamount to claiming self defence when shooting at an aggressor who is already running away, i.e., where the danger is no longer imminent.[1702]

7.616 With regard to the European Communities' contentions, the United States reiterates that full-year 2001 data were not, and should not be, considered. Furthermore, the USITC observed that, despite the declines from 1999 to 2000, and between interim 2000 and interim 2001, imports in 2000 and in interim 2001 were nonetheless at levels that were substantially higher than in earlier years of the period of investigation before 1999.[1703]

7.617 The European Communities counter-responds that the annualised interim 2001 data show that both, actual and relative imports have decreased significantly in the first part of 2001. The United States cannot rely on the ruling in *US – Line Pipe* because there are no facts and an adequate and reasoned explanations that imports "remained" at increased levels.[1704]

(ii) The USITC's method of analysis

7.618 China argues that the USITC did not satisfy the requirement that it consider the rate and amount of the relative and absolute increase in imports and the trends by simply stating the import data for each year of the period of investigations.[1705]

7.619 The European Communities also argues that the observation that imports were higher in 2000 than in 1996 is irrelevant because it is merely based on an end-point-to-end-point comparison. The European Communities submits that recent absolute import levels are irrelevant if the most recent trend shows a decrease in imports.[1706]

7.620 The United States also argues that the USITC's analysis was hardly based on a simple end-points comparison. In this regard, the European Communities overlooks the fact that the USITC also: (i) compared 2000 import levels to those in 1998 (and found that 2000 imports were 35.8% higher); (ii) compared interim 2001 imports levels to 1996 and 1997 (and found that imports in the first six months of 2001 exceeded full-year levels in 1996 and 1997); and (iii) compared the relative import

[1699] United States' first written submission, para. 265.
[1700] China's first written submission, para. 116.
[1701] China's first written submission, para. 271; European Communities' first written submission, paras. 323-328.
[1702] European Communities' first written submission, para. 327.
[1703] United States' first written submission, para. 262.
[1704] European Communities' second written submission, paras. 210-211.
[1705] China's first written submission, paras. 266-267.
[1706] European Communities' first written submission, para. 327.

ratio in interim 2001 to 1996, 1997 and 1998 (and found that it was higher than in any of those prior years).[1707]

7.621 Finally, according to the United States, it is not true that recent absolute import levels are irrelevant if the most recent trend shows a decrease in imports, as the European Communities argues. Article 4.2(a) does not focus on trends to the exclusion of the amount of imports and it is not necessary that imports be increasing up to the very end of the period of investigation.[1708]

(f) Welded pipe

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.622 The European Communities argues that, although imports have not decreased in the most recent past, the USITC failed to show that the increases in imports of welded pipe were "sudden, sharp and significant". The USITC's consideration that the "24.2 percent" increase in quantity "was the largest annual percentage increase of the period examined" and that imports "continued at a very high level in interim 2001"[1709] as well as the reference to a large increase in the ratio to domestic production at the end of the period examined[1710] is, submits the European Communities, not sufficient.[1711]

7.623 The European Communities and Switzerland argue that because imports of welded pipe increased steadily throughout the period of investigation, the increase was not "sudden, sharp and significant". A safeguard measure may not be used to protect the industry against a gradual and therefore adjustable increase in imports.[1712]

7.624 According to Switzerland, even if the Panel finds that the 24.2% increase in imports in 2000 was recent and sharp enough, the United States failed to provide an adequate and reasonable explanation of how the facts in the report support its findings and to demonstrate the relevance of the factors examined.[1713] The European Communities adds that absent such explanation, which cannot be cured in the dispute settlement proceedings, the Panel cannot and should not determine whether the existing increase is sufficient to meet the WTO standard.[1714]

7.625 Switzerland admits that imports of welded tubular products have increased during the period of investigation. However, there must be an extraordinary and abnormal surge in imports as stated in the first safeguard measure adjudicated by the GATT in the *US – Fur Felt Hats* case. A gradual increase in imports is the very purpose of trade liberalization between WTO members. A gradual increase can, therefore, not be substantial enough to trigger an emergency action like the imposition of a safeguard measure.[1715] The United States omits to say that in 1999 the imports decreased by 6.4% that the increase of almost 25% in 2000 is based on the comparison with 1999 figures, that is after there had been a decrease, and not on the comparison with 1998 figures where the increase would have been less important, for after a decrease, an increase to the previous level gives automatically a

[1707] United States' first written submission, para. 263.
[1708] United States' first written submission, para. 264.
[1709] USITC Report, Vol. I, p. 157.
[1710] USITC Report, Vol. I, p. 158.
[1711] European Communities' first written submission, para. 332.
[1712] European Communities' first written submission, para. 335; Switzerland's first written submission, paras. 253-254.
[1713] Switzerland's first written submission, para. 256.
[1714] European Communities' first written submission, para. 337.
[1715] Switzerland's first written submission, para. 71.

higher percentage of increase. The higher percentage increase in 2000 is due to a statistical effect. Another interesting development is that from 1996 to 1998 imports have increased by almost 44% compared to an increase of only 16 per cent during the period 1998-2000. However, the United States did not take any safeguard measure at the time when imports were more important that is during 1996-1998.

7.626 The United States claims that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of welded pipe. The European Communities misstates the standard under Article 2.1 of the Agreement on Safeguards when arguing that the USITC failed to show that the increases in imports of welded pipe were "sudden and sharp". For the same reasons, the United States rejects Switzerland's argument that because imports of welded pipe increased steadily throughout the period of investigation, the increase was not "sudden, sharp and significant". The United States also insists that the import data, and their link to the threat of serious injury to the domestic industry, are described in the USITC Report in a clear and straightforward manner.[1716]

7.627 The European Communities responds that the United States does not indicate where in its Report the USITC has provided a quantitative analysis of import developments showing that there has been an abnormal and unexpected change in import levels as opposed to the continuation of a perfectly foreseen gradual and adjustable rise in imports.[1717]

(ii) The USITC's method of analysis

7.628 The European Communities submits that the USITC has also failed to provide annual percentage increases and to evaluate *all* the trends in actual and relative imports by comparing their increases and decreases over the period of investigation.[1718]

(g) FFTJ

7.629 The European Communities argues that the USITC Report does not contain an adequate and reasoned explanation, based on a complete evaluation of import trends over the entire period of examination for each of the specific products grouped into this broad category, of why the steady development described by the USITC fulfils the very high and exacting standard of import surges that are sharp and significant enough so as to cause serious injury or a threat thereof for each of the specific products it grouped together in its mix of heterogeneous products.[1719]

7.630 The United States contends that, in arguing that the increase in imports was steady, rather than sharp and significant, the European Communities again applies the wrong standard. The Agreement on Safeguards requires an evaluation of whether there were imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury", and the USITC satisfied this standard when it first focused on increased imports and subsequently found injury and a causal link.[1720]

7.631 For the counter-responses of the European Communities, see section F.4c(i).

[1716] United States' first written submission, paras. 276, 272-273, 274.
[1717] European Communities' first written submission, para. 214.
[1718] European Communities' first written submission, para. 334.
[1719] European Communities' first written submission, para. 344.
[1720] United States' first written submission, para. 282; United States' written reply to Panel question No. 42 at the first substantive meeting, para. 85.

(h) Stainless steel bar

7.632 The European Communities states that it fails to see a reasoned explanation of how the facts can support a finding of a recent, sudden, sharp and significant surge. The European Communities challenges the USITC's finding of increased imports because what might at first glance appear to be an upward trend between 1999 and 2000 was a mere blip, i.e., a one year peak in imports which immediately returned to normal levels in 2001. The USITC itself acknowledged that absolute import numbers decreased in the first half of 2001. At the time the US President took his decision, the full year 2001 data confirmed the significant and enduring plunge in imports.[1721]

7.633 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of stainless steel bar. The United States submits that the Panel should not be misled by the characterization by the European Communities of the rise in imports in 2000 as "a mere blip". As regards the decline in imports in 2001 to which the European Communities points, the United States reiterates that full-year 2001 data were not, and should not be, considered. According to the United States, it is readily apparent from the data that the increase in imports in 2000 was sharp and substantial. [1722]

7.634 The European Communities responds that even on the basis of interim 2001 data, the sharp decrease in actual imports compensating the earlier increase must have been obvious to the USITC and required a particularly convincing explanation why imports remained at increased volumes.[1723]

(i) Stainless steel wire

(i) "Increased imports" within the meaning of the Agreement on Safeguards?

7.635 China and the European Communities contend that the USITC failed to determine whether the absolute and relative increase in imports was recent enough, sudden enough, sharp enough and significant enough, and failed to correctly evaluate the rate and amount of the increase in imports and to correctly consider the trends in imports.[1724]

7.636 In response to the contention that the USITC failed to determine whether the increase in imports was recent enough, sudden enough, sharp enough and significant enough, the United States reiterates that there are no absolute standards for how recent, sudden, sharp or significant an increase in imports must be.[1725]

7.637 The European Communities also argues that the increase observed in the period 1999-2000 was merely the flip side of a sharp decrease in imports in 1999.[1726] Also in relative terms, the 2000 increase in imports was a "blip development" not resulting in abnormal import levels. There is also no adequate and reasoned explanation for how these facts support a conclusion that the micro-

[1721] European Communities' first written submission, paras. 348, 349, 351.
[1722] United States' first written submission, paras. 287-288.
[1723] European Communities' second written submission, para. 220.
[1724] China's first written submission, paras. 302-303; European Communities' first written submission, para. 372.
[1725] United States' first written submission, para. 316.
[1726] USITC Report, Vol. I, p. 235.

development between 1999 and 2000 was an abnormal, sudden and sharp increase in imports threatening serious injury.[1727]

7.638 According to the United States, the European Communities' characterization of the 2000 increase as a "blip development" is not borne out by the facts and overlooks the fact that two of the USITC Commissioners making affirmative determinations found a threat of serious injury. In doing so, they focused not only on the increase in imports in 2000, but particularly on conditions in interim 2001.[1728] Chairman Koplan noted the rapid increase in relative import levels in interim 2001.[1729] Commissioner Bragg noted the increase in absolute import levels in 2000, and the fact that these declined only slightly between interim 2000 and interim 2001.[1730] Commissioner Devaney noted that the quantity of imports increased in 2000, and remained steady between the interim periods.[1731]

7.639 The European Communities responds that the references to extracts from the causation analysis are irrelevant and do not contain the required quantitative analysis of the increase in imports. Nowhere in the analysis of Chairman Koplan (who was the only one looking at stainless steel wire as a separate product) is there any explanation why relative import levels can be seen as abnormal and the Agreement on Safeguards does not permit safeguard measures to be taken against threat of imports, but only after imports have actually or relatively increased.[1732]

(ii) The USITC's method of analysis and the requirement of a reasoned and adequate explanation

7.640 China argues that the USITC failed to consider the rate and amount of increased imports in absolute and relative terms and the trends.[1733] China also asserts that the upward trend in imports was very smooth and, thus, the USITC was wrong in considering the increase from 1999 to 2000 apart from the rest of the period of investigation. In any event, the USITC did not provide any reasoned and adequate explanation concerning the trends in imports.[1734]

7.641 The United States insists that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of stainless steel wire.[1735] China's assertion that the USITC's analysis of the import trends was deficient because the upward trend in imports was "smooth", and the USITC failed to explain the trend in imports is without merit. The USITC Commissioners making affirmative determinations described the import data in a detailed and straightforward fashion. They noted the increases in imports, especially over the interim periods.[1736] China's arguments regarding increased imports are based only on the data considered by Chairman Koplan who defined the like product as stainless steel wire, but do not address the analysis of increased imports performed by the other two Commissioners who made affirmative determinations based on broader product categories.

[1727] European Communities' first written submission, paras. 369-371; European Communities' written reply to Panel question No. 44 at the first substantive meeting.

[1728] As the Appellate Body recognized in *US – Lamb*, para. 137, because of the future-oriented analysis involved in a threat determination, it is especially important to focus on more recent data.

[1729] USITC Report, pp. 256-259.

[1730] USITC Report, p. 280.

[1731] USITC Report, p. 343.

[1732] European Communities' second written submission, paras. 230-233.

[1733] China's first written submission, para. 299.

[1734] China's first written submission, para. 301.

[1735] United States' first written submission, para. 317.

[1736] United States' first written submission, para. 315.

7.642 China responds that it was right to rely only on the data considered by Chairman Koplan[1737], since that data alone related to stainless steel wire as such. The analysis provided by Commissioners Bragg and Devaney could not provide any useful basis for the assessment of imports trends for stainless steel wire, since they focused on another product, i.e. "stainless steel wire products, including stainless steel wire and rope".[1738]

(j) Stainless steel rod

7.643 China claims that the USITC failed to determine whether the increase in imports was recent enough, sudden enough, sharp enough and significant enough. According to China, indeed, the USITC did not address the right question when it stated that imports showed a dramatic and rapid increase in 2000, since "rapid and dramatic" was not the vocabulary chosen by the Appellate Body. In any event, there is a lack of explanation.[1739]

7.644 China also argues that the USITC failed to consider the rate and amount of increased imports in absolute and relative terms and the trends.[1740] China and the European Communities further argue that the USITC failed to consider trends in imports over the period of investigation. According to China and the European Communities, these trends show that imports of stainless steel rod increased twice during the period of investigation (by 29.4% in 1997 and by 25% in 2000), and that each surge was followed by a decline in the following year. Being immediately compensated the following year, these imports could not be considered as significant.[1741] The European Communities adds that the decline in actual import levels was already noticeable during the first half of 2001 and acknowledged by the USITC as a decline by 31.3% between interim 2000 and interim 2001 and that there is no reasoned and adequate explanation of how this just another one-year high justifies a safeguard measure and there is also no explanation with regard to the relative import increase, given that the USITC Report only shows asterisks.[1742]

7.645 The United States maintains that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the USITC's determination that there were increased imports of stainless steel rod. China's and the European Communities' contentions rest on the use of full-year 2001 data, which were not, and should not be, considered. When viewed within the USITC's period of investigation, imports show a clear rising trend over the last two full years, with the largest increase – of over 25% on an absolute basis – occurring in 2000. Moreover, even if imports followed a pattern of successive surging and receding, this could cause serious injury to the domestic industry, such as to warrant a safeguard measure.[1743]

7.646 China points out that since a decline in imports in interim 2001 occurred, it was a clear signal for the United States to look at the full data for 2001, in order to determine whether or not this new trend was representative. In view of the fact that increased quantities in 1997 and 2000 had vanished by the following year, it was all the more necessary to look at data for the full year 2001.[1744]

[1737] United States' first written submission, para.314.
[1738] China's second written submission, para. 128.
[1739] China's first written submission, para. 278.
[1740] China's first written submission, para. 275.
[1741] China's first written submission, para. 281; European Communities' first written submission, para. 353.
[1742] European Communities' first written submission, paras. 355-357; European Communities' second written submission, paras. 219-221.
[1743] United States' first written submission, paras. 295-296, 300.
[1744] China's first written submission, paras. 119, 121.

7.647 In response to China's argument that the USITC failed to evaluate the rate and amount of increased imports, the United States points out that the USITC noted the amount of the increase in imports from the first full year to the last full year of the period of investigation; and it noted the trends during the period of investigation (some fluctuation, with a sharp increase at the end). The Agreement on Safeguards does not require that competent authorities describe the data in certain ways.[1745]

7.648 The United States further argues that China misconstrues what is meant by "recent" when arguing that the USITC failed to consider the most recent period, i.e. interim 2001. As the *US – Line Pipe* Panel recognized, it is not necessary that imports be increasing up to the very end of the period of investigation. The Agreement on Safeguards also does not require a determination that the increase in imports was "recent enough, sudden enough, sharp enough and significant enough".

7.649 China finally affirms that imports decreased from 45,647 short tons in the first half of 2000, to 36,697 short tons in the second half of 2000, and finally to 31,365 short tons in the first half of 2001. China submits that this strong and lasting recent decline was not given any consideration.[1746]

7.650 As regards China's argument about a decline in imports that started in 2000 and lasted until the end of the period of investigation, the United States rejects this attempt to carve up the investigation period to achieve a desired result. Also, the Agreement on Safeguards does not specify how the period of investigation should be broken down. In the absence of any evidence of manipulation or bias, the investigating authorities' methodology should be left undisturbed.[1747]

G. SERIOUS INJURY OR THREAT OF SERIOUS INJURY

1. Competent authorities' obligations under the Agreement on Safeguards in making injury determinations

7.651 Relying upon the Appellate Body decision in *US – Lamb*, China asserts that, in determining whether the domestic industry has suffered serious injury, that is "significant overall impairment" of its position in the industry, competent authorities must evaluate all relevant factors and conduct a substantive evaluation of the "bearing", "influence", "effect" or "impact" that the relevant factors have on the situation of [the] domestic industry.[1748] China and the European Communities also rely upon that decision to argue that the competent authorities' explanation must fully address the nature, and, especially, the complexities of the data, and respond to other plausible interpretations of that data.[1749]

7.652 The European Communities argues that it follows from Articles 2.1 and 4.2 of the Agreement on Safeguards, that a competent authority is under an obligation to justify its decision to impose safeguard measures. That is, in the words of the Appellate Body, it must provide a "reasoned and adequate explanation" of its determination that the necessary pre-conditions for the application of safeguard measures have been fulfilled.[1750]

7.653 The European Communities argues that, in addition, flowing from Articles 3.1 and 4.1(c) of the Agreement on Safeguards, a competent authority must publish a report setting out its factual

[1745] United States' first written submission, para. 297.
[1746] China's first written submission, para. 283.
[1747] United States' first written submission, para. 301.
[1748] China's first written submission, paras. 305-307.
[1749] China's first written submission, paras. 305-307; European Communities' first written submission, para. 381.
[1750] European Communities' first written submission, para. 380.

findings and providing justification for the conclusions which led to the imposition of safeguard measures. The European Communities argues that this is also a logical consequence of the domestic investigation process set out in Article 3, which is intended to give interested parties the opportunity to make any concerns known to the competent authority. The European Communities argues that a competent authority must also justify its decision in the light of the comments made before it during its investigation.[1751] In the view of the European Communities, the competent authority's report must set out the pertinent facts on the basis of which a Member imposes a safeguard measure. Moreover, the published report cannot leave the reader guessing about how the competent authority dealt with complexities arising from the data- examination process.[1752]

2. "Significant overall impairment"

(a) CCFRS

7.654 With regard to the USITC's determination of whether there had been a "significant overall impairment in the position of the domestic industry" producing CCFRS, New Zealand argues that although the USITC referred to some factors to support its findings, it did not balance these factors in any objective way. New Zealand questions how, when the domestic industry's share of total domestic consumption had remained stable (and increased significantly in the interim 2001 figures to 93.1% from 91% in 1996), when the domestic share of total commercial shipments had been stable (and increased from 76% in 1996 to 81.5% in interim 2001), when domestic sales had been shown to have increased by 10.9%, when domestic production had increased 8.4% and when productivity had "increased sharply" rising 13.2% there could still be a finding of "serious injury".[1753] New Zealand asserts that the USITC chose to disregard these factors, focussing instead on the fact that capacity utilization had decreased from 91.0% to 85.1%, the fact that operating income had fallen from 4.3% of sales to –1.4% of sales and the fact that the number of workers had declined by 4.4% and the number of hours worked had declined by 3.5%. New Zealand argues that the USITC did not explain why these three negative factors should have outweighed the five positive factors.[1754]

7.655 Further, New Zealand argues that the USITC failed to accord appropriate weight to the significant number of factors indicating gains rather than declines in the position of the domestic industry, and it accorded disproportionate weight to the factors that indicated declines. New Zealand asserts that the USITC frequently rejected factors that did not support a predetermined conclusion of "serious injury" and that nowhere did the USITC show how the factors it had relied upon adequately demonstrate the "very high" standard of "significant overall impairment" in the position of the industry.[1755] Similarly, China notes that the USITC made reference to the industry's financial problems in its report. However, China argues that at no point did the USITC explain how the importance of this factor outweighed the other positive factors and leads to the conclusion that there is an overall impairment of the situation of the industry.[1756]

7.656 In response, the United States asserts that the USITC acknowledged that not every single factor it examined pertinent to the industry's condition was in decline. The United States argues that there need not be a decline in each Article 4.2(a) factor for there to be a finding of serious injury. The United States notes that the USITC specifically found, however, that improvements in certain factors

[1751] European Communities' first written submission, para. 382.
[1752] European Communities' first written submission, para. 383.
[1753] New Zealand's first written submission, para. 4.101.
[1754] New Zealand's first written submission, para. 4.102.
[1755] New Zealand's first written submission, para. 4.103.
[1756] China's first written submission, para. 315.

"do not offset the significant declines exhibited by other indicia of the industry's condition with respect to the issue of whether the industry is suffering serious injury". In this regard, the United States makes reference to declines, which it claims have not been disputed by any party, including significant idling of productive capacity, sharp deterioration in financial performance, and significant unemployment.[1757]

7.657 The United States also asserts that the USITC specifically discussed and acknowledged increases in capacity, production and productivity[1758] and examined the implications of the increases. The USITC fulfilled its obligation under Articles 2.1 and 4.2(a) by concluding that these isolated increases did not detract from its finding of serious injury in light of all pertinent factors having a bearing on the state of the industry.[1759]

7.658 In particular, the United States argues that the USITC Report provided several reasons why increases in production and capacity were consistent with a finding of serious injury. First, according to the United States, the USITC explained that increases from 1996 to 2000 occurred at a time when apparent domestic consumption of CCFRS was increasing. The United States asserts that one would normally expect production and capacity to increase in a growing market. However, according to the United States, the increase in production from 1996 to 2000 was only incrementally greater than the increase in United States apparent consumption of CCFRS during the same period.[1760] Second, the USITC emphasized that the increased capacity was not being utilized. Instead, capacity utilization for the domestic industry had declined steadily from 1996 to 2000 and fell sharply between interim 2000 and interim 2001. The United States asserts that the USITC emphasized that declines in capacity utilization were apparent in each of the particular product categories within the industry, as well as in the industry as a whole.[1761] In any event, the United States argues that Article 4.2(a) does not expressly mention changes in capacity as a factor that an investigating authority must consider in evaluating whether there is serious injury. Instead, it references changes in "capacity utilization".[1762] Third, according to the United States, the overall picture in the industry was not one of steady expansion. The United States asserts that, as had been found by the USITC, ten United States producers of CCFRS declared bankruptcy during the period of its investigation and several shut down and ceased production altogether.[1763] The United States argues that, in light of the foregoing, the USITC thoroughly explained why the positive trends with respect to capacity and production did not outweigh other negative trends concerning idling productive resources in the industry.[1764]

7.659 According to the United States, the USITC also acknowledged that productivity in the CCFRS industry increased from 1996 to 2000. The United States asserts that the USITC considered the effect of this increase on employment levels in the industry and concluded that the increase in productivity "may have offset to some degree the declines in employment".[1765] The United States argues that, therefore, it is clear that the USITC considered the increase in productivity but concluded that it did not outweigh or entirely explain the declines in employment. According to the United States, the annual trends in productivity do not correlate with the trends in employment. Productivity for the CCFRS industry increased during every full year during the period of investigation. This

[1757] United States' first written submission, para. 338.
[1758] United States' first written submission, paras. 339 and 349.
[1759] United States' first written submission, para. 349.
[1760] United States' first written submission, paras. 340-341.
[1761] United States' first written submission, para. 342.
[1762] United States' first written submission, para. 344.
[1763] United States' first written submission, para. 343.
[1764] United States' first written submission, para. 344.
[1765] United States' first written submission, para. 345.

included years in which employment was relatively stable as well as those in which it declined.[1766] The United States argues that, moreover, increased productivity could only explain declining employment at a particular facility where production continued on an ongoing basis. It could not explain declines in employment attributable to the shutting down of operations at production facilities. According to the United States, the decline in employment for the CCFRS industry occurred at a time when several productive facilities closed entirely. Thus, there were losses of employment at facilities where productivity essentially declined to zero.[1767] The United States also argues that increases in productivity, which would generally be expected to lead to improved financial results, did not track productivity given that the financial results of the CCFRS industry declined sharply after 1997, and the industry recorded overall operating losses in 1999, 2000, and interim 2001.[1768]

7.660 In counter-response, New Zealand asserts that a simple unreasoned assertion that improvements in the range of performance factors described in detail by the USITC itself "do not offset the significant declines exhibited by other indicia"[1769], can never hope to meet these requirements.[1770]

7.661 New Zealand further argues that the United States provides no substantiation for the key propositions it asserts. New Zealand questions why it is necessarily "consistent with a finding of serious injury" that production increases from 1996 to 2000 of 8.4% "occurred at a time when apparent consumption of certain flat steel was increasing"? According to New Zealand, an increase in production is a positive indicator in its own right, to be weighed and balanced with other factors, positive and negative, when coming to an overall determination on serious injury. So, for that matter, is an increase in consumption, which offers strong evidence of a healthy market. New Zealand asserts that, what is more, there is no logical or legal basis in Article 4.2(a) – and the United States offers none – for ignoring a positive industry condition indicator just because it correlates (or does not correlate) with movements in another of the listed factors.[1771]

7.662 With regard to the reasons advanced by the United States as to why the industry's increase in capacity is irrelevant and not to be taken into account as a positive factor[1772], New Zealand submits that none is credible. According to New Zealand, the mere fact that this factor is not included in the Article 4.2(a) list is neither here nor there, given that the text requires an evaluation of all relevant factors, "in particular" (i.e. not limited to) those factors then listed. Capacity increases could well be evidence of an industry in good health and therefore need to be assessed and weighed against other factors in the course of reaching an overall evaluation of serious injury. In this connection, the United States argument that certain producers declared bankruptcy so there is no overall industry picture of expansion is belied by the USITC's own figures, which showed an increase in capacity of 15.9%.[1773] Nor should capacity increases be discounted just because they correlate, or do not correlate, with movements in other factors such as capacity utilization.[1774] Accordingly, it should be regarded as a potential positive factor in its own right.[1775]

[1766] United States' first written submission, para. 346.
[1767] United States' first written submission, para. 347.
[1768] United States' first written submission, para. 348.
[1769] USITC Report, Vol. I, p. 55, quoted in United States' first written submission, para 338.
[1770] New Zealand's second written submission, para. 3.74.
[1771] New Zealand's second written submission, para. 3.78.
[1772] United States first written submission, paras. 342-344.
[1773] USITC Report, Vol. I, p. 54.
[1774] As claimed by the United States; United States first written submission, para 342.
[1775] New Zealand's second written submission, para. 3.79.

7.663 In relation to the sharp productivity increase of 13.2%, New Zealand submits that the United States considers this can apparently be discounted because "annual trends in productivity do not correlate with the trends in employment"[1776] and the increase "cannot explain the financial results of the certain flat steel industry". According to New Zealand, nothing in Article 4.2(a) suggests that a productivity increase has to correlate with employment trends[1777] or a certain type of financial result before it qualifies to be weighed and balanced with the whole range of negative and positive factors in making an overall assessment of serious injury.[1778]

7.664 In the context of its arguments regarding causation, the United States argues that the Agreement on Safeguards "requires not a focus on one or two selected criteria but on all of the relevant criteria bearing on the condition of the industry".[1779] New Zealand argues in response that the United States then fails to draw the obvious conclusions: that the USITC's serious injury analysis does not meet the relevant requirements of the Agreement on Safeguards as interpreted by the Appellate Body. According to New Zealand, to a large extent the United States submissions comprise mere repetition of the USITC's findings and "reasoning" and fail to provide any credible defence of why what the USITC did could in fact comply with the Agreement on Safeguards provisions and the relevant Appellate Body decisions in this area.[1780]

7.665 With respect to the USITC's conclusion that there had been a "significant idling" in the domestic industry's productive facilities, New Zealand asserts that the USITC placed great weight on the decline between 1996 and 2000 but argues that the 6% overall decline in capacity utilization was dwarfed by the much more significant capacity, production, and productivity increases that occurred during the same period. In particular, New Zealand argues that during that period, capacity increased 15.9%, production 8.2%, and productivity "sharply increased" by 13.2%.[1781] New Zealand argues that the USITC simply brushed these factors aside without any adequate or reasoned explanation, observing simply that "despite increases in capacity and production, there was significant idling of the domestic industry's productive facilities during the period, given the numerous bankruptcies and the shut down of some facilities, as well as decreased capacity utilization". In making this statement, New Zealand argues that the USITC also failed to explain that the bankruptcies referred to did not necessarily equate with an idling of productive facilities; the USITC itself conceded that only "some" bankrupt companies "ceased operations altogether".[1782] With regard to the issue of capacity utilization, see arguments made by the United States in paragraph 7.658.

7.666 New Zealand also argues that the USITC's finding that there was "significant unemployment or underemployment in the domestic industry" was based on a reduction over the period of investigation in the number of workers and the number of hours worked. According to New Zealand, the USITC did not consider the role of increased productivity in reducing labour requirements; nor did it consider the role of newer, less labour intensive, technology upon this indicator. New Zealand asserts that this failure is particularly noteworthy given the USITC's recognition that the period of investigation witnessed the "first large-scale production of cold-rolled and coated steel by minimills". New Zealand argues that the fact that the number of workers and hours worked had reduced should

[1776] New Zealand's second written submission, paras. 346-348.
[1777] In fact, the 1996-2000 figures throws doubt on the United States factual assertion also – a productivity increase of 13.2% corresponds over this period with a decline of 4.4% in the number of workers and of 3.5% of hours worked.
[1778] New Zealand's second written submission, para. 3.80.
[1779] United States' first written submission, para. 450.
[1780] New Zealand's second written submission, para. 3.76.
[1781] New Zealand's first written submission, para. 4.104.
[1782] New Zealand's first written submission, para. 4.105.

not be presumed to indicate injury given the labour advantages enjoyed by minimills.[1783] With regard to the issue of productivity, see arguments made by the United States in paragraph 7.659.

7.667 New Zealand also argues that the USITC failed to investigate the extent to which the negative effects they perceived to be affecting the domestic industry differed as between integrated producers and more modern efficient minimills, which was necessary in order to arrive at an accurate assessment of significant "overall" impairment. According to New Zealand, while the former were utilizing increasingly obsolete production technology, the latter were taking advantage of modern technologies and increasing their market share during the period of the investigation. The analysis thus failed to reckon with the fact that during the period of investigation the United States steel industry was an industry in transition – undergoing structural change – with modern minimill producers displacing or taking market share away from obsolete integrated plants.[1784] New Zealand argues that the USITC failed to investigate properly the extent to which performance differed as between integrated mills and minimills.[1785]

7.668 In response, the United States argues that under both Articles 2.1 and Article 4.2(a) of the Agreement on Safeguards, an investigating authority must determine whether "a domestic industry" is experiencing serious injury or is threatened with serious injury. According to the United States, nothing in these provisions require an authority further to determine that each discrete segment that may exist within a particular industry is seriously injured. Having determined that the pertinent domestic industry was the one producing CCFRS, the United States asserts that the USITC's obligation was to assess serious injury on an industry-wide basis. This is precisely what it did.[1786] The United States submits that an examination of the CCFRS industry could not have encompassed only minimills, when the industry contained both minimill producers and the much larger integrated producers. It adds that the obligation to evaluate the industry as a whole, however, does not require an investigating authority to obtain information concerning every producer, or on 100% of industry production. The Panel in *US – Lamb* observed that the "as a whole" and "major proportion" clauses in Article 4.1(c) were grammatically linked and relate "to the representativeness of the data pertaining to the condition of the industry". The United States submits that the USITC collected and used the most comprehensive data possible concerning each of the ten domestic industries on which it made an affirmative finding of serious injury or threat of serious injury. The USITC collected questionnaire data from United States producers representing a clear majority of production in each of these industries.[1787] In this regard, the United States notes that based on the data concerning CCFRS minimill production[1788] and the data concerning total CCFRS production[1789], minimills account for less than 15% of total United States CCFRS production in 2000.[1790]

7.669 The United States argues in this regard that minimills were part of the domestic CCFRS industry, and the USITC found both that the CCFRS industry as a whole was seriously injured and that minimills, as well as integrated producers, had been adversely affected by the increased imports. The USITC acknowledged that minimills had cost advantages over integrated producers, and had some effect on price levels. It concluded, however, that the imports, not the minimills, led to the price pressure that typically drove prices downwards.[1791] The United States argues that numerous

[1783] New Zealand's first written submission, para. 4.106.
[1784] New Zealand's first written submission, para. 4.107.
[1785] New Zealand's written reply to Panel question No. 70 at the first substantive meeting.
[1786] United States' first written submission, para. 351.
[1787] United States' written reply to Panel question No. 70 at the first substantive meeting.
[1788] United States' first written submission, footnote 668.
[1789] US Exhibit-33.
[1790] United States' written reply to Panel question No. 76(a) at the first substantive meeting.
[1791] United States' written reply to Panel question No. 76(c) at the first substantive meeting.

manifestations of serious injury to the CCFRS industry were applicable to minimill producers. Minimill producers' prices went down and their profitability declined during the period of investigation.[1792]

7.670 The United States adds that even if a sectoral analysis of the CCFRS was required, the USITC engaged in such an analysis as well. In particular, the United States argues that the USITC's analysis was conducted on the basis of the pertinent product categories (i.e, slab, plate, hot-rolled, cold-rolled, and galvanized) on which the producers and importers were requested to provide data. According to the United States, the USITC found that its conclusions concerning declines in capacity utilization and financial performance were applicable for each product category as well as for the industry as a whole.[1793] The United States also submits that, in any event, the impact of minimills was pertinent, if at all, to the issue of causation rather than to the issue of whether the entire CCFRS industry in which minimills were responsible for a much smaller share of production than were integrated producers was incurring serious injury.[1794]

7.671 In counter-response, New Zealand observes that the USITC focuses in an unbalanced and unobjective way on the poorly performing sectors of the industry while seemingly unaware that the industry was already making the transition to efficiency and long-term viability, as evidenced by the increasingly strong performance of minimill producers.[1795] This fact receives no mention in the USITC serious injury analysis. According to New Zealand, the United States mischaracterizes this observation as a claim by New Zealand that the USITC was required to undertake separate sectoral injury evaluations, whereas the Agreement on Safeguards requires an analysis of the whole industry. In fact, New Zealand is saying the opposite – that the USITC needed to consider adequately the condition of *all* sectors, not just the sector that was failing, in order to carry out the industry-wide analysis which the United States accepts was required.[1796]

7.672 In conclusion, New Zealand submits that the United States has failed to rebut New Zealand's case that the USITC selectively and disproportionately accorded weight to some factors and not others. Nor has the United States been able to demonstrate that adequate consideration was given to the condition of all sectors of the domestic industry or that the high threshold of "serious injury" has been met. Accordingly, the United States has failed to demonstrate the existence of "serious injury" being suffered by the domestic industry as required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards. It also follows that the United States has failed to provide a reasoned and adequate explanation for its determination of "serious injury" as required by Article 3.1 of the Agreement on Safeguards.[1797]

7.673 The United States submits that because a serious injury finding must focus on an entire industry, an authority is not obliged to conduct an analysis that focuses only on one segment of an industry in isolation. For this reason, the United States submits that the Panel must reject New Zealand's claim that the USITC gave insufficient attention to minimill producers in determining that the CCFRS industry was seriously injured.[1798] The United States reiterates that minimill producers

[1792] United States' written reply to Panel question No. 76(b) at the first substantive meeting.
[1793] United States' first written submission, para. 352.
[1794] United States' first written submission, para. 353.
[1795] New Zealand first written submission, paras. 2.27-2.32. The United States notes that minimills accounted for fully one-third of total CCFRS production in the United States; United States' first written submission, para. 353, footnote 381.
[1796] New Zealand's second written submission, para. 3.81.
[1797] New Zealand's second written submission, para. 3.82.
[1798] New Zealand's written reply to Panel question No. 70 at the first substantive meeting.

accounted for less than 15% of overall United States CCFRS production in 2000.[1799] The USITC acted appropriately, and consistently with United States obligations under the Agreement, by basing its serious injury finding for CCFRS on data relating to the entire industry, rather than to only the 15% of the industry which was represented by minimill production.[1800]

(b) Rebar

7.674 China argues that given that most of the injury factors were positive in the case of rebar, the USITC had the obligation to explain how the negative factors outweighed the positive factors and why the overall situation of the industry was nevertheless severely impaired. China asserts that it was not enough to merely state that positive factors reflected strong increases in United States apparent consumption.[1801]

7.675 In response, the United States argues that the USITC did exactly what China suggests it should have done. In particular, the United States contends that the USITC explained how the negative factors outweighed the positive factors and why the overall situation of the industry was nevertheless considered to have been severely impaired. The USITC acknowledged that "several indicators pertaining to the rebar industry, such as capacity, production, and employment, increased during the period examined". It found, however, that these increases reflected strong increases in United States apparent consumption.[1802] The United States asserts, however, that United States producers' shipments did not increase commensurately with apparent consumption notwithstanding increases in the domestic industry's productive capacity. The United States argues that, consequently, as the USITC emphasized, the domestic industry lost substantial market share during the period of investigation. In the United States' view, relying on this consideration was clearly consistent with Article 4.2(a), which specifically references "the rate and amount of the increase in imports of the products concerned in absolute and relative terms" as a pertinent factor in evaluating serious injury.[1803]

7.676 China disagrees that the USITC has provided sufficient explanation as how the negative factors outweighed the positive factors. China reiterates that it was not admissible to disregard all the positive factors by simply stating that they reflected strong increases in United States apparent consumption. According to China, the United States' reply does not provide any further justification, but rather only restates what already was to be found in the USITC Report.[1804]

(c) Welded pipe

7.677 Switzerland argues that the trends of several indicators referred to by the USITC do not testify to a threat of injury that was serious enough to fulfil the criteria of the Agreement on Safeguards. Switzerland notes in this regard that the USITC mentions that "the years 1996 to 1998 were a period of generally good health for the domestic industry producing welded tubular products". Switzerland argues that, moreover, some of the indicators examined by the USITC were positive: the number of employees as well as the hourly wages were higher in 2000 than in 1996; the same remarks can be made in relation to United States shipments quantities, operative income and capital expenditures.[1805] Switzerland also notes that the USITC mentioned that two United States firms closed down during the

[1799] United States', response to Panel question No. 76 at the first substantive meeting.
[1800] United States' second written submission, para. 114.
[1801] China's first written submission, para. 335.
[1802] United States' first written submission, para. 370.
[1803] United States' first written submission, para. 371.
[1804] China's second written submission, para. 150.
[1805] Switzerland's first written submission, para. 272.

examined period. Switzerland argues, however, that the USITC failed to show why this fact was relevant, since the importance of these bankruptcies was not clearly explained in the USITC Report. Moreover, according to Switzerland, bankruptcies of non-competitive firms were, in principle, considered to be normal phenomena in a market-based economy and must not necessarily be the consequence of serious injury that has been suffered by a certain industry.[1806] With regard to the relevance of bankruptcies, see arguments made by the United States in paragraph 7.681.

7.678 In response to Switzerland's criticism of the USITC's determination on the basis that certain factors, such as employment and United States shipment quantity, were higher in 2000 than in 1996, and that the operating income of the industry producing welded pipe products remained positive, the United States contends that this overlooks the fact that the USITC's determination was based on threat of serious injury rather than serious injury. The USITC acknowledged that the industry's condition was not at the level of serious injury.[1807] However, in the United States' view, the USITC found that the industry's condition would imminently deteriorate to the level of serious injury. In so doing, the USITC put particular emphasis on declines since 1998 in many factors, particularly production, shipments, capacity utilization, financial performance, and employment. The United States submits that this is fully consistent with the statement of the Appellate Body that, for purposes of the Agreement on Safeguards, "data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury".[1808] The United States notes that the Appellate Body has also instructed that "competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period". The United States contends that, consistent with this instruction, the USITC did not rely solely on the fact that important indicators of industry performance had declined during the latter portion of the period of investigation. Instead, it emphasized that, in 2000, several of these indicators were at their lowest full-year level during the period of investigation (i.e., capacity utilization, market share, operating income), or were only marginally higher than the period lows (i.e., production, employment). The USITC thus fully explained why the declines it observed during the latter portions of the period of investigation demonstrated an imminent threat of serious injury.[1809]

3. Obligation to evaluate all relevant factors

7.679 New Zealand argues that in view of the disproportionate weight that the USITC accorded to some factors in making its serious injury determination and its failure to accord appropriate weight to others, the USITC failed to evaluate all relevant factors.[1810]

7.680 The United States asserts that the USITC evaluated each of the factors specified in Article 4.2(a).[1811] The United States argues that while the factors expressly articulated in Article 4.2(a) are "of an objective and quantifiable nature", the factors are not all quantifiable in the same manner. For example, imports, sales, and production will be measured in units of output, employment will be measured in numbers of workers, profits and losses will be measured in units of currency, and capacity utilization and productivity are ratios.[1812] The United States argues that, consequently, when conducting its analysis under Article 4.2(a), an investigating authority cannot

[1806] Switzerland's first written submission, para. 273.
[1807] United States' first written submission, para. 383.
[1808] United States' first written submission, para. 384.
[1809] United States' first written submission, para. 385.
[1810] New Zealand's first written submission, para. 4.108.
[1811] United States' first written submission, para. 322.
[1812] United States' first written submission, para. 323.

derive a single injury "measure" and that there is no requirement that it do so. According to the United States, the evaluation must be based on the factors as a whole. Moreover, the authority may find serious injury even if not every single factor it examines concerning the industry's condition is declining. The United States contends that, instead, "it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination" and the "overall picture" of industry factors must demonstrate significant overall impairment.[1813]

7.681 The United States argues that in conducting its analysis of serious injury an authority may examine factors not expressly referenced in Article 4.2(a). More particularly, the United States argues that an authority can and should examine additional "factors of an objective and quantifiable nature having a bearing on the industry" that it has concluded are relevant. For several industries, the USITC evaluated additional factors it deemed to be relevant, including bankruptcies that had been declared by producers. The United States argues that while several complainants have questioned the relevance of this factor, its significance is clear. According to the United States, firms that declare bankruptcy but remain in operation frequently restructure their operations as part of the bankruptcy process. Consequently, bankruptcies can indicate declines in productive facilities and employment levels. Additionally, the United States argues that when a corporation lacks sufficient liquid assets to pay its creditors, and consequently must seek protection, restructuring, or even liquidation from the United States bankruptcy courts, this situation has obvious implications for the competitive viability of that producer. According to the United States, a corporation will generally not make a bankruptcy filing unless its operations have been significantly impaired. Similarly, an entire industry's viability may be in question when several producers within that industry declare bankruptcy.[1814] The United States also questions the contention by China that the USITC's finding that hot-rolled bar producers had gone bankrupt "is not supported by all the relevant and sufficient data". It points in this regard to the fact that bankruptcies of United States firms are a matter of public record. It also notes that the public USITC Report identified four hot-rolled bar producers that declared bankruptcy and indicated that three of the four had shut down all or a portion of their production operations in 2001. The United States asserts that the accuracy of this data cannot be challenged.[1815]

7.682 China refers to the Appellate Body decision in *US – Lamb*. China states that, in that case, the Appellate Body stated that:

> "[…] Under Article 4.2(a), competent authorities must, as a formal matter, evaluate 'all relevant factors'. However, that evaluation is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check-list'. Under Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the 'bearing', or the 'influence' or 'effect'" or "impact" that the relevant factors have on the "situation of [the] domestic industry". (Emphasis added)".[1816]

7.683 China asserts that what the United States seems to be saying is that a competent authority has no obligation to make a separate evaluation of injury for all the relevant factors. According to China, this is not true. Moreover, China does not agree with the United States that this evaluation "must be based on the factors as a whole". It is true that the Appellate Body stated that competent authorities must reach a determination in light of the evidence as a whole.[1817] However, according to China, this requirement relates only to the final determination of injury and does not prevent the competent

[1813] United States' first written submission, para. 323.
[1814] United States' first written submission, para. 325.
[1815] United States' first written submission, para. 359.
[1816] China's second written submission, para. 133.
[1817] Appellate Body report, *US – Lamb*, para.144.

authority from conducting, prior to this final determination, an evaluation of injury from all relevant factors.[1818]

7.684 In support, the European Communities notes that in *Argentina – Footwear (EC)* the Appellate Body stated that:

> "Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."[1819]

7.685 The European Communities submits that this makes it clear that there must be an evaluation of each factor listed in Article 4.2(a). The European Communities submits that the competent authority is then under an obligation to determine whether, on the basis of an evaluation of these and any other relevant factors, the domestic industry has suffered a "significant overall impairment" in the sense of Article 4.1(a). The European Communities refers to the following excerpt from the Appellate Body's report in *Argentina – Footwear (EC)*:

> "In our view it is only when the overall position of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry. Although Article 4.2(a) technically requires that certain listed factors must be evaluated, and that all other relevant factors must be evaluated, that provision does not specify what such an evaluation must demonstrate. [….] [I]n addition to a technical examination of whether the competent authorities in a particular case have evaluated all the listed factors and any other relevant factors, we believe that it is essential for a panel to take the definition of 'serious injury' in Article 4.1(a) of the Agreement on Safeguards into account in its review of any determination of 'serious injury'."[1820] [1821]

7.686 New Zealand also refers to the Appellate Body decision in *US – Lamb* where, New Zealand says, the Appellate Body repeatedly emphasized that a competent authority must evaluate, in assessing serious injury, "*all relevant factors*" of an "objective and quantifiable nature" and their "bearing" on the domestic industry. This requires a separate evaluation of each factor.[1822]

7.687 New Zealand also argues that the Panel's duty is to review whether the competent authority has, "as a formal matter", evaluated all relevant factors, and second whether it has, "as a substantive matter, provided a reasoned and adequate explanation of how the facts support their determinations". The Appellate Body in *US – Lamb* found that the USITC failed this second requirement, though emphasized it was not making a factual determination as to whether or not there was a threat of serious injury. New Zealand submits that the present case is very similar. The USITC had as a formal matter identified a series of positive and negative factors but had as a substantive matter failed to provide a reasoned and adequate explanation of how the facts supported its serious injury determinations. For example it did not examine and weigh these factors together. Hence, whether or

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[1818] China's second written submission, para. 134.
[1819] Appellate Body report, *Argentina – Footwear (EC)*, para. 136.
[1820] Appellate Body report, *Argentina – Footwear (EC)*, para. 139.
[1821] European Communities' written reply to Panel question No. 23 at the second substantive meeting.
[1822] New Zealand's written reply to Panel question No. 23 at the second substantive meeting.

not serious injury actually existed, the USITC – to paraphrase the finding in *US – Lamb* – "acted inconsistently with Article 4.2(a) and Article 2.1 of the Agreement on Safeguards".[1823]

7.688 China submits that the United States seems to consider that the competent authority conducting an investigation should have discretion in determining what other factors are relevant for its injury determination and that its evaluation should be limited to these other factors alone.[1824] China believes that such an interpretation does not meet the requirements of the Agreement on Safeguards, as clarified by the Appellate Body. The United States refers to the Appellate Body report in *US – Wheat Gluten* to assert that: "An authority can and should examine additional 'factors of an objective and quantifiable nature having a bearing on the industry' that it has concluded are relevant". According to China, such an interpretation would restrict the obligations of the competent authority far beyond the requirements of the Agreement on Safeguards as clarified by the Appellate Body.[1825] In China's view, rather, it is clear that the first obligation of the competent authority is to evaluate all the relevant factors and that, therefore, the competent authorities "must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors".[1826]

7.689 In this regard, and as far as the bankruptcy factor is concerned, China asserts that the United States may not provide in its written submission an explanation regarding the relevance of this factor. Rather, the USITC should have provided, in its report, an adequate and reasoned explanation as why it was relevant to analyse this factor in its injury determination and to what extent it was allowed to demonstrate the existence of serious injury. According to China, the fact that the United States needs to provide such additional information in its written submission is clear evidence that the USITC failed to do so.[1827]

4. Obligation to provide reasoned and adequate explanations

7.690 China argues that, with respect to the USITC's interpretation of the investigation data on injury for all ten products that are covered by the safeguard measures, the USITC failed to provide reasoned and adequate explanations.[1828] Similarly, the European Communities argues that the United States is in breach of its obligations under Articles 2.1 and 4.2 of the Agreement on Safeguards because it failed to provide reasoned and adequate explanations of its determination that serious injury, or threat thereof existed. The European Communities also asserts that it is also in violation of Articles 3.1 and 4.2(c).[1829]

7.691 In response, the United States contends that the USITC explained in some detail why there was a significant overall impairment of the state of each industry that it concluded was seriously injured. According to the United States, these industries uniformly reported poor financial performance. Numerous firms, and often the entire industry, showed unprofitable operations. In several industries, producers had gone bankrupt. For most of the pertinent industries, there were also

[1823] New Zealand's written reply to Panel question No. 23 at the second substantive meeting, citing Appellate Body Report, *US – Lamb*, para. 161.
[1824] United States' first written submission, para. 325, referred to in China's second written submission, para. 135.
[1825] United States' first written submission, para. 325, referred to in China's second written submission, para. 136.
[1826] Appellate Body report, *US – Wheat Gluten*, para. 55, cited in China's second written submission, para. 137.
[1827] China's second written submission, para. 138.
[1828] China's first written submission, para. 308.
[1829] European Communities' first written submission, para. 429.

declines in capacity and production, with closures in productive facilities. Many also had declines in capacity utilization and employment.[1830] The United States also argues that for both welded pipe and stainless steel wire (the two industries on which it found threat of serious injury) the USITC provided a detailed, fact-based explanation why a significant overall impairment in the state of the industry was clearly imminent.[1831]

7.692 China disagrees that the USITC has sufficiently explained, in a reasoned and adequate manner, "why there was a significant overall impairment of the state of each industry that it concluded was seriously injured".[1832]

(a) Alternative explanations of data

7.693 On the basis of the Appellate Body decision in *US – Lamb*, China argues that the Panel should determine whether the explanations given in the USITC Report fully addressed the nature and, especially, the complexities of the data, and responded to the interpretations of that data by China. In other words, if the explanations given by the USITC do not rebut China's interpretation, or if contradictions between the facts and the USITC's conclusions are not fully addressed, China asserts that the Panel must find that the explanations are not reasoned and adequate.[1833]

7.694 In response, the United States observes that China did not provide any interpretations of data to the USITC in its investigation and that Article 3.1 merely directs authorities to provide "findings and reasoned conclusions reached on all pertinent issues of fact and law"; it does not further require authorities to respond directly to all arguments raised by parties to the investigation. The United States indicates that the USITC report nevertheless contains sufficient reasoning to respond to the criticisms of China.[1834]

(i) CCFRS

7.695 China argues that the determination that the domestic industry of CCFRS products was suffering serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1835]

7.696 China refers[1836] to the statement contained in the USITC Report that "In view of the significant idling of productive facilities, the sharp deterioration in the financial performance of the domestic industry, and significant unemployment or underemployment within the domestic industry, we find that the domestic industry producing CCFRS is seriously injured". With regard to employment, China argues that, contrary to the conclusion reached by the USITC, although employment had decreased, this did not necessarily indicate the industry had been injured. Indeed, productivity had increased by 13.2% between 1996 and 2000 and consumption had only increased by 7.8%. China further argues that since the industry is capital-intensive rather than labour-intensive, it may be that unemployment was mainly due to higher productivity.[1837]

[1830] United States' first written submission, para. 335.
[1831] United States' first written submission, para. 337.
[1832] China's second written submission, para. 139.
[1833] China's first written submission, para. 309.
[1834] United States' first written submission, para. 363.
[1835] China's first written submission, para. 317.
[1836] China's first written submission, para. 312.
[1837] China's first written submission, para. 313.

7.697 China notes that the USITC also mentioned a decline in capacity utilization with respect to CCFRS in its report. China argues that the fact that the increase in productivity was well in excess of domestic demand must also have had some impact on capacity utilization. China argues that, therefore, although capacity utilization declined, this does not mean that the industry was in a difficult position, especially given the fact that the domestic industry gained a larger market share of the United States market.[1838]

7.698 China also notes that the USITC made reference to the industry's financial problems in its report. However, China argues that at no point did the USITC explain how the importance of this factor outweighed the other positive factors leading to the conclusion that there is an overall impairment of the state of the industry.[1839]

7.699 China argues that the USITC did not provide a reasoned and adequate explanation for its determination given that the USITC Report did not address the issues referred to by China nor did it explain why the industry had been seriously injured, despite the existence of the positive factors that had been raised by China.[1840]

7.700 In response, the United States asserts that the USITC acknowledged that not every single factor it examined, pertinent to the industry's condition, was in decline. The United States argues that there need not be a decline in each Article 4.2(a) factor in order for there to be a finding of serious injury. The United States notes that the USITC specifically found, however, that improvements in certain factors "do not offset the significant declines exhibited by other indicia of the industry's condition with respect to the issue of whether the industry is suffering serious injury". In this regard, the United States makes reference to declines, which it claims have not been disputed by any party, including significant idling of productive capacity, sharp deterioration in financial performance and significant unemployment.[1841]

7.701 The United States also asserts that the USITC specifically discussed and acknowledged increases in capacity, production and productivity[1842] and examined the implications of the increases. The USITC, it asserts, fulfilled its obligation under Articles 2.1 and 4.2(a) by concluding that these isolated increases did not detract from its finding of serious injury in light of all the pertinent factors having a bearing on the state of the industry.[1843]

7.702 In particular, the United States argues that the USITC Report provided several reasons why increases in production and capacity were consistent with a finding of serious injury. First, according to the United States, the USITC explained that increases from 1996 to 2000 occurred at a time when apparent domestic consumption of CCFRS was increasing. The United States asserts that one would normally expect production and capacity to increase in a growing market. However, according to the United States, the increase in production from 1996 to 2000 was only incrementally greater than the increase in United States apparent consumption of CCFRS during the same period.[1844] Second, the USITC emphasized that the increased capacity was not being utilized. Instead, capacity utilization for the domestic industry had declined steadily from 1996 to 2000 and fell sharply between interim 2000 and interim 2001. The United States asserts that the USITC emphasized that declines in capacity

[1838] China's first written submission, para. 314.
[1839] China's first written submission, para. 315.
[1840] China's first written submission, para. 316.
[1841] United States' first written submission, para. 338.
[1842] United States' first written submission, paras. 339 and 349.
[1843] United States' first written submission, para. 349.
[1844] United States' first written submission, paras. 340-341.

utilization were apparent in each of the particular product categories within the industry, as well as in the industry as a whole.[1845] In any event, the United States argues that Article 4.2(a) does not expressly mention changes in capacity as a factor that an investigating authority must consider in evaluating whether there is serious injury. Instead, it references changes in "capacity utilization".[1846] Third, according to the United States, the overall picture in the industry was not one of steady expansion. The United States asserts that, as had been found by the USITC, ten United States producers of CCFRS declared bankruptcy during the period of its investigation and several shut down and ceased production altogether.[1847] The United States argues that, in light of the foregoing, the USITC thoroughly explained why the positive trends with respect to capacity and production did not outweigh other negative trends concerning idling productive resources in the industry.[1848]

7.703 According to the United States, the USITC also acknowledged that productivity in the CCFRS industry increased from 1996 to 2000. The United States asserts that the USITC considered the effect of this increase on employment levels in the industry and concluded that the increase in productivity "may have offset to some degree the declines in employment".[1849] The United States argues that, therefore, it is clear that the USITC considered the increase in productivity but concluded that it did not outweigh or entirely explain the declines in employment. According to the United States, the annual trends in productivity did not correlate with the trends in employment. Productivity for the CCFRS industry increased every full year during the period of investigation. This included years in which employment was relatively stable as well as those in which it declined.[1850] The United States argues that, moreover, increased productivity could only explain declining employment at a particular facility where production continued on an ongoing basis. It could not explain declines in employment attributable to the shutting down of operations at production facilities. According to the United States, the decline in employment for the CCFRS industry occurred at a time when several productive facilities closed down entirely. Thus, there were losses of employment at facilities where productivity essentially declined to zero.[1851] The United States also argues that increases in productivity, which would generally be expected to lead to improved financial results, did not track productivity given that the financial results of the CCFRS industry declined sharply after 1997, and the industry recorded overall operating losses in 1999, 2000, and interim 2001.[1852]

7.704 Despite explanations proffered by the United States, China submits that it still considers that the USITC did not provide an adequate and reasoned explanation for its determination. Indeed, China does not consider that the USITC has furnished sufficient explanation as to how the negative factors outweighed the other positive factors. In China's view, a mere statement that "the improvements in these indicia do not offset the significant declines exhibited by other indicia" is an insufficient explanation.[1853] Furthermore, China notes that the explanations given by the United States, which are to a large extent a re-statement of the USITC Report as far as capacity, production and productivity are concerned, are largely based on end-points comparison between 1996 and 2000. According to China, reliance on such end-points comparison is insufficient to rebut the claim by China that the USITC did not properly examine these three factors.[1854]

[1845] United States' first written submission, para. 342.
[1846] United States' first written submission, para. 344.
[1847] United States' first written submission, para. 343.
[1848] United States' first written submission, para. 344.
[1849] United States' first written submission, para. 345.
[1850] United States' first written submission, para. 346.
[1851] United States' first written submission, para. 347.
[1852] United States' first written submission, para. 348.
[1853] China's second written submission, para. 141.
[1854] China's second written submission, para. 142.

7.705 China argues that the USITC did not provide a reasoned and adequate explanation for its determination given that the USITC Report did not address the issues referred to by China nor did it explain why the industry had been seriously injured, despite the existence of positive factors that had been raised by China.[1855]

(ii) Hot-rolled bar

7.706 China argues that the determination that the domestic industry of hot-rolled bar was suffering serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1856] China believes that the USITC did not fully address the nature and the complexity of the data. China argues, that, moreover, the USITC Report does not contain a response to the interpretations of the data that have been put forward by China. On this basis, China argues that the USITC failed to provide a reasoned and adequate explanation for its determination.[1857]

7.707 In response, the United States argues that there is no basis for China's assertion that the USITC did not fully address the nature and complexity of the data. The United States submits that, on the contrary, the USITC's report fully explained both the nature of the data the USITC used in analysing serious injury to the hot-rolled bar industry and why that data supported its conclusion of serious injury. That conclusion satisfies the obligations of Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1858]

7.708 More particularly, the United States argues that in determining that the hot-rolled bar industry was seriously injured, the USITC cited a wide variety of data indicating that the industry was in a significantly impaired condition. It pointed to declining production, shipments, and capacity that had occurred in the industry since 1998; three United States producers declaring bankruptcy and shutting down production in early 2001; idling productive facilities; the sharply declining financial performance of the industry since 1998 and the overall operating losses in 2000 and interim 2001; declining employment during the latter portion of the period of investigation and capital expenditures and research and development expenditures declining throughout the period of investigation.[1859] The United States asserts that China, ignoring these pervasive declines and the reasoning the USITC used to support its serious injury conclusion, instead chooses to direct a number of scattered criticisms concerning the USITC's analysis. The United States argues that China's criticisms, in addition to being factually incorrect, do not demonstrate that the United States failed to comply with its obligations under Articles 2.1 and 4.2(a).[1860]

7.709 China refers to the statement contained in the USITC Report that: "In light of the poor financial performance of the hot-rolled bar industry, the declines in output and shipments, and the numerous bankruptcies and plant closures that occurred during the latter portion of the period examined, with the consequent unemployment due to these closures, we conclude that the industry is seriously injured".[1861] China argues that the USITC's statement as far as it concerns "declines in output and shipments" is not supported by the facts of the investigation. Rather, in China's view, production and shipments increased between 1996 and 2000. China acknowledges that both factors declined towards the end of the period of investigation. However, China argues that the USITC failed

[1855] China's first written submission, para. 316.
[1856] China's first written submission, para. 326.
[1857] China's first written submission, para. 325.
[1858] United States' first written submission, para. 363.
[1859] United States' first written submission, para. 354.
[1860] United States' first written submission, para. 355.
[1861] China's first written submission, para. 318.

to explain why these declines indicated serious injury and were not just a normal reaction to the sharp increase in these factors which had occurred at the beginning of the period of investigation. China argues that, in any case, the USITC failed to justify why only the last years of the period of investigation were considered relevant in examining these factors. In addition, China asserts that the USITC failed in its argument that these factors declined between interims 2000 and 2001 because the industry was injured rather than as a result of a decline in consumption.[1862]

7.710 In response, the United States argues that the fact that production and shipments for the hot-rolled bar industry were each higher in 2000 than they were in 1996 cannot be dispositive. According to the United States, Article 4.2 does not permit an investigating authority to rely exclusively on an endpoint-to-endpoint analysis in assessing serious injury.[1863] The United States asserts that the USITC did not stop with an endpoint-to-endpoint analysis. It also examined trends within the period of investigation. The United States contends that this examination demonstrated that production, shipments, sales quantities and revenues pervasively declined over the latter portion of the period of investigation. Moreover, shipments and sales quantities declined, and production increased only minimally from 1999 to 2000, when United States apparent consumption of hot-rolled bar increased. Consequently, in the United States' view, this was not a situation where the rate of increase merely slowed during the period of investigation, as China appears to posit. According to the United States, the USITC's thorough examination and explanation of trends within its period of investigation further indicates that the declines in output-related indicators were not merely functions of changes in United States apparent consumption.[1864] The United States also states that declines in production, shipments, and sales during the latter portion of the period of investigation were significant because, first, they were based on the most recent data available and clearly probative of current impairment in the position of the domestic industry and. secondly, they were coincident with other negative trends upon which the USITC relied – namely, the industry's deteriorating operating performance.[1865]

7.711 China disagrees with the statement by the United States that China tried to rely on an end-points comparison, as far as the analysis of production and shipments is concerned. In its submission, China stated that: "Production and shipments rather increased between 1996 and 2000". Rather than relying on a comparison between end-points, China emphasized that the general trend over the whole investigation period was somewhat upward, even if slight decreases could be noticed.[1866]

7.712 China also states that special attention needs to be drawn to the "numerous bankruptcies and plant closures". Contrary to the USITC's view, China does not believe that this criterion should be used as grounds for a determination of serious injury since it was not supported by all the relevant and sufficient data.[1867] In this respect, China asserts that all that was known about the hot-rolled bar industry was that there were 32 domestic firms that responded to the questionnaire and which represented 70 to 78% of domestic production. No information had been provided on the total number of firms or the size of the different firms.[1868] China also notes that the USITC stated that the 3 firms that declared bankruptcy in 2001 did not respond to the questionnaire.[1869] China asserts that the only information available was that these three firms accounted for approximately 1.5 million tons of capacity. However, according to China, there was no information concerning the time during which

[1862] China's first written submission, para. 319.
[1863] United States' first written submission, para. 356.
[1864] United States' first written submission, para. 357.
[1865] United States' first written submission, para. 358.
[1866] China's second written submission, para. 143.
[1867] China's first written submission, para. 320.
[1868] China's first written submission, para. 321.
[1869] China's first written submission, para. 320.

such capacity was achieved, nor concerning productivity or any other criteria. Furthermore, there was no information concerning the health of these firms during and before the period of investigation. China argues, in addition, that there was no information as to why this factor should be considered.[1870]

7.713 With respect to the reference to bankruptcies by the USITC in making its serious injury determination, the United States argues that in conducting its analysis of serious injury an authority may examine factors not expressly referenced in Article 4.2(a). More particularly, the United States argues that an authority can and should examine additional "factors of an objective and quantifiable nature having a bearing on the industry" that it has concluded are relevant. For several industries, the USITC evaluated additional factors it deemed to be relevant, including bankruptcies that had been declared by producers. The United States argues that while several complainants have questioned the relevance of this factor, its significance is clear. According to the United States, firms that declare bankruptcy but remain in operation frequently restructure their operations as part of the bankruptcy process. Consequently, bankruptcies can indicate declines in productive facilities and employment levels. Additionally, the United States argues that lacking sufficient liquid assets to pay its creditors, and consequently having to seek protection, restructuring, or even liquidation from the United States bankruptcy courts, has obvious implications for the competitive viability of a producer. According to the United States, a corporation will generally not make a bankruptcy filing unless its operations have been significantly impaired. Similarly, an entire industry's viability may be in question when several producers within that industry declare bankruptcy.[1871] The United States also questions the contention by China that the USITC's finding that hot-rolled bar producers had gone bankrupt "is not supported by all the relevant and sufficient data". It points, in this regard, to the fact that bankruptcies of United States firms are a matter of public record. It also notes that the public USITC Report identified four hot-rolled bar producers that declared bankruptcy and indicated that three of the four had shut down a portion or all of their production operations in 2001. The United States asserts that the accuracy of this data cannot be challenged.[1872]

7.714 As far as bankruptcies are concerned, China does not challenge the accuracy of the data, but rather would like to underline that, due to the lack of response to the questionnaire, there is insufficient explanation as to how this criterion could be used in the assessment of whether the industry has suffered a serious injury and whether this injury can be attributed to increased imports.[1873] China reiterates that if some producers did not respond to the questionnaires, the information provided to the competent authority may not reflect completely, and may not be truly representative of the industry's situation. The authority must therefore be particularly cautious when using this information. In this case, the need for a reasoned and adequate explanation is of particular importance.[1874]

7.715 China notes that, according to the USITC, the data from the questionnaires showed a decline in employment. However, China is of the opinion that no such decline took place and that, rather, changes in employment were a function of cycles during the period of investigation.[1875] China notes, in this regard, that while the USITC stated that "the lack of questionnaire responses from some producers that have shut down facilities means that the questionnaire data do not fully reflect declines in employment that occurred at the conclusion of the period examined" it went on to state that following the closing down of the three firms, which have not answered the questionnaire, 1,000

[1870] China's first written submission, para. 321.
[1871] United States' first written submission, para. 325.
[1872] United States' first written submission, para. 359.
[1873] China's second written submission, para. 144.
[1874] China's second written submission, para. 145.
[1875] China's first written submission, para. 322.

employees have lost their jobs.[1876] China argues that if the answers to the questionnaires did not fully reflect the situation of the industry as regards unemployment, such information was not representative of the industry and the USITC's conclusion in respect of this criterion could not have been reasoned and adequate.[1877]

7.716 China also argues that the treatment of the employment factor by the USITC was not objective. In this regard, China points out that the USITC considered unemployment in all three firms that declared bankruptcy, although these firms did not respond to the questionnaire. However, the USITC did not consider employment in the remaining firms which were not bankrupt and which did not answer the questionnaire either. China argues that the examination of the employment factor was not objective, reasoned or adequate preventing the USITC from making an objective determination of the overall situation of the industry.[1878]

7.717 In response, the United States notes that, as stated in its report, because not all the bankrupt hot-rolled bar producers responded to its questionnaire, the USITC referred to public data concerning these firms in its analysis of capacity and employment trends for the hot-rolled bar industry.[1879] The United States also asserts that China cites no provision of the Agreement on Safeguards to justify its apparent belief that the USITC could only use information it obtained from the questionnaire responses it received in its analysis of serious injury. The United States submits that, to the contrary, Article 3.1 of the Agreement on Safeguards requires investigating authorities to provide "public hearings or other appropriate means in which importers, exporters, and other interested parties could present evidence and their views" but that, presumably, it would not require investigating authorities to permit interested parties to submit evidence pertinent to the investigation if the investigating authorities could not consider such evidence once it were submitted.[1880] The United States notes that interested parties that supported the imposition of safeguards remedies for hot-rolled bar presented information concerning certain hot-rolled bar producers that did not respond to the USITC's questionnaire, including information on capacity of certain firms that had ceased operations and the number of employees affected by each shutdown. The United States argues that parties that opposed the imposition of remedies had the opportunity to challenge the accuracy or reliability of this data. According to the United States, none did so before the USITC and China does not do so before the Panel. In the United States' view, the USITC found the data to be reliable and probative. Consequently, it acted in a manner fully consistent with the Agreement on Safeguards when relying on the entirety of data in its record concerning the hot-rolled bar industry.[1881]

7.718 As far as employment is concerned, China considers that, since the USITC acknowledged that the questionnaire data did not fully reflect falls in employment, this data was not sufficiently reliable for the USITC to draw conclusions from it. Since the data gathered by the USITC through the questionnaires was clearly incomplete, it should have considered this data very carefully and there was an increased need for an adequate and reasoned explanation as to how it was supporting the USITC's conclusion that the industry was being seriously injured.[1882] China also submits that the USITC should have addressed the issue of unemployment for the remaining firm that were not

[1876] China's first written submission, para. 323.
[1877] China's first written submission, para. 324.
[1878] China's first written submission, para. 324.
[1879] United States' first written submission, para. 360.
[1880] United States' first written submission, para. 361.
[1881] United States' first written submission, para. 362.
[1882] China's second written submission, para. 146.

bankrupt. According to China, there is no evidence indicating that the United States did so. On this basis, China considers that the USITC did not fully address the nature and complexity of the data.[1883]

(iii) Cold-finished bar

7.719 China argues that the USITC determination that the domestic industry of cold-finished bar was suffering serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1884] China believes that the USITC did not fully address the nature and the complexity of the data. China argues, moreover, that the USITC Report does not contain a response to the interpretations of the data that have been put forward by China. On this basis, China argues that the USITC failed to provide a reasoned and adequate explanation for its determination.[1885]

7.720 In response, the United States notes that in finding that the cold-finished bar industry was seriously injured, the USITC identified the industry's poor financial performance (such as drops in operating income, the existence of operating losses and declines in sales revenue) and loss of market share as particularly pertinent. The United States contends that the USITC also cited declines in the industry's capacity, shipments, and production during the last three full years of its period of investigation, and its low levels of capacity utilization.[1886] The United States argues that the USITC objectively examined all pertinent factors and provided a reasoned explanation for its conclusion that the cold-finished bar industry was seriously injured. The United States, therefore, satisfied its obligations under Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1887]

7.721 China notes that the concluding section on injury in respect of cold-finished bar in the USITC Report stated that: "The most pertinent indicator of the industry's condition is the poor financial performance. The industry's financial condition improved in 1997 and 1998 from the level in 1996, but its operating performance declined sharply in 1999 and continued to be poor in 2000. During both 1999 and 2000, the industry was only marginally profitable, with an increasing number of firms posting operating losses. Industry financial performance continued to deteriorate in interim 2001, when the industry sustained an operating loss. Although the cold finished-bar industry's shipments and production were higher in 2000 than in 1996, these indicators declined during the last three years of the period examined and there was significant unused capacity throughout the period. In light of these considerations, we conclude that the cold-finished bar industry is seriously injured".[1888] China argues that this statement does not present an accurate picture of the situation of the industry. With regard to production, United States shipments, capacity and capacity utilization, increases between 1996 to 1998 were significant. China argues that, accordingly, even if production and the other factors subsequently declined in the period of investigation, levels in 2000 were significantly higher than the 1996 levels. China also asserts that United States consumption significantly increased between 1996-2000. China argues that, therefore, a sound interpretation of the data should be that the position of the industry was positive.[1889]

7.722 According to China, the USITC could not ignore the positive factors that it itself acknowledged, by simply stating that the financial performance was the most pertinent indicator of the industry's condition. In any case, it is China's view that this is insufficient to explain how the

[1883] China's second written submission, para. 147.
[1884] China's first written submission, para. 331.
[1885] China's first written submission, para. 330.
[1886] United States' first written submission, para. 364.
[1887] United States' first written submission, para. 368.
[1888] USITC Pub. 3479, Vol. I at 104 cited in China's first written submission, para. 327.
[1889] China's first written submission, para. 328.

negative factors outweighed the positive factors. Indeed, there is nothing in the Agreement on Safeguards that would allow the USITC to consider one indicator more important than the others. Furthermore, the USITC has given no explanation as to why the deterioration of the industry's financial performance was to be considered as the "most pertinent indicator of the industry's condition".[1890]

7.723 In response, the United States notes that the USITC expressly acknowledged that certain output-related factors increased from 1996 to 2000 for cold-finished bar. The United States further contends that the analysis of serious injury is not merely a question of endpoint-to-endpoint comparisons.[1891]

7.724 China also does not agree with the USITC's interpretation that emphasis should be placed on the most recent period, given the sharp increase in most factors at the beginning of the period of investigation. More particularly, China argues that the recent decline in factors had to be evaluated in the light of the unusual increase that had taken place just before that period. In China's view, the recent decline in some factors only demonstrates that factors were stabilizing and that, therefore, the industry was not seriously injured.[1892]

7.725 In response, the United States argues that China has not explained what was "unusual" about the increases in shipments and production that the USITC acknowledged occurred between 1996 and 1998. In the United States' view, these increases merely followed increases in domestic consumption. Apparent consumption also increased from 1999 to 2000, yet the domestic industry's shipments and production declined during this period. The United States argues that the USITC appropriately concluded that, although the United States cold-finished bar industry was able to increase its output to reflect changes in apparent consumption at the beginning of the period of investigation, it was not able to do so at the conclusion of the period.[1893] The United States also argues that, contrary to a submission made by China, the cold-finished bar industry's financial condition was not "stabilizing" at the conclusion of the period of investigation. Instead, financial indicators declined sharply after 1998. The United States asserts that the deterioration of the industry's financial performance, which the USITC explained was "[t]he most pertinent indicator of the industry's condition" was simply ignored by China.[1894]

7.726 As far as the word "unusual" is concerned, China states that it was used by China to underline the clear contradiction between the USITC's conclusion that the industry has been seriously injured and the clear positive trends shown by certain factors. However, the point of the sentence quoted by the United States was to make clear that China disagrees with the USITC's interpretation that considerable importance should be given to the most recent period. The state of the domestic industry should have been assessed with a view of the trends over the whole investigation period, which are clearly positive for a certain number of indicators.[1895]

(iv) Rebar

7.727 China argues that the USITC failed to make a determination of injury with respect to rebar that was consistent with the requirements of Articles 2.1 and 4.2(a) of the Agreement on

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[1890] USITC Pub. 3479, Vol. I, p. 104, cited in China's second written submission, para. 148.
[1891] United States' first written submission, para. 365.
[1892] China's first written submission, para. 329.
[1893] United States' first written submission, para. 366.
[1894] United States' first written submission, para. 367.
[1895] China's second written submission, para. 149.

Safeguards.[1896] China believes that the USITC did not fully address the nature and the complexity of the data and that, as a result, the USITC failed to provide a reasoned and adequate explanation for its determination.[1897]

7.728 In response, the United States argues that the USITC objectively considered all the pertinent data and provided a reasoned basis in finding that the rebar industry was seriously injured. According to the United States, that finding is consistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1898] More particularly, the United States notes that in finding that the rebar industry was seriously injured, the USITC emphasized the industry's poor financial performance during the latter portion of the period of investigation. Reference is made by the United States in particular to the deterioration of the industry's financial condition between 1999 and 2000: the fact that the domestic industry's capital expenditures declined during each year of the period of investigation, and the 2000 expenditures were less than half the 1996 level; and that the domestic industry's market share was considerably lower in 2000 than it was in 1996.[1899]

7.729 China notes that the USITC stated in its report that: "Although several indicators pertaining to the rebar industry, such as capacity, production, and employment, increased during the period examined, these increases reflect strong increases in United States apparent consumption. Notwithstanding these increases, however, the rebar industry showed poor financial performance during the latter portion of the period examined. The industry's financial condition deteriorated sharply between 1999, when it had a positive operating margin of 5.0%, and 2000, when it had a negative operating margin of 1.6%. Additionally, the domestic industry's market share declined during the period examined and its capital expenses declined considerably. We consequently conclude that the rebar industry is seriously injured".[1900] China believes that this statement does not present an accurate picture of the situation of the industry.[1901] In particular, China argues that while the imports' share of the domestic market was greater in 2000 as compared to the level in 1996, it remained low. Furthermore, domestic industry sales and capacity utilization increased. China further argues that losses suffered by the industry were incurred towards the end of the period of investigation. China points out that such losses were also suffered at the beginning of the period of investigation, which did not prevent the industry from realizing important profits three years in a row. Thus, China posits that the losses incurred by the industry towards the end of the period of investigation were just part of a cycle. China argues that the USITC did not make any demonstration to the contrary.[1902]

7.730 In response, the United States argues that the record did not show an industry with cyclical patterns. Rather, it showed one that had continued and sustained increases in demand for its product throughout the period of investigation. According to the United States, rebar producers' inability to operate profitably during a time of record demand was a clear indication of serious injury.[1903] The United States notes that apparent United States consumption of rebar rose by 48.1% during 1996 to 2000 and was also 2.0% higher in interim 2001 than in interim 2000. In light of these conditions of competition, the fact that the United States rebar industry expanded capacity and employment and was able to increase its output during the period of investigation was not surprising. The United States submits that, as the USITC observed the rebar industry was not able to benefit from increasing

[1896] China's first written submission, para. 337.
[1897] China's first written submission, para. 336.
[1898] United States' first written submission, para. 373.
[1899] United States' first written submission, para. 369.
[1900] USITC Pub. 3479, Vol. I at 111 cited in China's first written submission, para. 332.
[1901] China's first written submission, para. 333.
[1902] China's first written submission, para. 334.
[1903] United States' first written submission, para. 372.

demand. Its share of the United States market fell significantly (10 percentage points) from 1996 to 2000. Moreover, notwithstanding increases in factors such as production and employment, its financial condition deteriorated sharply. The industry had an operating loss in 2000, and was only marginally profitable during interim 2001. The USITC also noted that the industry's capital expenses declined over the period of investigation. The USITC properly evaluated both the industry's improvements and declines with respect to each of the Article 4.2(a) factors, and fully explained why the factors as a whole supported its conclusion of serious injury.[1904]

7.731 China submits that its claim that the losses incurred by the industry towards the end of the period of investigation are just part of a cycle was an illustration of the lack of adequate explanation provided by the USITC regarding the losses incurred by the industry with regard to only one specific part of the investigation period.[1905]

7.732 The United States submits in response that the USITC explained that it was highly pertinent that the domestic rebar industry had sharply deteriorating financial performance during the latter portion of the period of investigation, notwithstanding its increases in output. There was no evidence in the record for finding that the domestic industry's financial performance was a reflection of a business cycle. The record did not show an industry with cyclical patterns – it showed one that had continued and sustained increases in demand for its product throughout the period of investigation. Rebar producers' inability to operate profitably during a time of record demand was a clear indication of serious injury.[1906]

7.733 China notes that, in its reply, the United States responds that "the USITC further explained that it was highly pertinent that the domestic rebar industry had sharply deteriorating financial performances during the latter portion of the period of investigation, notwithstanding its increases in output". However, there is no explanation as why this would be "highly pertinent".[1907]

(v) Welded pipe

7.734 Switzerland argues that the USITC failed to demonstrate for welded pipe products (other than OCTG), that there was a threat of "serious injury" in the sense of a "significant overall impairment in the position" of the industry, as is required by Article 4.1(a) of the Agreement on Safeguards.[1908] In particular, Switzerland argues that if the categorisation of welded pipe products had been done correctly, the USITC would have found that for precision tubes, there was until recently only one firm among the tubes producers in the United States that claimed to be able to produce similar products, albeit not of the same quality. Accordingly, Switzerland argues that it fails to understand how the United States industry in the sector could face serious injury.[1909]

7.735 By way of a general response, the United States argues that, in requesting establishment of a Panel, Switzerland did not include a claim that the United States findings of serious injury or threat of serious injury were inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards. The United States submits, therefore, that this claim is outside the Panel's terms of reference, and there is

[1904] United States' written reply to Panel question No. 79 at the first substantive meeting.
[1905] China's second written submission, para. 334.
[1906] United States' first written submission, para. 372.
[1907] China's second written submission, para. 152.
[1908] Switzerland's first written submission, para. 259.
[1909] Switzerland's first written submission, para. 268.

no basis for the Panel to address it. It goes on to state, however, that if the Panel decides to address this issue, it should find that Switzerland has failed to meet their burden of proof.[1910]

7.736 In counter-response, Switzerland submits that it did not specifically mention the requirement of serious injury or the threat thereof in its request for establishment of a Panel. However, in its request for the establishment of a Panel, it invoked Articles 2.1 and 4.2(a) of the Agreement on Safeguards, which explicitly refer to increased imports, serious injury or threat thereof and causal link. Switzerland, furthermore, specifically referred to increased imports and causal link. The argument of causal link (between increased imports and serious injury or threat thereof) inherently covers the element of serious injury or threat thereof as no argument can be made regarding the causal link if the argument of injury or threat thereof is excluded.[1911]

7.737 China argues that the USITC failed to make a determination of threat of serious injury in relation to certain pipe products that was consistent with the requirements of Articles 2.1 and 4.2(a) of the Agreement on Safeguards.[1912]

7.738 In response, the United States notes that the USITC's determination on welded pipe was based on threat of serious injury. While the USITC found that the industry producing welded pipe was not seriously injured, it characterized its overall condition as "weak". It concluded that serious injury appeared imminent on the basis of the fact that production had declined since 1998 despite generally stable United States apparent consumption; capacity utilization had fallen sharply in 1999 and 2000; United States producers' market share had fallen sharply in 2000 and declined further in interim 2001; domestic producers' operating income was at its lowest full-year level in 2000; and employment in the industry had fallen in 1999 and 2000, and was close to the lowest level of the period of investigation in 2000. Wages showed similar trends. Interim 2001 employment levels were above those of 2000, but wages and the number of hours worked were not.[1913]

7.739 Switzerland does not dispute that the United States industry has suffered difficulties. However, it argues that the USITC has not demonstrated, for the welded pipe products (other than OCTG), the threat of "serious injury" in the sense of a threat of a "significant overall impairment in the position" of the industry, as is required by Article 4.1(a) of the Agreement on Safeguards.[1914] In this regard, Switzerland points out that the USITC found that the domestic industry of welded pipe was facing a threat of serious injury. The USITC came to this conclusion after having given particular emphasis to the following declining factors since 1998: production, shipments, capacity utilization, financial performance and employment. However, the USITC itself recognized that "during the period of investigation the domestic welded pipe capacity increased and was at its highest level in 2000. According to Switzerland, United States capacity growth largely tracked the increase in apparent consumption of welded pipe. The recent decline in domestic production coupled with the increase in domestic capacity resulted in a significant decline in capacity utilization beginning in 1999 and continuing through 2000, and interim 2001". [1915]

7.740 China argues that the USITC failed to explain, in a reasoned and adequate manner, why there was a threat of serious injury to the certain pipe products industry, given that the market for large

[1910] United States' first written submission, para. 382.
[1911] Switzerland's second written submission, para. 78.
[1912] China's first written submission, para. 343.
[1913] United States' first written submission, para. 374.
[1914] Switzerland's second written submission, para. 80.
[1915] USITC Report, Vol. I, p.160, cited in China's second written submission, para. 81.

diameter line pipe had begun to surge and would continue to expand in the immediate future.[1916] China asserts in this regard that the USITC agreed with the projections of continued growth due to rising demand for pipeline projects. According to China, the USITC also stated that domestic production increased between 1996 and 1998 in conjunction with rising levels of aggregate apparent United States consumption. China argues that, according to the USITC, since rising levels of consumption resulted in an increase in production, one could expect the increase in demand for line pipe to result in an increase in production, which would improve the situation of the industry.[1917]

7.741 In response, the United States argues that the USITC acknowledged in its report that there had been a recent increase in demand for large diameter line pipe and that continued growth in this market segment was likely.[1918] The United States notes that the USITC provided two reasons why this fact did not detract from its conclusion of threat of serious injury. It first observed that large diameter line pipe accounted for only 20 to 30% of the entire industry producing welded pipe.[1919] Contrary to China's contention, the USITC was justified in concluding that it should not have been dispositive. In support, the United States asserts that the USITC was analysing serious injury on the basis of the industry as a whole. In making an analysis for 100% of the industry, the USITC was not compelled to conclude that increased demand in 20% of the industry outweighed the remaining 80% facing different conditions of competition. [1920] Secondly, the USITC did not find the increase in demand for large diameter line pipe to be dispositive. As the USITC noted, demand for this product had already begun to increase. Consequently, whether the increase in demand for large diameter line pipe would affect demand in the entire industry would be apparent in the data collected in the USITC investigation.[1921] However, overall demand for welded pipe had not increased appreciably during the latter portion of the period of investigation. Instead, as the USITC observed, it had remained generally stable since 1998.[1922] The United States argues that, although the increases in demand for large diameter line pipe observed at the conclusion of the period of investigation had been sufficient to stabilize overall United States demand for welded pipe, it had not been sufficient to prevent the declines in shipments, production and capacity utilization observed during these periods. Although the USITC concluded that demand conditions for the imminent future would be the same as those observed during the latter portion of the period of investigation, it was nevertheless justified in finding that the unfavourable trends in output-related factors for the entire industry producing welded pipe, which it had observed during these periods would continue.[1923]

7.742 China notes that, despite the foregoing, the USITC explained that large diameter line pipe only represented a portion of the industry and that overall demand for welded pipe products remained "relatively" constant despite the recent rise in demand. On that basis, the USITC believed that the threat of serious injury remains.[1924] In China's opinion, this explanation was far from sufficient. First, China argues that it was normal that overall demand increased only slightly in interim 2001 given that demand was only starting to rise at that point. Moreover, China argues that in order to come to the conclusion that serious injury was still imminent, the USITC had to determine the impact in the near future of this increase in demand and then determine whether it could prevent serious injury or not.[1925] China argues that the fact that 20-30% of the whole category of the product in question would be

[1916] China's first written submission, para. 338.
[1917] China's first written submission, para. 339.
[1918] United States' first written submission, para. 376.
[1919] United States' first written submission, para. 377.
[1920] United States' first written submission, para. 378.
[1921] United States' first written submission, para. 379.
[1922] United States' first written submission, para. 380.
[1923] United States' first written submission, para. 381.
[1924] China's first written submission, para. 340.
[1925] China's first written submission, para. 341.

affected by the increasing demand was a very important factor to be considered. China argues that the USITC did not examine it closely enough and did not give reasoned and adequate explanations as to why injury was still imminent.[1926]

7.743 Despite arguments of the United States, China notes that the USITC did not assess to what extent the demand for line pipe, that the USITC acknowledged should still be increasing in the future, could have an impact in the on the demand for the overall welded product category. Indeed, this might have confirmed the trend, underlined in the United States' reply, that consumption of welded pipe has been increasing since 1999.[1927] Accordingly, China maintains that the USITC failed to provide a reasoned and adequate explanation as to why injury was still imminent.[1928]

7.744 Switzerland notes that the USITC, in its report, stated that: "In view of the declining trends in most of the industry's performance factors beginning in 1999 and continuing through 2000 and into 2001, particularly the decline in industry production, capacity utilization, shipments, number of workers, and profitability in 2000, we find that the domestic industry is approaching a state of serious injury".[1929] Switzerland argues that rather than there being a threat of serious injury, the relevant United States domestic industry actually failed to adapt to the adjustment process of the steel industry world-wide.[1930]

7.745 In response, the United States argues that Switzerland does not explain why a more generalized discussion of the adjustment process of the steel industry world-wide is required under Article 4.2(a). According to the United States, this topic clearly does not pertain to any factor expressly listed under Article 4.2(a) nor is the topic analogous to any factor listed under Article 4.2(a). The United States contends that the focus in that provision is on objective, empirical factors "having a bearing on the situation" of the pertinent domestic industry. These factors describe or indicate the state of the industry, as opposed to considerations not subject to quantification that may have an effect on the domestic industry. The United States submits that, in contrast, an analysis of the effects of world-wide conditions of competition would appear more properly to relate to the evaluation of the causal link between increased imports and serious injury required under Article 4.2(b). The United States argues that the USITC's consideration of all the factors expressly listed in Article 4.2(a), together with several other empirical factors relevant to evaluation of the condition of the domestic industry producing welded pipe, fully satisfies the requirements of that provision.[1931]

7.746 Concerning the question of the adaptation of the United States domestic industry to the adjustment process world-wide, Switzerland, on the basis of the injury factors considered by the USITC, is of the view that the United States industry of welded tubes increased its capacity to the extent that, already in 1996, the capacity exceeded the United States apparent consumption by 855,809 tons.[1932] Recognizing that Article 4.2(a) of the Agreement on Safeguards does not require an analysis of the adjustment process of the steel industry world-wide, Switzerland does not claim that the United States should have done so. Switzerland submits that it deduced from the figures cited in the USITC Report and the developments in the steel industry worldwide that the United States

[1926] China's first written submission, para. 342.
[1927] China's second written submission, para. 153.
[1928] China's second written submission, para. 154.
[1929] USITC Report, Vol. I, p. 162 cited in Switzerland's first written submission, para. 267.
[1930] Switzerland's first written submission, para. 269.
[1931] United States first written submission, para. 388.
[1932] Switzerland's second written submission, para. 85.

industry must not have adapted to the situation of the steel industry world-wide, suffering from chronic overcapacity of production, the way for instance Swiss steel industry did.[1933]

7.747 As regards the indicator of capacity, Switzerland notes that United States domestic capacity increased strongly (+22%) and constantly between 1996 and 2000, whereas United States domestic demand increased to a lesser extent (+19%). In comparison, foreign capacity increased only slightly (+3%) during the same period. Switzerland states that during the period of investigation the share of the United States industry in global capacity rose from about 25% to nearly 29%. With an increase in their capacity larger than the increase in United States demand, United States firms had either to gain market share in the United States, to produce for the stocks or not to use their capacity.[1934] Switzerland further argues that because the United States industry increased, between 1996 and 2000 its production capacity (+22%) more than the United States demand increased (+19%), United States firms had either to gain market share in the United States, to produce for the stocks or not to use their capacity. Switzerland submits that the decline in the factors examined by the USITC should not be a surprise, because the United States capacity of the welded pipe industry was too great and still increased while the situation of the United States industry started to deteriorate. The argument made by the United States that the decline of capacity utilization is an indication that the industry was facing a threat of serious injury is not valid despite Article 4.2(a) of the Agreement on Safeguards because firms cannot simply assume that they can increase the capacity as they like and transform it into increased production opportunities.[1935]

7.748 Switzerland also notes that the import unit value continuously decreased (-9%) between 1996 and 2000. Switzerland suggests that this could be explained by the fact that, abroad, investments were largely made with the objective of reducing production costs. However, according to Switzerland, in the United States, the average sales value increased by 3% between 1996 (USD606) and 1998 (USD622), before it started decreasing. Switzerland suggests that this could have been due to either enterprises' inadequate pricing policies or to a wrong investment policy, or to other reasons.[1936]

7.749 Switzerland also notes that the USITC Report indicates that the United States producers' shipments increased through 1999, but then fell by 9.1% in 2000 and remained stable (at slightly lower levels) in the first half of 2001. According to the figures in the USITC Report, the United States producers' shipments increased slightly in interim 2001 compared with interim 2000.[1937] Thus, according to Switzerland, if the situation stabilized or even seemed to have improved recently, the threat of serious injury is not really demonstrated.[1938]

7.750 Finally, Switzerland submits that using the basis of only a one-year decline to conclude that the United States industry is in a situation of threat of serious injury is using too short a period of time. The threat could be demonstrated almost at will. In the present case, it is more important to take into account a longer period, because certain indicators were increasing also in the short run. Taking, for instance, employment, the United States claims that serious injury appeared imminent because the employment in the industry fell in 1999 and 2000 and was close to the lowest level of the period of investigation in 2000.[1939] In reality, the number of workers was relatively stable and

[1933] Switzerland's second written submission, para. 86.
[1934] Switzerland's first written submission, para. 270.
[1935] Switzerland's second written submission, para. 82.
[1936] Switzerland's first written submission, para. 271.
[1937] USITC Report, Vol. II, TUBULAR 15.
[1938] Switzerland's second written submission, para. 83.
[1939] United States first written submission, para. 374.

fluctuated just slightly during the period of investigation except in 1999 where it increased by 7%.[1940] It even increased in interim 2001 (1.2%) compared to interim 2000. Industries that consider they are facing a threat of serious injury would not hire additional workforce. In addition, the number of production workers was higher at the end (6,736 in 2000) of the period of investigation than at the beginning (6,539 in 1996).[1941]

(vi) Stainless steel wire

7.751 China argues that the determination that the domestic industry of stainless steel wire was suffering serious injury or threat of serious injury did not fulfil the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[1942] China believes that the USITC did not fully address the nature and complexity of the data. China argues, moreover, that the USITC Report does not contain a response to the interpretations of the data that have been put forward by China. On this basis, China argues that the USITC failed to provide a reasoned and adequate explanation for its determination.[1943]

7.752 In response, the United States argues that each of the affirmative-voting Commissioners provided a lengthy analysis of the Article 4.2(a) factors, and explained how these factors supported their affirmative conclusions.[1944]

7.753 China argues that consideration of the relevant injury factors for stainless steel wire demonstrate that there was no overall impairment of the situation of the industry.[1945]

7.754 In response, the United States notes that Chairman Koplan made an affirmative determination of threat of serious injury based on a domestic industry producing stainless steel wire. He emphasized pervasive declines in many industry indicators between interim 2000 and interim 2001, including shipments, production, market share, productivity, employment, wages and financial performance. The United States submits that several of the other factors were already at low levels or well below period peaks before they declined in interim 2001, such as operating income, which declined rapidly between interim 2000 and interim 2001, employment indicia and capital expenditures. The United States notes that Commissioner Bragg based her determination on a domestic industry producing both stainless steel wire and stainless steel wire rope. She likewise cited pervasive declines in industry performance from interim 2000 to interim 2001. Commissioner Devaney also found that the pertinent domestic industry produced both stainless steel wire and stainless steel wire rope. He found this industry to be seriously injured, citing inadequate profitability and declines in market share, employment, and capital expenditures.[1946]

7.755 China argues that there was no threat of serious injury to the market for stainless steel wire. In support, China argues that slight declines in employment, R&D and capital expenditure were not significant enough to offset the overall positive situation of the industry. Moreover, according to China, there were no signs that competitive conditions would change in the immediate future so as to warrant the conclusion that the industry would be impaired especially given that imports' market share declined during the first five full years of the period of investigation. China also argues that although imports consistently undersold domestic products, price movements did not clearly correlate with the underselling of imports. Since imports had failed to injure the industry in the past, and since the

[1940] USITC Report, Vol. II, TUBULAR-15.
[1941] Switzerland's second written submission, para. 84.
[1942] China's first written submission, para. 349.
[1943] China's first written submission, para. 347.
[1944] United States first written submission, para. 391.
[1945] China's first written submission, para. 344.
[1946] United States' first written submission, para. 390.

condition of the industry had improved over the period of investigation, China submits that the only sound conclusion that could be reached was that that there was no threat of serious injury.[1947]

7.756 Similarly, the European Communities argues that the USITC's finding of threat of serious injury for stainless steel wire was premised on the notion that imports would continue to increase and the threat of serious injury would materialise into serious injury. However, according to the European Communities, while the data before the USITC for interim 2001 showed a small increase in imports when compared to interim 2000, the data available before the President decided to impose safeguard measures showed that imports for full year 2001 had decreased slightly from full year 2000. The European Communities asserts that this suggested that the trend of increase in interim 2001, on which the USITC based its determination, did not continue in the second half of 2001. According to the European Communities, given this change in trend, the competent authority, who should have been aware of this data, was under a duty to reason its decision to impose safeguard measures based on the threat of serious injury. The European Communities asserts that the President did no such thing and that, therefore, the measures imposed on stainless steel wire were inadequately explained and inconsistent with Article 2.1 and 4.2.[1948]

7.757 In response, the United States asserts that China's argument that affirmative threat determinations were not warranted in light of "slight" declines in indicators during the latter part of the period of investigation and the "overall positive" condition of the industry, mischaracterizes and fails to address or acknowledge the findings that Commissioners Koplan and Bragg made. Neither Commissioner found the current condition of the industry to be positive overall. According to the United States, Chairman Koplan emphasized the low operating margins of the industry. Commissioner Bragg characterized industry performance as "not strong". Both Commissioners noted significant declines between the interim periods in production, capacity utilization, market share and employment.[1949] Consequently, both Commissioners Koplan and Bragg evaluated the declines in industry indicators during interim 2001 in the context of the industry's lacklustre performance overall during the period of investigation as a whole. The United States argues that, as a consequence, both their analyses and explanations of threat of serious injury with respect to domestic industries producing stainless steel wire satisfy the requirements of Articles 2.1 and 4.2(a).[1950]

7.758 China also argues that three USITC Commissioners expressed in the USITC Report that there was no serious injury or threat of serious injury in relation to stainless steel wire. In China's view, their conclusions were also supported by explanations concerning the facts of the investigation. China argues that, as a result, the remaining Commissioners had a duty to support their affirmative determinations with explanations that rebutted the interpretations and conclusions of the three Commissioners who voted in the negative. China submits that the absence of such a rebuttal resulted in contradictions. Furthermore, in China's view, there was no clear indication as to why serious injury or threat thereof was still present. Accordingly, China argues that there is a clear lack of reasoned and adequate explanation by the USITC.[1951]

7.759 In response to a question from the Panel as to whether, in the event of a split vote within a competent national authority such as the USITC, there is a legal requirement to rebut the arguments of the negative determinations, the European Communities and Norway answered in the affirmative arguing that the negative or dissenting determinations constitute, or at least contain, plausible

[1947] China's first written submission, para. 345.
[1948] European Communities' first written submission, para. 420.
[1949] United States' first written submission, para. 392.
[1950] United States' first written submission, para. 393.
[1951] China's first written submission, para. 346.

alternative explanations and the prevailing determination must therefore consider them and explain why they are not adopted or followed in the prevailing determination.[1952] Korea argues that since the concept of a split vote does not exist in the context of the Agreement on Safeguards, the question is whether the conditions for safeguard relief have been met. A finding that they have been met and a finding that they have not been met in the same determination cannot be reconciled and, consequently, the conditions for imposing safeguard relief have not been met. [1953] Japan, on the other hand, argues that as long as there is a legitimate affirmative determination (in other words, a majority of Commissioners voting affirmative or negative on the basis of the same like product), there is no legal requirement to rebut the arguments of Commissioners dissenting from the majority vote; nor does it matter whether a dissenting Commissioner publishes a separate dissenting opinion.[1954]

7.760 The United States answers in the negative. It submits that there is no requirement in the Agreement on Safeguards for members of the USITC voting in the affirmative to rebut the arguments raised by other members of the USITC who voted in the negative. As long as the official determination of the USITC includes the findings, reasoned conclusions, detailed analysis of the case and demonstration of the relevance of the factors examined as required by Articles 3 and 4 of the Agreement on Safeguards, then the determination is sufficient. The United States argues that this conclusion does not change depending on whether or not a Member publishes separate or dissenting votes. A determination stands on its own, regardless of whether certain decision-makers disagree with that determination. A contrary conclusion would lead to absurd results. It would mean, in effect, that a determination might be consistent with the Agreement on Safeguards when the views of dissenting or concurring decision-makers are not published, but an identical determination would be inconsistent when such views are published. Such a rule would lead Members to avoid publishing separate or dissenting votes, which would stifle a full discussion of the issues.[1955]

7.761 For China, it remains clear that the fact that the decision, by the President, that the determinations of those Commissioners who voted in the affirmative should be the determination of the USITC, is not sufficient to resolve the contradictions between the views of the various Commissioners. In particular, China finds it surprising that the United States seems to consider the three Commissioners, members of the USITC, even if they made negative findings related to the existence of serious injury, as "persons or entities who may participate in the investigation, but are not part of the authority that has made the serious injury determination".[1956]

7.762 Furthermore, according to China, even for the Commissioners who voted in the affirmative, it is clear that, in view of the numerous positive trends in certain factors, their determination is revealing a lack of adequate and reasoned explanation. For instance, the fact that Chairman Koplan mainly relied on interim data clearly provides insufficient justification for the findings.[1957] In any case, China considers that, as for the analysis on increased imports, the analysis provided by Commissioners Bragg and Devaney is of no relevance since it was based on an industry producing not stainless steel wire, but "stainless steel wire products", i.e. stainless steel wire and stainless steel wire rope. Therefore, these analyses cannot provide any useful indications as far as the state of the industry producing stainless steel wire only is concerned, and cannot be compared with the results of the

[1952] European Communities' written reply to Panel question No. 131 at the first substantive meeting; Norway's written reply to Panel question No. 131 at the first substantive meeting.
[1953] Korea's written reply to Panel question No. 131 at the first substantive meeting.
[1954] Japan's written reply to Panel question No. 131 at the first substantive meeting.
[1955] United States' written reply to Panel question No. 131 at the first substantive meeting.
[1956] United States' first written submission, para. 391, footnote 431, cited in China's second written submission, para. 155.
[1957] China's second written submission, para. 156.

analysis provided by Chairman Koplan either. There is a clear lack of adequate and reasoned explanation as to how the analyses of these two Commissioners can support final determinations regarding the state of the industry producing stainless steel wire.[1958] According to China, this is even more evident in view of the fact that there was not even agreement between the three Commissioners voting affirmatively about the state of these different domestic industries. Indeed, Chairman Koplan found a domestic industry producing stainless steel wire to be threatened with serious injury.[1959] While Commissioner Bragg found a domestic industry producing both stainless steel wire and stainless steel wire rope to be threatened with serious injury.[1960,] At the same time, Commissioner Devaney found the same industry producing stainless steel wire and stainless steel wire rope to have been seriously injured.[1961]

7.763 China argues that, consequently, the decision by the President itself does not provide sufficient explanation as to the final determination by the USITC. Indeed, it is not clear whether the final determination of the USITC was that the industry was suffering serious injury (opinion of Commissioner Devaney), or that serious injury was only threatened (opinion of Commissioners Koplan and Bragg). This reveals obvious contradictions in the assessment both of the domestic industry and of the injury indicators that, in itself, sufficiently demonstrates the lack of adequate and reasoned explanation underlying the US measure on stainless steel wire.[1962] China states that it does not intend to contest the right of WTO Members to establish their own decision-making processes for reaching determinations in applying safeguard measures. China merely argues that this does not excuse the United States from satisfying the requirement of providing an "adequate and reasoned explanation", in particular, from giving proper or adequate consideration to views, even minority ones, that have been expressed in the USITC Report.[1963]

(vii) Other products

7.764 The United States notes that none of the complainants have made any challenge to the USITC's determinations of serious injury to the industries producing tin mill, carbon and alloy fittings and flanges, stainless steel bar, or stainless steel rod. The United States argues that, consequently, the complainants have not satisfied their burden of presenting a prima facie case of a violation of section 4.2(a) with respect to the findings concerning these industries.[1964]

7.765 In response, China disagrees with the statement by the United States that "no complainant has made any challenge to the USITC's determinations of serious injury to the industries producing tin mill, FFTJ, stainless steel bar, or stainless steel rod". In its second written submission, China states that it did challenge the determinations of the USITC regarding serious injury for all ten products in the following terms: "China believes that for all ten products covered by the measures of safeguard, the USITC failed to provide reasoned and adequate explanations".[1965] In addition, for six out of ten products, China presented some possible alternative interpretations of the facts.[1966]

7.766 The European Communities asserts that the suggestion by the United States that for four product bundles the complainants had not challenged the USITC's serious injury determination is

[1958] China's second written submission, para. 157.
[1959] USITC Pub. 3479, Vol. I, p. 255.
[1960] USITC Pub. 3479, Vol. I, p. 288.
[1961] USITC Pub. 3479, Vol. I, p. 344, cited in China's second written submission, para. 158.
[1962] China's second written submission, para. 159.
[1963] China's second written submission, para. 160.
[1964] United States' first written submission, para. 336.
[1965] China's first written submission, para. 308.
[1966] China's second written submission, para. 130.

inaccurate. While the European Communities has not entered into a discussion of the specifics of any product bundle determination, it has challenged the methodology applied in each of those determinations. Not only has the USITC employed a methodology which fails to meet the standards of the Agreement on Safeguards, it has also failed to provide a reasoned and adequate explanation of certain findings where it has provided insufficient or no data at all.[1967]

7.767 Norway also submits that Norway did challenge the USITC's determination of serious injury to the industry producing tin mill products, in the following manner:

> "For the Tin Mill Products, the USITC claims that the domestic industry is experiencing serious injury. While Norway will not dispute before this Panel that the United States steel industry in general has suffered difficulties, the United States has not demonstrated, for the producers of *inter alia* Tin Mill Products, the existence of 'serious injury' in the sense of a 'significant overall impairment in the position' of the industry, that can be attributed to imports."[1968]

7.768 Norway states that it did not expand further on this issue while it was so blatantly clear that no causal link whatsoever existed between any injury that might be suffered by the United States' industry and imports.[1969]

(b) Representativeness of data

(i) Production destined for internal consumption

7.769 The European Communities argues that in analysing financial performance only on the basis of commercial shipments, i.e. production which was not destined for further internal consumption, the USITC failed to examine the industry as a whole and thus failed to arrive at an objective and reasoned determination of the existence of serious injury.[1970] The European Communities argues that this vitiates both the USITC's injury finding and also the causation finding given that causation is established by relating and comparing the trends between the injury indicators and increased imports.[1971] The European Communities further argues that such a selective examination does not permit a competent authority to establish the existence of serious injury. By limiting its examination in such a manner, the competent authority does not determine the existence of "serious injury" as is required by Articles 2.1 and 4.2(a) of the Agreement on Safeguards and as a consequence does not provide a reasoned and adequate explanation of its findings.[1972]

7.770 In response, the United States argues that the data collected by the USITC purported to provide, and did in fact provide, information pertaining to the entire industry.[1973] Consequently, the USITC satisfied the obligation under Articles 4.1 and 4.2(a) of the Agreement on Safeguards to render its analysis of serious injury or threat of serious injury based on information pertaining to each

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[1967] European Communities' second written submission, para. 290.

[1968] Norway's second written submission, para. 100, referring to para. 278 of Norway's first written submission.

[1969] Norway's second written submission, para. 101.

[1970] European Communities' first written submission, para. 378.

[1971] European Communities' first written submission, paras. 378 and 379.

[1972] European Communities' written reply to Panel question No. 71 at the first substantive meeting.

[1973] United States' first written submission, para. 334; United States' second written submission, para. 109.

domestic industry at issue.[1974] The United States submits that the USITC did not reduce the scope of its injury examination.[1975]

7.771 The United States notes in this regard that there is an important distinction between transfers for internal consumption, on the one hand, and transactions in the commercial or merchant market, on the other. In the commercial market, a producer sells product to a purchaser in an arm's-length transaction. By contrast, the internal transfers of an individual producer are not the result of such transactions and, thus, should not be considered "sales". The United States submits that because product that is internally transferred is not sold, the USITC could not generate objective and consistently-derived data concerning the valuation of such transfers that could be used in financial analysis. Consequently, the USITC's financial analysis was based on the one type of objective industry-wide data available in the record, namely that pertaining to commercial sales. The United States further notes that the unreliability of transfer value data was a particular problem for the domestic industry producing CCFRS. Including data on internal transfers would have resulted in double or triple counting of the same unit of production. This is because all internal transfers of hot-rolled steel are ultimately reported as cold-rolled or corrosion-resistant steel when sold in their final processed form. Thus, to have included in the CCFRS financial analysis data concerning both internal transfers of hot-rolled steel and commercial sales of cold-rolled or coated steel would have counted the same ton of steel twice. The United States submits that by using commercial sales value, the USITC was able to avoid problems relating to double-counting of product. The United States submits that, by contrast, the USITC could and did generate objective quantity-based information on internal transfers. It used and relied on such data in its report in calculating the quantity of production, total United States shipments, and United States apparent consumption.[1976]

7.772 The European Communities submits that the claim that the USITC could not "generate objective and consistently-derived data" is not a sufficient defence. First, there is no examination of the industry as a whole – as is clearly required by the Agreement on Safeguards. There can be little doubt that the USITC is capable of obtaining such data at least for all productive activities of the industry – that is exactly what it did in the determination which led to the *US – Hot-Rolled Steel* dispute.[1977] The European Communities questions why this exercise is possible for an industry where 60% of production is internally consumed but not possible for industries in which considerably less production is internally consumed. Second, even if the USITC was not in a position to gather the data which it considered necessary, the Appellate Body clearly required that an explanation be given why production for internal consumption was not examined.[1978] The USITC never provided such an

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[1974] United States' first written submission, para. 334.
[1975] United States' second written submission, para. 1090.
[1976] United States' written reply to Panel question No. 73 at the first substantive meeting.
[1977] The Panel in *US – Hot-Rolled Steel* quoted the USITC Report which stated:

> "From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half. On merchant market sales, the ratio of operating income to net sales declined from 5.9 per cent in 1997 to 0.6 per cent in 1998 and overall, the ratio declined from 5.5 per cent in 1997 to 2.6 per cent in 1998."

USITC Report, quoted Panel Report, *US – Hot-Rolled Steel*, para. 7.209.
[1978] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204, where the Appellate Body stated:

> In our view, [an objective examination] means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all other the other parts that make up the industry, as well as examine the industry as

explanation.[1979] The European Communities submits that, as a result, the United States has, by failing to examine performance on production for internal consumption failed both to ensure an examination of the performance of the industry as a whole and to examine, where it has examined only one part of the industry, other parts in an equivalent manner. Therefore, all the USITC's injury determinations should be found to be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards.[1980]

7.773 The European Communities further argues that Article 4(1)(c) of the Agreement on Safeguards refers to "producers as a whole" and producers of a major proportion of "total domestic production" as the object of the serious injury examination. The European Communities argues that in making the serious injury examination, a competent authority cannot distinguish *per se* between producers on the basis of the destination of their output. That is, a competent authority cannot define the "domestic industry" as only those producers who sell their produce on the "free" or "merchant" market as opposed to those who produce for internal consumption of an integrated downstream processor, or captively consumed products. In this regard, the European Communities points to the Appellate Body decision of *US – Cotton Yarn*. The European Communities asserts that, when faced with a United States decision to exclude from the definition of "domestic industry" producers of cotton yarn who produced for integrated upstream processors, the Appellant Body found in that case that the term "producing" in Article 6.2 of the Agreement on Textiles and Clothing "cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with a product".[1981] The European Communities argues that while it is not alleged that the USITC has defined the domestic industry so as to exclude producers who produce only for internal consumption, the USITC has, nevertheless, in its examination of profits and losses, neglected to examine the potential relevance of an industry's production for internal consumption, and in so doing has reduced the scope of its injury examination.[1982]

7.774 The European Communities also makes reference to the Appellate Body decision made in the context of an injury determination for an anti-dumping investigation. According to the European Communities, in *US – Hot-Rolled Steel*, the Appellate Body found that the definition of "domestic industry", and the use of the term in Article 3 of the Anti-Dumping Agreement, indicated that an investigating authority was not entitled to look only at "one part, sector or segment of the domestic industry".[1983] The European Communities also asserts that the Appellate Body found in that case that investigating authorities are not entitled to conduct their investigations in such a way that it becomes more likely that, as a result of the fact finding or evaluation process, they will determine that the domestic industry is injured.[1984] The European Communities asserts that in *US – Hot-Rolled Steel*, the Appellate Body found that where free market sales are subject to a specific examination, it is not enough that captive sales be included in the overall assessment, they must be disaggregated and a separate analysis must be carried out.[1985] The European Communities asserts that the same reasoning applies to a safeguards investigation.[1986]

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a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it was not necessary to examine directly or specifically the other parts of the domestic industry.

[1979] European Communities' second written submission, para. 299.
[1980] European Communities' second written submission, para. 300.
[1981] European Communities' first written submission, para. 391.
[1982] European Communities' written reply to Panel question No. 71 at the first substantive meeting.
[1983] European Communities' first written submission, para. 397.
[1984] European Communities' first written submission, para. 398.
[1985] European Communities' first written submission, para. 401.
[1986] European Communities' first written submission, para. 399.

7.775 In response, the United States asserts that it does not dispute the general proposition that Articles 4.1(a), 4.1(c), and 4.2(a) of the Agreement on Safeguards require that an authority's finding of serious injury pertain to the entire domestic industry. It also acknowledges jurisprudence that an investigating authority cannot consider the factors referred to in Article 4.2(a) for only one segment of the industry without explaining how the factor is significant for the industry as a whole.[1987] The United States argues that the USITC's analysis focused on each industry as a whole consistent with United States law and the mentioned jurisprudence. With one exception, the USITC did not engage in a segmented analysis for any of the domestic industries it examined. In the case of the exception, the United States contends that the USITC used its analysis of the various segments to support its conclusions concerning serious injury to the industry as a whole.[1988]

7.776 With respect to the reference by the European Communities to the Appellate Body decision in *US – Hot-Rolled Steel*, the United States argues that, in that case, the Appellate Body addressed the consistency with the AD Agreement of a provision of US anti-dumping and countervailing duty law directing the USITC to focus primarily on merchant market sales in certain circumstances.[1989] The United States argues that that particular provision of US law is not applicable to safeguards investigations and was never invoked by the USITC in the present case. The United States asserts that the portions of the USITC Report that discussed serious injury did not refer to "merchant market" or "captive consumption" segments but, rather, were computed on the basis of the entire industry.[1990]

7.777 The European Communities asserts that the United States contents itself with claiming that, because it was not possible to generate consistent data for internal production, it satisfied its obligations under the Agreement on Safeguards. The United States defends itself legally by arguing that the report of the Appellate Body in *US – Hot-Rolled Steel*, which concerned the identical situation in the anti-dumping context, did not concern both a US statutory provision regulating captive production and its application, but only concerned the statutory provision.[1991] However, the European Communities asserts that the briefest examination of the Appellate Body's report in *US – Hot-Rolled Steel* shows that the Appellate Body considered that the lack of analysis of financial performance on internal consumption when an analysis had been made of commercial sales vitiated the USITC's determination irrespective of the statutory provision at issue. This shows both that the United States' legal defence fails to deal satisfactorily with the basic thrust of the Appellate Body's decision, and that the United States' explanation that it could not derive consistent data for internal consumption is wholly inadequate.[1992]

7.778 The European Communities states that in order to better understand the import of the Appellate Body's findings, it is useful to examine the nature of the investigation which the Appellate Body was asked to consider. The Appellate Body set out the situation as follows:

> "[W]e observe that the USITC Report contains data for, firstly, the merchant market and, secondly, for the overall market. […] In particular, in its examination of market share and of each of the financial performance indicators, the USITC mentioned data pertaining to the merchant market and the overall market. However, while the USITC Report includes frequent reference to data for the merchant market, it does not contain, describe, or otherwise refer to, data for the captive market. […] According to

[1987] United States' first written submission, para. 327.
[1988] United States' first written submission, para. 328.
[1989] United States' first written submission, para. 329.
[1990] United States' first written submission, para. 330.
[1991] European Communities' second written submission, para. 294.
[1992] European Communities' second written submission, para. 295.

> the United States, the examination of the data for the captive market is subsumed within the examination of the domestic market as a whole, even though the merchant market is the subject of separate and express examination.
>
> It is true [...] that the *aggregate* data for the industry as a whole includes data for every part of the industry. However, without further analysis to *disaggregate* this data, the data relating to the captive market remains unknown. Moreover, the mere fact that the *aggregate* data for the industry as a whole include data for every part of the industry does not overcome the fact that the USITC Report discloses no *analysis* of the significance of the data for the captive market. Thus, there is no explanation by the USITC of the state of the part of the domestic industry that is shielded from direct competition with imports, nor any explanation of the significance of that shielding for the domestic industry as a whole. […] Yet, in the examination provided of the merchant market, there *is* an explanation of the poor state of that part of the domestic industry which is *not* shielded from the effects of imports.
>
> As we have already explained, in the absence of a satisfactory explanation, Article 3.1 of the *Anti-Dumping Agreement* does not entitle investigating authorities to conduct an selective examination of one part of a domestic industry. Rather, where one part of an industry is the subject of separate examination, the other parts should also be examined in like manner. Here, we find that the USITC examined the merchant market, without also examining the captive market in like or comparable manner, and the USITC provided no explanation for its failure to do so."[1993] (footnotes omitted, emphasis in original)[1994]

7.779 The European Communities submits that, in other words, the Appellate Body found an examination of financial performance which was divided into an examination of performance on the merchant market (i.e. on commercial sales) and for all production, was inconsistent with the AD Agreement because there was no comparable focus on performance on captive consumption or no reasonable explanation why this was not necessary. In the present case, as is undisputed, the USITC analysed the industry's financial performance only on commercial sales, and not for all productive activities nor specifically for internal consumption.[1995] According to the European Communities, the United States seeks to deny that *US – Hot-Rolled Steel* is relevant. The European Communities submits that, evidently it is relevant – it sets out a principle that the United States has failed to respect. Indeed, the United States has acted inconsistently with its obligations in two senses – it has failed to examine all activities of the industry, and by examining only one part it has failed to examine all parts equally or explain why this was not necessary.[1996]

7.780 The European Communities argues that where captive activities are excluded from the analysis, a competent authority will not have made an objective assessment nor provided a reasoned and adequate explanation of its conclusions. Moreover, such an incomplete analysis will bring into question the objectivity and representativeness of the competent authority's investigation under Article 4.2.[1997] The European Communities argues that this, in turn, takes away the basis for concluding that there is serious injury suffered by the domestic industry.[1998] It states that this is

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[1993] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 212-214.
[1994] European Communities' second written submission, para. 296.
[1995] European Communities' second written submission, para. 297.
[1996] European Communities' second written submission, para. 298.
[1997] European Communities' first written submission, para. 402.
[1998] European Communities' first written submission, para. 392.

confirmed by Article 4.2(a) of the Agreement on Safeguards, which contains a non-exhaustive list of injury indicators which an investigating authority must examine.[1999] It argues that the scope of the provision is not qualified by reference to the use made of the products in question. Consequently, according to the European Communities, a competent authority must examine the state of all the productive activities of the domestic industry. A competent authority cannot simply examine "profit and losses" made on non-internally consumed production and conclude that there is sufficient evidence of significant overall impairment in the position of a domestic industry.[2000] In this regard, the European Communities points out that an integrated producer may forego profits on upstream input products in order to maximise profit-taking on sales of more valuable downstream finished and highly specialised products and may simply sell surplus production of the input product. Therefore, an analysis of whether losses are made on sales of the upstream input product will only provide an incomplete picture of the state of such an industry.[2001]

7.781 The European Communities further argues that the USITC's examination is not objective, because it does not examine all areas of activities, including those in which the domestic industry may be performing well. "Serious injury" is defined in Article 4.1(a) as a "significant overall impairment in the position of a domestic industry". Article 4.2(a) requires an evaluation of "all relevant factors" "having a bearing on the situation" of the industry. The performance of an industry with respect to production for internal consumption must be a factor which may have a bearing on that industry and which therefore must be evaluated and cannot be ignored. The European Communities argues that consequently, the United States has not evaluated all relevant factors, and has not, therefore, undertaken a proper serious injury examination. The total absence of any information on its treatment of production for internal consumption also raises serious questions as to how costs were allocated between production for commercial sale and that for internal consumption. If costs were disproportionately allocated to commercial sales, this would evidently decrease the profitability of such sales. Since the United States admits that it did not ensure consistent treatment of internal transfers (and therefore that profits and losses were not artificially shifted between products), it has failed to conduct a proper investigation.[2002] The European Communities argues that this methodological flaw applies to all of the products concerned. For each product, at least some of the production is internally consumed and financial performance on these products was, therefore, not analysed. Consequently, all findings are not based on an assessment of the situation of the domestic industry as a whole.[2003]

7.782 In response, the United States contends that the information concerning operating performance and profit margins included in the USITC's report was intended to represent the performance of each industry as a whole, not merely a particular segment of that industry.[2004] The United States acknowledges that the data on operating income that appeared in the USITC Report were based on the value of commercial sales. However, the United States explains that there were several reasons why the USITC used this measure. First, the USITC obtained financial performance data principally through the questionnaires it issued. According to the United States, by requesting that producers, for purposes of providing financial information, limited their reporting to revenues actually received for commercial sales, and costs relating to those sales, the USITC assured that the financial data it received would be computed on a basis that was both consistent among different

[1999] European Communities' first written submission, para. 393.
[2000] European Communities' first written submission, para. 394.
[2001] European Communities' first written submission, para. 395.
[2002] European Communities' first written submission, paras. 423-452; European Communities' written reply to Panel question No. 71 at the first substantive meeting.
[2003] European Communities' first written submission, para. 424.
[2004] United States' first written submission, para. 331.

producers for each particular product on which it collected data and consistent for a particular producer across several products it produced. Therefore, according to the United States, the USITC assured that the financial data it received was "objective" and consistent with United States generally accepted accounting principles.[2005] In contrast, presenting financial data based on many different schemes for computing transfer values for internal transfers of product could have seriously compromised the objectivity of the data reported.[2006] The United States argues that, moreover, had the USITC instructed the producers to attempt to determine values for internal transfers of product, this presumably would have required producers to construct transfer values on the basis of commercial sales values. Therefore, there would have been no difference or only minimal difference between those constructed transfer values and the reported concerning merchant sales values, particularly for the numerous domestic industries where internal transfers constituted a very small percentage of overall production.[2007]

7.783 The European Communities submits that, inevitably, if data for commercial sales is all that is analysed, questions arise as to how costs are allocated between production for internal consumption and production for commercial sales. An improper analysis of costs would undermine both the analysis of serious injury and the analysis of causation. This issue has already exercised the panel and Appellate Body in *US – Wheat Gluten*.[2008] In that dispute, similarly to the instant dispute, three products, one of which was wheat gluten, were produced from the same raw material on the same production line. Indeed, in the present dispute, the product is in fact the same (stainless steel rod for internal consumption is identical to stainless steel rod for commercial sale), only the immediate use is different – either commercial sale or internal consumption. In *US – Wheat Gluten* the European Communities raised a concern as to how the allocation of profits between the different products was carried out. The Appellate Body reversed the panel's finding that the USITC had provided a reasoned and adequate explanation of the allocation methodologies applied to allocate profit among the three different products, because the panel relied on statements made by the United States which were not contained in the USITC Report.[2009] [2010]

7.784 The European Communities states that, in the present case, the European Communities asked the United States to identify where in the USITC Report it had explained how it ensured that allocations of costs to commercial sales were consistent and objective. In its response to this question, the United States explained that USITC staff checked data reported by US producers against audited annual financial statements, referring to page 7 of the overview of the USITC Report.[2011] The USITC explained in page 7 of its overview, after describing how it distributed questionnaires:

> "[A] careful review of the data submitted by questionnaire respondents was undertaken by the Commission staff. Certain basic analytical procedures were conducted on data in questionnaires from all sources, including US producers, foreign producers, US purchasers, and US importers. Each firm's unit values for major items such as shipments, prices, sales values, and costs were scrutinized and compared to public source data and to the aggregate unit values for all firms. Comments regarding

[2005] United States' first written submission, para. 332; United States' second written submission, para. 110.
[2006] United States' first written submission, para. 332.
[2007] United States' first written submission, para. 333.
[2008] Panel Report, *US – Wheat Gluten*, paras. 8.57 to 8.66 and, reversing the Panel's conclusions, Appellate Body Report, *US – Wheat Gluten*, paras. 156-163.
[2009] Appellate Body Report, *US – Wheat Gluten*, para. 163.
[2010] European Communities' second written submission, para. 301.
[2011] United States' written reply to European Communities' question No. 5, paras. 11 and 12.

> discrepancies from all parties in the investigation were considered and material problems with data submissions were resolved.
>
> Additional procedures and reviews focused on US producer companies. Their reported data on sales, operating income, and capacity were reconciled with each firm's financial statements to the fullest extent possible, and reported sales values were compared with reported commercial sales values. A limited-scope verification was also conducted on one of the largest US steel producers, Nucor Corp., wherein its questionnaire data were reconciled with its corporate records."[2012]

7.785 According to the European Communities, on its face, the USITC Report does not explain how the USITC ensured the correct allocation of costs. Indeed, the latter paragraph on domestic producers does not refer to costs at all. There is no explanation of how the USITC ensured that the allocation of costs was consistent across different companies. Reconciling data with annual financial accounts for a company as a whole, based on income generated on all the products sold by the company, takes for granted certain allocations of operating income and hence costs, which may be done by different companies on a different basis. Moreover, according to the European Communities, there is no explanation whatsoever as to how the USITC verified the accuracy of any data for interim 2001 since the data for these periods could not logically be checked against annual audited accounts. Nor can it be determined how the USITC verified the accuracy of the data for interim 2000 because no explanation is provided of how the respondents allocated data within the year 2000.[2013]

7.786 The European Communities notes that, in *US – Wheat Gluten*, the USITC had explicitly discussed the issue of allocation of profits. The USITC concluded:

> "Based on a careful review of the allocation methodologies used by domestic wheat gluten producers in responding to the Commission's questionnaire, we find those allocations to be appropriate."[2014]

7.787 According to the European Communities, the Appellate Body concluded that this statement did not provide a reasoned and adequate explanation of the USITC's treatment of the allocation of profits. It found the panel's determination that the above-quoted statement did constitute a reasoned and adequate explanation on the basis of information provided during the panel proceedings to be inconsistent with the standard of review the panel was required to apply, and consequently reversed the Panel's findings.[2015]

7.788 The European Communities asserts that in the present case, the USITC did not even discuss the allocation methodologies applied, did not explain whether it considered the allocation methodologies were consistent between different producers and did not even claim that the allocations were "appropriate". In the light of the Appellate Body's examination of this similar issue in *US – Wheat Gluten*, the European Communities requests that the Panel find that the USITC failed to

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[2012] USITC Report, Vol. III., p. OVERVIEW-7, cited in European Communities' second written submission, para. 302.

[2013] European Communities' second written submission, para. 303.

[2014] USITC Report on imports of Wheat Gluten quoted in Appellate Body Report, *US – Wheat Gluten*, para. 157, cited in European Communities' second written submission, para. 303.

[2015] Appellate Body Report, *US – Wheat Gluten*, paras. 162-163, cited in European Communities' second written submission, para. 305.

provide a reasoned and adequate explanation of how it ensured that costs were properly allocated between production for commercial sale and for internal consumption.[2016]

7.789 In response, the United States submits that to the extent that there are "serious questions as to how costs were allocated between production for commercial sale and that for internal transfer", as the European Communities asserts[2017], it has fully responded to them and allayed any possible concerns about the USITC's cost allocation methodology. The United States reiterates that USITC accounting staff reconciled the financial data United States producers reported in their questionnaire responses with those producers' audited financial statements to ensure that cost data in its report were allocated to commercial sales in a manner consistent with United States generally accepted accounting principles. Indeed, because the audited financial statements contain information about commercial sales only, and do not encompass internal transfers, the USITC could not have performed an analogous reconciliation process had it attempted to use data concerning such transfers for its financial analysis.[2018] The United States submits that the nature of the reconciliation process ensured that the financial data on which the USITC relied were objective. By contrast, a financial analysis based on data relating to internal transfers, as the European Communities advocates, would have raised many difficulties with respect to double counting of product, particularly with respect to the CCFRS like product.[2019]

7.790 The European Communities states that it is not in a position to assess the effect in this particular case of the fact that internal consumption has not been taken into account. It submits that it is not for the European Communities, which does not have access to the same information which the United States authorities had, or should have had, to establish what would have been the difference in this case had captive consumption been properly considered. However, the European Communities considers that it has made a prima facie case that the methodology used by the United States does not permit an evaluation of the existence of serious injury consistent with the Agreement on Safeguards. It is not in a position to apply the correct methodology, and consequently determine the difference a proper examination would have made to the serious injury determination. Needless to say, while the USITC neglected to examine profits and losses on internal consumption for all product bundles, for those product bundles with substantial proportion of internal consumption the effect of this exclusion may well be significant.[2020] In any event, the United States was obliged to explain why it did not examine such production, even where only a small proportion of production was internally consumed, and why only examining the free market sales still allowed, in its view, to have a reliable basis for a WTO consistent serious injury determination. Such a conclusion must be demonstrated by the competent authorities in their report and not *ex post facto* before the Panel.

7.791 The United States submits that the European Communities has failed to establish that there is some objective manner of measuring financial "performance" with respect to what is not an arm's-length commercial transaction, but merely a single producer's internal transfer. The United States further argues that the European Communities has failed to rebut statements made by the United

[2016] European Communities' second written submission, para. 306.
[2017] European Communities' written replies to Panel questions Nos. 71 and 151 at the first substantive meeting.
[2018] United States' second written submission, para. 112.
[2019] United States' second written submission, para. 113.
[2020] European Communities' first written submission, para. 424, Figure 30 and common annex B – tables 1-15.

States about the lack of objective data pertaining to financial performance concerning internal transfers.[2021]

7.792 The European Communities concludes that it is clear that the USITC has, by failing to examine performance on production for internal consumption, failed both to ensure an examination of the performance of the industry as a whole and to examine, where it has examined only a segment, other segments in an equivalent manner. The European Communities submits, therefore, that the USITC's findings are not reasoned and adequate and should not be upheld. In addition, the USITC failed to explain, in a reasoned and adequate manner, how it ensured that the allocation of costs between production for commercial sales and internal consumption was verified and ensured to be consistent across the various producers which responded. As a result of these two failings, the USITC's injury determination is inconsistent with Articles 2.1, 4.2(a), 3.1 and 4.2(c) of the Agreement on Safeguards.[2022]

(ii) Confidential information

7.793 The European Communities argues that, despite the numerous injunctions of the Appellate Body, the USITC failed to provide a reasoned and adequate explanation of the basis for its findings because it did not provide substantial data elements.[2023] More particularly, the European Communities argues that the findings in the USITC Report fail to provide a reasoned and adequate explanation of the determination because it kept confidential, or fails to provide, significant swathes of information which were necessary to properly assess the correctness of the USITC's findings with respect to the existence of serious injury and that this also affected the determination of the existence of a causal link.[2024] The European Communities argues that this failing is particularly relevant with respect to the product groups of CCFRS, stainless steel rod, stainless steel wire and stainless steel bar.[2025] The European Communities argues that this vitiates both the USITC's injury finding and the causation finding given that causation is established by relating and comparing the trends between the injury indicators and increased imports.[2026]

7.794 With regard to CCFRS, the European Communities argues that the overall tables for flat products, that is, the tables in which the USITC had aggregated slab, plate, hot-rolled, cold-rolled, coated, grain oriented electrical steel and tin mill were regarded as confidential by the USITC.[2027] With respect to stainless steel rod, the USITC did not provide any data with respect to "trade and employment" (i.e. capacity, production, shipments, inventories and employment), "financial indicators" (i.e. results of operations) and price comparisons. Similarly, with regard to stainless steel bar and stainless steel wire, no data was provided on the financial performance of the industry. The European Communities argues that none of these determinations are, therefore, consistent with Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards.[2028] The European Communities also argues that no or only partial data was provided with respect to undercutting or underselling for slabs; coated; cold-finished bar; certain pipe products; carbon and alloy fittings and flanges; stainless steel bar; and stainless steel rod.[2029]

[2021] United States' second written submission, para. 111.
[2022] European Communities' second written submission, para. 307.
[2023] European Communities' first written submission, para. 378.
[2024] European Communities' first written submission, paras. 407-408.
[2025] European Communities' first written submission, para. 409.
[2026] European Communities' first written submission, paras. 378-379.
[2027] European Communities' first written submission, para. 413.
[2028] European Communities' first written submission, para. 416.
[2029] European Communities' first written submission, para. 417.

7.795 According to the United States, other than to make a general claim that the United States acted inconsistently with its obligations by not publishing the confidential data, the European Communities does not ask for the tables either in their confidential form or in an indexed form. Nor does the European Communities assert that any of the redacted information is necessary or appropriate to the Panel's evaluation of its claims, or ask the Panel to invoke Article 13.1 of the DSU.[2030] The United States notes that the European Communities in particular claims that the USITC violated Article 3.1 by failing to publish certain "aggregated data" regarding domestic flat-rolled steel producers.[2031] In this regard, the United States points out that in its report, the USITC published data regarding the "results of operations of US producers", and "U.S. producers' capacity, production, shipments, inventories, and employment" for each flat-rolled product (i.e., slabs, plate, hot-rolled, cold-rolled, coated, and tin) except GOES. The reason data were not published for GOES was that, because there are only two domestic producers, such publication might reveal confidential company-specific information. The USITC could not publish aggregate flat-rolled data because to do so would enable readers to determine GOES information simply by subtracting data for each of the other flat-products.[2032]

7.796 The United States argues that the assertion by the European Communities that the USITC should, at the very least, have published "aggregated data" to maintain confidentiality, while complying with the publication requirements of Article 3.1, was rejected by the *US – Wheat Gluten* panel.[2033] The United States submits that the panel in *US – Wheat Gluten* concluded that in view of:

> "[T]he fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not "cause" has been shown for information to be treated as "confidential"; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information 'which is by nature confidential or which is provided on a confidential basis,' including aggregate data."[2034]

7.797 The United States continues by stating that most recently, the Panel in *US – Line Pipe* confirmed that the publication requirements of Article 3.1 must be construed so as not to impair the confidentiality requirements of Article 3.2. In particular, the panel stated that:

> "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

[2030] United States' first written submission, para. 1330.
[2031] United States' first written submission, para. 1331.
[2032] United States' first written submission, para. 1332.
[2033] United States' first written submission, para. 1336.
[2034] United States' first written submission, para. 1337.

is by nature confidential or which is provided on a confidential basis' within the meaning of Article 3.2."[2035]

7.798 According to the United States, there is no reason why the Panel should not to be guided by the *US – Wheat Gluten* Panel's finding in respect of the European Communities' Article 4.2(c) claim. Similarly, and given the express reference in Article 4.2(c) to Article 3, the United States notes that it fails 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. The United States submits that, accordingly, it encourages the Panel to reject the European Communities' 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). In the view of the United States, there was, therefore, no requirement that the United States publish confidential information, even in an "aggregated" format.[2036]

7.799 The European Communities argues that Article 11 of the DSU directs panels to, *inter alia*, make an objective assessment of the facts. The European Communities also relies upon the Appellate Body decision in *US – Wheat Gluten* where, according to the European Communities, the Appellate Body found that the Panel had failed in its duty under Article 11 when, in evaluating the soundness of the USITC's analysis, it relied upon explanations furnished by the United States during the cause of proceedings which were not present in the USITC's Report. On the basis of that decision, the European Communities argues that a Member applying a safeguard measure must provide all data and explanations sufficient to justify the measure in the report it is required to provide. According to the European Communities, this does not oblige a Member to divulge data which are confidential, release of which would harm individual enterprises. However, according to the European Communities, it does require that the Member provide aggregate data in which the data on individual enterprises are not identifiable, or provide indexed data which illustrates the trends in the data. The European Communities submits that such a requirement is, in some senses, the concomitant obligation to that imposed on individual enterprises to provide a non-confidential summary of the data, set out in Article 3.2.[2037]

7.800 The European Communities argues that data may legitimately be kept confidential where only one company has provided a competent authority with the data which has been used to justify a safeguard measure. In this respect, the European Communities notes that Article 4.1(c) of the Agreement on Safeguards defines the "domestic industry" as "producers as a whole", or "those whose collective output of the like or directly competitive product constitutes a major proportion of total domestic production". The European Communities argues that given that serious injury must be shown, at the very least, to a "major proportion" of production, it must be questioned whether the data can be considered to prove that a "major proportion" of the domestic industry has suffered serious injury if only one producer provides data.[2038]

7.801 The European Communities argues that while it is understood that the USITC was under certain confidentiality obligations under domestic law, this does not excuse the United States from its WTO obligations to provide an adequate and reasoned explanation of its factual findings and the legal conclusions drawn therefrom. In the European Communities' view, where two or more companies had provided data, the aggregated data would have been sufficient to ensure that confidential

[2035] United States' first written submission, para. 1338.
[2036] United States' first written submission, para. 1340.
[2037] European Communities' first written submission, para. 384.
[2038] European Communities' first written submission, para. 387.

company-specific information would not come into the public domain. It argues, further, that even where data had been provided by only one company, such data could have been indexed in a manner which would be sufficient to demonstrate, in a reasoned and adequate manner, that the safeguard action taken was justifiable.[2039]

7.802 The United States notes that the European Communities is the only complainant in this proceeding to raise a claim concerning confidential information. The United States asserts that, therefore, all other complainants found the public USITC Report either to be adequate in this regard, or, at least, not a subject to be addressed by them in this dispute.[2040]

7.803 The United States notes that the European Communities acknowledges that the United States has certain confidentiality obligations under domestic law and does not ask the United States to violate those obligations or for the United States to provide the confidential versions of the relevant data tables. The United States notes that, indeed, the protections afforded to confidential information under United States law are consistent with similar protections accorded by Article 3.2 of the Agreement on Safeguards.[2041] The United States also notes that the European Communities claims that the United States "could have" indexed such information in its report, but it apparently now does not seek indexed information either. The European Communities states that it is too late for the United States "to cure its insufficient report by providing now the information".[2042] In response, the United States argues that whether the United States "could have" developed a non-confidential summary of the confidential data does not translate into a requirement that it must have done so. The Agreement on Safeguards does not require that a Member publish indexed information or other public summaries as parts of its report, and the European Communities cites no provision in the Agreement or panel or Appellate Body findings in support of its inference that it does. Under Article 3.1 of the Agreement, it is sufficient that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".[2043]

7.804 The United States notes that the USITC published two versions of its report, a confidential version and a public version. The confidential version was sent to the President and to authorized persons under the USITC's administrative protective order (including attorneys representing most of the major EU steel producers). A redacted version was made available to the general public. Nothing in Articles 3.1 and 4.2(c) of the Agreement on Safeguards requires the competent authorities to publish, in a public report, the confidential information that supports their findings and conclusions. Indeed, paragraph 2 of Article 3, the second paragraph of the very same article that requires the competent authorities to publish a report, acknowledges that the competent authorities are likely to have received confidential information in the course of their investigation, and very unambiguously states that "Such information shall not be disclosed without permission of the party submitting it".[2044]

7.805 The United States also asserts that it is not only domestic law which precludes the Commission from disclosing confidential information. Article 3.2 of the Agreement on Safeguards itself requires that such confidentiality be maintained. The United States refers to the panel in *US – Wheat Gluten* which found that:

[2039] European Communities' first written submission, para. 418.
[2040] United States' first written submission, para. 1323.
[2041] United States' first written submission, para. 1324.
[2042] United States' first written submission, para. 1325.
[2043] United States' first written submission, para. 1326.
[2044] United States' first written submission, para. 1327.

> "Article 3.2 SA places an obligation upon domestic investigating authorities not to disclose – including in their published report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law and demonstrating the relevance of the factors examined – information which is "by nature confidential or which is provided on a confidential basis" without permission of the party submitting it."[2045]

7.806 According to the United States, given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, 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 required publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2 of the Agreement on Safeguards.[2046]

7.807 The European Communities argues in counter-response that the USITC, as an investigating authority, was obliged to treat some of the information it received as confidential. This meant that those data could not be disclosed in its public report. The European Communities does not dispute that the United States may refuse to provide specific data when confidential treatment is warranted. However, that the United States may withhold specific data does not excuse it from its obligation to provide a reasoned and adequate explanation. Without such a reasoned and adequate explanation, the Panel cannot make an objective assessment of the matter before it and, with interested WTO Members, cannot ensure that the conditions necessary for the application of safeguard measures have been satisfied.[2047]

7.808 The European Communities further argues that much of the United States' argumentation on this issue has been that it is not required to disclose confidential data.[2048] According to the European Communities, this is besides the point. The European Communities has argued that the USITC was under an obligation to provide a reasoned and adequate explanation, and that this could be done in the form of the provision of, for example, indexed data, or aggregated data. The United States rejected this, arguing that:

> "[W]hether the United States "could have" developed a non-confidential summary of the confidential data does not translate into a requirement that it must have done so."[2049]

7.809 According to the European Communities[2050], in so doing, it appeared to deny the obligation to provide a reasoned and adequate explanation of its findings. However, in response to a question from the Panel as to the relationship between the possibility to protect confidential information and the obligation to provide a reasoned and adequate explanation the United States opined:

> "When an investigation involves substantial amounts of confidential information, there are several means by which the authority can satisfy both its Article 3.1

[2045] Panel Report, *US – Wheat Gluten*, para. 8.19 cited in United States' first written submission, para. 1334.
[2046] United States' first written submission, para. 1335.
[2047] European Communities' second written submission, para. 308.
[2048] United States' first written submission, paras. 1322-1340.
[2049] European Communities' second written submission, para. 309.
[2050] European Communities' second written submission, para. 310.

> obligation to provide findings and reasoned conclusions, and its Article 3.2 obligation not to disclose confidential information."[2051]

7.810 The European Communities states that while it would not formulate the applicable law in quite the same manner, the European Communities does welcome the fact that the United States agrees that the claimed right not to disclose confidential information coexists with the obligation to provide a reasoned and adequate explanation to meet the "serious injury" test in Article 4 of the Agreement on Safeguards. The issue then becomes what is required of an investigating authority in the light of the obligation to provide a reasoned and adequate explanation with respect to data that is entitled to confidential treatment ?[2052]

7.811 The European Communities notes that in an effort to settle this dispute, the European Communities requested the United States to provide information that had been withheld in the public version of the USITC Report. The European Communities states that the United States never responded to that request. It further argues that the United States cannot attempt to cure its insufficient report by now providing the information which, in order to respect Articles 2.1, 4.2, and 3.1 of the Agreement on Safeguards, should have appeared in the report.[2053]

7.812 In response, the United States asserts that after meeting with the European Communities representatives, USTR informally asked the USITC to review the public version of its report to determine whether any of the redacted data in the tables was improperly designated as confidential and should be disclosed. The USITC found that none of the data had been improperly designated as confidential. Accordingly, there was nothing for the United States to report. The United States comments that the Panel should be aware that the USITC Report contained nearly 400 tables, the overwhelming percentage of which were made available in their entirety in the public version of the USITC Report. According to the United States, the European Communities is taking issue with data redacted from only 14 of those tables.[2054]

7.813 In response to a question posed by the Panel, the United States argues that it does not believe that the Article 3.1 requirement to provide a reasoned and adequate explanation and the Article 3.2 requirement to protect confidential information are in conflict. An authority's obligation to protect confidential information under Article 3.2 is not conditioned in any way. The first sentence of Article 3.2 states that confidential information "shall, upon cause being shown, be treated as such by competent authorities". Article 3.2 does not state that the authority may release such information if it is particularly central to its decision, or if its disclosure would aid in understanding the reasons for its findings and conclusions. Instead, the authority's obligation not to disclose confidential information is absolute. The United States argues that, consequently, the findings and reasoned conclusions that an authority provides under Article 3.1 must be findings and conclusions that do not disclose confidential information. Indeed, because maintaining confidentiality is an obligation, a Panel cannot take an adverse inference against a Member because the Member's competent authority did not disclose confidential information. Instead, the Panel must judge the adequacy of the authority's explanation on the basis of the information the authority could properly disclose.[2055]

7.814 The United States also argues that when an investigation involves substantial amounts of confidential information, there are several means by which the authority can satisfy both its

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[2051] United States' written reply to Panel question No. 77 at the first substantive meeting.
[2052] European Communities' second written submission, para. 311.
[2053] European Communities' first written submission, para. 419.
[2054] United States' first written submission, para. 1329.
[2055] United States' written reply to Panel question No. 77 at the first substantive meeting.

Article 3.1 obligation to provide findings and reasoned conclusions and its Article 3.2 obligation not to disclose confidential information. One is to provide a non-confidential narrative discussion of the confidential information. The United States submits that this is an approach the USITC repeatedly took in its report. For example, in the discussion of price declines for cold-finished bar, the USITC had to redact certain numbers quantifying price declines that appear on page 105 of its report. Instead, it characterized the declines as "dramatic". Consequently, the nature of its discussion is clearly discernible. Even for stainless steel rod, where virtually all data concerning the domestic industry was confidential, the USITC still was able to discuss trends in the industry data in general, but descriptive, terms that enable the Panel to discern the reasons for the USITC's conclusions. In this manner the USITC provided findings and conclusions that did not disclose confidential information.[2056]

7.815 In response, the European Communities states that the question is not whether the trend is "discernible" as a result of the use of the word dramatic. The issue is whether, in the words of the Appellate Body, a competent authority has provided a "reasoned and adequate explanation of how the facts support its determination".[2057] The use of the word "dramatic" says nothing about whether the facts support the determination that the price decline was "dramatic". The European Communities states that it is not suggesting that the United States disclose information which is confidential. Indexing pricing developments would be one way of allowing a Panel to determine whether a decline in prices was in fact "dramatic". Indeed, quoting the finding for which the United States considers that the use of the word "dramatic" is sufficient illustrates that the notion of the "non-confidential narrative discussion" of confidential information does not permit a competent authority to provide a reasoned and adequate explanation of its findings:

> "[A]verage unit values of the imports trended downward from 1996 to 1998, and the decline accelerated in 1999. [...] Additional evidence that import prices declined dramatically in 1999 is provided by data for one-inch round C12L14, the cold-finished bar product for which the Commission obtained significant pricing data concerning imports. Between the fourth quarter of 1998 and the first quarter of 1999, import prices for this product declined by *** percent. They fell an addition *** percent between the first and second quarters of 1999, the largest quarterly decline to that point in the period examined."[2058]

7.816 According to the European Communities, there is no indication of how the facts support the USITC's determination that the decline in imports prices was "dramatic". Had the data on import pricing been indexed, the investigating authority, without providing the specific figures, could have shown that the decline in prices was of a sufficient magnitude to be qualified as "dramatic". Thus, providing a "non-confidential narrative discussion" is not sufficient to provide a reasoned and adequate explanation of how the facts support the determination.[2059]

7.817 With reference to the alleged failure to provide any data (other than import data) for stainless steel rod and the failure to provide financial data for stainless steel bar and stainless steel rod, the European Communities notes that for all three products, the European Communities has argued, and the USITC acknowledged, that cost developments (mostly related to nickel), in addition to energy

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[2056] United States' written reply to Panel question No. 77 at the first substantive meeting.

[2057] Appellate Body Report, *US – Lamb,* para. 103.

[2058] USITC Report, Vol. I, p. 105-106, referred to in United States' written reply to Panel question No. 77 at the first substantive meeting, and cited in European Communities' second written submission, para. 313.

[2059] European Communities' second written submission, para. 313.

costs, had a substantial effect on the industry's performance. The European Communities notes that with respect to stainless steel bar, the USITC found that:

> "While the average unit value of the industry's net commercial sales increased in 2000 and 2001, the industry's cost of goods sold rose from *** percent of its net sales revenues to *** percent of its net commercial values in 1999, *** percent of net commercial sales in 2000, and *** percent in interim 2001. As a result of these decreasing margins between the industry's cost of goods sold and its net sales values, the industry's operating income levels declined from a profit of *** percent in 1998 to a loss of *** percent in 1999, recovered only slightly to a minimal profit of *** percent in 2000, and then fell to a loss of *** percent in interim 2001."[2060]

7.818 According to the European Communities, increasing costs may, in certain circumstances be an alternative cause of injury. Thus their analysis may be vital. However, because costs for these products have not been provided on an indexed basis, there is no means to determine whether the facts which the USITC found supported its determination. The same issue was dealt with in the same manner for stainless steel rod [2061] and for stainless steel wire.[2062] The European Communities submits that perhaps the most striking use of redaction is with respect to arguments of interested parties that certain problems affecting one of the very few domestic producers impacted the overall situation of the domestic industry. For stainless steel rod and bar the USITC noted:

> "[I]n addition, we also have considered respondent's argument that the industry's condition during the period was affected significantly by the poor operations of the domestic producer AL Tech/Empire. However, ***."[2063]

7.819 The European Communities asserts that having accepted, therefore, that a Member must provide a reasoned and adequate explanation, even when certain data cannot be disclosed for reasons of confidentiality, there can be no doubt that providing only a "non-confidential narrative discussion" is insufficient to provide a reasoned and adequate explanation of how the facts support a determination of the existence of serious injury and a causal link. According to the European Communities, the United States proved that it was perfectly capable of providing data in another format which protected the confidentiality of the underlying data, and could potentially provide a reasoned and adequate explanation, in its discussion of the proportionality of the measure on Stainless Steel Rod.[2064] The United States, has, therefore, for stainless steel rod, stainless steel bar and stainless steel wire acted inconsistently with Articles 2.1, 4.2(a), 3.1 and 4.2(c) of the Agreement on Safeguards.[2065]

(iii) Recent data

7.820 The European Communities argues that a Member must take account of all information available to it before taking a measure. It asserts that this is an essential element of the provision of an adequate and reasoned explanation, especially in relation to determinations of threat of serious injury, which depend on extrapolations of trends. The European Communities argues that if recent

[2060] USITC Report, Vol. I, pp. 211-212 (footnotes omitted), cited in European Communities' second written submission, para. 315.

[2061] USITC Report, Vol. I, pp. 220-221.

[2062] USITC Report, Vol. I, p. 259.

[2063] USITC Report, Vol. I, p. 221, and for Stainless Steel Bar p. 212 where the USITC states, "We note, however, that ***", cited in European Communities' second written submission, para. 316.

[2064] United States' first written submission, paras. 1160-1161.

[2065] European Communities' second written submission, para. 317.

data that is available before the competent authority decides to impose safeguard measures would bring a determination of threat of serious injury into doubt, the competent authority must justify its determination of threat of serious injury in light of those recent developments. According to the European Communities, failing to do so means that the determination is not reasoned and adequate and, further, a conclusion by the competent authority that a measure is justified would be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards.[2066]

(iv) Analysis of trends

7.821 The European Communities asserts that the USITC based a number of its determinations (on, for example, capacity utilization, average unit values, cost of raw materials and productivity) on an end-to-end comparison (i.e. 1996 against 2000). In so doing, it provided no data that would have indicated the trends of the injury indicators over the period of investigation and would have consequently permitted a proper causation analysis. The European Communities argues that the absence of data showing the trends shows that both the injury and causation analysis had not been adequately reasoned or explained by the USITC.[2067]

(c) Aggregation of data

(i) CCFRS

7.822 The European Communities argues that, as concerns CCFRS, the USITC Report failed to provide a reasoned and adequate explanation of the determination. In particular, the European Communities argues that while separate data sets existed for each of the products which the USITC collapses into the single CCFRS group (that is, for slabs, plate, hot-rolled, cold-rolled and coated), there were no tables that contained data for the five products as grouped together by the USITC. Thus, the injury findings for the single product group of CCFRS were based on aggregated data from the five individual products. The European Communities argues that there were no means to determine how the data for CCFRS as a whole had been calculated and, consequently, whether the conclusions reached by the USITC are justified.[2068]

7.823 Further, the European Communities argues that aggregation involved substantial double-counting issues which, it says, must be accommodated in order to avoid that the aggregated data become unreliable.[2069] The European Communities submits that double counting arose as a result of the fact, *inter alia*, that capacity for some products was also used to produce other products, and that a substantial proportion of products were consumed in the production of downstream products. The European Communities asserts that the USITC was, therefore, aware of these issues as it conducted its investigation. However, it never provided, in the USITC Report (or elsewhere), a table showing and explaining its adjustment of the data to take account of such double-counting.[2070]

7.824 The European Communities submits that the United States cannot, at the same time, pretend to rely on an aggregated group CCFRS and fail to provide correct data for this artificial group which it itself created. According to the European Communities, without such a demonstration, the determination is not reasoned and adequately explained.[2071] The European Communities notes in this

[2066] European Communities' first written submission, para. 388.
[2067] European Communities' first written submission, para. 412.
[2068] European Communities' first written submission, para. 410.
[2069] European Communities' first written submission, para. 411.
[2070] European Communities' written reply to Panel question No. 72 at the first substantive meeting.
[2071] European Communities' first written submission, para. 411.

regard that the overall tables for flat products were regarded as confidential by the USITC.[2072] The European Communities states that, in any event, these tables would not have provided a fully accurate picture of the group of CCFRS because they also included data for GOES and tin mill products.[2073]

7.825 In response, the United States submits that in conducting its investigation, the USITC recognized that the internal consumption of types of CCFRS to produce other such downstream products could lead to double-counting problems if the data for some injury factors (such as production and capacity) were merely aggregated for the five types of CCFRS. It sought the advice of the parties to the investigation as to how these double-counting issues could be minimized.[2074] In making its determinations, the USITC generally relied on combined data for the five types of CCFRS. However, to account for the double-counting problem, it also examined data for the separate types of CCFRS and considered a variety of different ways of measuring these factors, in accordance with arguments made by representatives of domestic and foreign producers. It found that, in most cases, these separate data showed trends that were similar to the aggregated data for the industry as a whole.[2075] [2076]

(ii) Tin mill products

7.826 Norway submits that an unspecified number of tin mill producers also produce a variety of other types of CCFRS, including slab and also hot-end production (slabs). There is no evidence that the operating results from these parts of the firms have been separated out when establishing which firms are the "producers of the like product".[2077] Norway submits that when this has not been done, an incorrect assessment of injury to the tin mill industry results, given that the alleged injury may be caused to other parts of the operations of these firms.[2078]

7.827 In response, the United States submits that Norway is mistaken. Its argument appears to assume that, if a United States producer produced several different types of steel, it would report its data to the USITC on the basis of all the products it produced. In fact, the USITC's questionnaire instructions required each domestic producer to report all data, including financial data, separately for each of the 33 categories of steel.[2079] Since tin mill was a distinct category for data collection, a producer that produced both tin mill and other types of steel covered by the investigation would have reported its tin mill data separately from data on other categories. Furthermore, the USITC staff examined all domestic producer questionnaire responses to ascertain whether they contained data discrepancies on reported information on factors including shipments, sales, and capacity.[2080] [2081]

(d) Decision-making processes in the context of the USITC's injury determinations

7.828 China argues that because of the tie-vote situation in relation to stainless steel wire, the investigation with respect to this product was not completed until the President decided, in his Proclamation, which determination he was in favour of. China notes that at Article 4 of the Presidential Proclamation, the President decided to "consider the determination of the groups of

[2072] European Communities' first written submission, para. 413.
[2073] European Communities' first written submission, para. 413.
[2074] USITC Report, p. FLAT-15 n. 11, p. FLAT-30 footnote 13, and FLAT-44 footnote 14.
[2075] USITC Report, p. 51 footnote 193, and p. 56 footnote 232.
[2076] United States' written reply to Panel question No. 24 at the second substantive meeting.
[2077] Norway's first written submission, para. 236.
[2078] Norway's second written submission, para. 73.
[2079] Exhibit US-22 (questionnaire instructions); United States' first written submission, para. 319.
[2080] USITC Report, p. OVERVIEW-7.
[2081] United States' written reply to Panel question No. 25 at the second substantive meeting.

commissioners voting in the affirmative" with regard to stainless steel wire. China asserts, however, that the Commissioners voting in the affirmative did not agree upon a single and common determination and the President did not state precisely according to which views he decided to vote in favour of a safeguard measure. China argues that, accordingly, the decision of the President was not supported by clear explanations of why he found that the stainless steel wire industry was suffering injury or threat of serious injury. On the basis of the foregoing, China submits that it is very difficult to determine whether injury factors were properly examined and whether sufficient and sound explanations were given for the Presidential determination.[2082]

7.829 In response to a question posed by the Panel, the United States notes that Chairman Koplan found threat of serious injury based on a like product of stainless steel wire, Commissioner Bragg found threat of serious injury based on a like product of "stainless steel wire products" (including both stainless steel wire and stainless steel wire rope), Commissioner Devaney found serious injury based on a like product of stainless steel wire products, and the other three USITC Commissioners made negative determinations with respect to stainless steel wire. The United States argues that for purposes of determining whether increased imports are causing serious injury to a domestic industry, the "determination of the competent authorities" is a matter of the Member's domestic law. There is a well-established practice under United States law that when USITC Commissioners disagree with respect to the like product definition, the USITC determination is based on the overlap of the determinations of the individual Commissioners. The United States submits that, here, the six Commissioners produced three affirmative and three negative individual determinations concerning stainless steel wire. Under United States domestic law, the President may treat the USITC's equally divided determination as an affirmative determination. An overlap of decisions is acceptable as long as each decision-maker addressed the goods in question and found that the increased imports caused serious injury or threat of serious injury. [2083]

7.830 The United States notes that there is also the separate question of whether the competent authority has presented the "findings and reasoned conclusions reached on all pertinent issues of fact and law" for its determination required by Article 3.1. The United States submits that United States law differentiates between the determination, which is the USITC's conclusion, and the explanation of the determination. When an authority such as the USITC has multiple members and these members do not issue a collective opinion in support of their determination, the Panel should refer to the opinion for each individual member of the authority whose vote was necessary for the authority to reach its determination. The United States argues that the Article 3.1 requirement is satisfied when each member has provided findings and reasoned conclusions that support the ultimate conclusion he or she reached with respect to the goods in question.[2084]

H. CAUSATION

1. Definition and establishment of "causal link"

7.831 Norway, Brazil and other complainants argue that Articles 2.1 and 4.2(b) of the Agreement on Safeguards mean that Members must demonstrate an explicit "causal link" between the increase in imports and any serious injury suffered by the domestic industry.[2085]

[2082] China's first written submission, para. 348.
[2083] United States' written reply to Panel question No. 78 at the first substantive meeting.
[2084] United States' written reply to Panel question No. 78 at the first substantive meeting.
[2085] Norway's first written submission, para. 285; Brazil's first written submission, para. 147.

7.832 China and New Zealand submit that, on the basis of Appellate Body jurisprudence, a competent authority's task in determining whether the causal link between increased imports and serious injury exists "involves a genuine and substantial relationship of cause and effect".[2086] In doing this, the competent authority must establish the coincidence between increased imports and serious injury, it must not attribute to increased imports injury caused by other factors, and it must establish non-attribution explicitly and expressly through a reasoned, clear, unambiguous and straightforward explanation.[2087] Switzerland and Norway consider that the determination of the existence of a genuine and substantial relationship of cause and effect usually involves two elements: first, there is typically a coincidence in trends between serious injury and increased imports and second, the transmission of serious injury by increased imports must be shown, in the light of the coincidence (or lack of) between trends.[2088]

7.833 New Zealand adds that Articles 4.2(a) and (b) in combination underline the importance of ensuring that the competent authorities substantiate their determination that increased imports have caused, or threaten to cause serious injury through a proper and objective assessment of all relevant factors bearing on the industry. In New Zealand's view, only in this way can the requisite "causal link", as specifically referred to in Article 4.2(b), be demonstrated.[2089]

7.834 The United States notes that the Appellate Body has described the basic requirements applicable to a causation analysis under the Agreement on Safeguards on several occasions.[2090] As a general matter, the Appellate Body has stated that Article 4.2(b) of the Agreement on Safeguards contains "two distinct legal requirements" that must be satisfied for a safeguard action to comply with the Agreement. First, as indicated in the first sentence of Article 4.2(b), the authority must demonstrate the "'existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.'" Second, as set forth in the second sentence of Article 4.2(b), the competent authority must ensure that the "injury caused by factors other than the increased imports [is] … not … attributed to increased imports."[2091]

2. Correlation

7.835 The European Communities, Japan, Korea, Switzerland, Norway, New Zealand and Brazil argue that the Appellate Body in *Argentina – Footwear (EC)* stated that if causation is present, increased imports "normally should coincide" with a decline in the relevant injury factors.[2092] New Zealand further argues that a coincidence between increased imports and injury factors will provide an important initial indication of a causal link[2093] and that a competent authority should demonstrate such coincidence.[2094] According to the European Communities and Brazil, the facts must

[2086] China's first written submission, para. 352; New Zealand's first written submission, para. 4.111.
[2087] New Zealand's first written submission, para. 4.111; China's first written submission, para. 352.
[2088] Switzerland's first written submission, para. 292; Norway's first written submission, para. 293.
[2089] New Zealand's first written submission, para. 4.110.
[2090] The United States cites the Appellate Body Reports, *US – Line Pipe*, paras. 200-222; *US – Lamb Meat*, paras. 162-188; *US – Wheat Gluten*, paras. 60-92; *Argentina – Footwear (EC)*, paras. 140-47.
[2091] United States' first written submission, para. 401.
[2092] European Communities' written reply to Panel question No. 81 at the first substantive meeting; Japan's written reply to Panel question No. 81 at the first substantive meeting; Japan's second written submission, para. 113; Korea's first written submission, para. 103; Switzerland's written reply to Panel question No. 81 at the first substantive meeting; Norway's first written submission, para. 283; New Zealand's written reply Panel question No. 81 at the first substantive meeting; Brazil's second written submission, para. 63; Brazil's written reply to Panel question No. 81 at the first substantive meeting.
[2093] New Zealand's first written submission, para. 4.113.
[2094] New Zealand's first written submission, para. 4.112.

demonstrate, at a minimum, a correlation in time between the increased imports and the decline in industry performance.[2095]

7.836 New Zealand notes that the Appellate Body has not set out abstract mathematical parameters for how close a degree of coincidence is required.[2096] Similarly, the European Communities and Norway argue that there is no mathematical formula which dictates the applicable time-frame for establishing causal link.[2097] Likewise, Japan and Brazil argue that it is impossible to put forward a precise standard.[2098] Nevertheless, the European Communities, Switzerland and Norway argue that the degree of coincidence between the increased imports and the serious injury suffered should be significant.[2099]

7.837 Japan, Switzerland and Brazil submit that the term "coincide" implies a very tight correlation between increased imports and injury within a narrow period of time. Indeed, the Oxford English Dictionary defines "coincide" as, to "[o]ccupy the same portion of space ... [o]ccur at or during the same time".[2100] Korea argues that the relevance of the coincidence of time between increased imports and materialization of injury is that there logically should be a close connection.[2101]

7.838 The European Communities and Brazil argue that absent this correlation, the increase in imports cannot be said to have caused the serious injury.[2102] More particularly, Brazil submits that in the absence of a correlation between increased imports and serious injury, there can be no causal link, and no measure applied.[2103] Similarly, Norway argues that if there is no correlation between the increase in imports and the serious injury suffered, it is highly doubtful that a causal link exists.[2104]

7.839 The European Communities, Japan and Brazil argue that if there is no coincidence, it is still possible that there is a causal link, but a competent authority must provide a "very compelling analysis" of this causal link.[2105] Switzerland and Norway also submit that in the absence of coincidence, a "compelling analysis" is needed that establishes the existence of a genuine and substantial relationship of cause and effect between increased imports and the serious injury allegedly suffered, in the light of the coincidence of trends, and the means by which such injury is transmitted

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[2095] European Communities first written submission, para. 438; Brazil's first written submission, para. 149.

[2096] New Zealand's written reply to Panel question No. 81 at the first substantive meeting.

[2097] European Communities' written reply to Panel question No. 81at the first substantive meeting; Norway's written reply to Panel question No. 86 at the first substantive meeting.

[2098] Japan's written reply to Panel question No. 81 at the first substantive meeting; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2099] European Communities' first written submission, para. 451; Switzerland's first written submission, para. 293; Norway's first written submission, para. 294.

[2100] Japan's written reply to Panel question No. 81 at the first substantive meeting; Japan's second written submission, para. 113; Switzerland's written reply to Panel question No. 81 at the first substantive meeting; Brazil's second written submission, para. 63; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2101] Korea's written reply to Panel question No. 81 at the first substantive meeting

[2102] European Communities' first written submission, para. 438; Brazil's first written submission, para. 149.

[2103] Brazil's second written submission, para. 62.

[2104] Norway's first written submission, para. 283.

[2105] European Communities first written submission, paras. 450 and 453; Japan's second written submission, para. 114; Brazil's written reply to Panel question No. 81 at the first substantive meeting; Japan's written reply Panel question No. 81 at the first substantive meeting. Reference is made in this regard to *Argentina – Footwear (EC)* at para. 144.

by increased imports.[2106] Japan and Brazil say that, at a minimum, some level of demonstrable, relevant and "very compelling" correlation between increased imports and serious injury must exist.[2107]

7.840 The United States argues that the Appellate Body has consistently stated that the "primary objective" of a Member when conducting a safeguards investigation is to "determine whether there is 'a genuine and substantial relationship of cause and effect' between increased imports and serious injury and threat thereof." Accordingly, the United States asserts that, when interpreting Article 4.2(a) and 4.2(b), first sentence, of the Agreement, the Appellate Body has stated that the "central" consideration in a causation analysis is assessing whether there is a "relationship between the movements in imports (volume and market share) and the movement in injury factors." The United States adds that, the Appellate Body has indicated that, even in the absence of a "coincidence between an increase in imports and a decline in the relevant injury factors," a competent authority is not precluded from finding that there is the requisite causal link between increased imports and serious injury; instead, the competent authority may still find the causal link needed to justify a safeguard action if the authority provides a "compelling analysis of why causation is still present."[2108]

7.841 The United States adds that, for the ten steel products for which the President imposed a safeguard remedy, the USITC considered all of the record evidence and concluded that there was a clear correlation between the volume and price trends of imports and declines in the overall condition of the industry. Moreover, for each product, the USITC also conducted a detailed and well-reasoned discussion of the ample record evidence showing that there was a genuine and substantial correlation between increased imports and serious injury.[2109]

7.842 The United States argues that although the complainants correctly recognize that the Appellate Body has indicated that there should "normally" be a "relationship between the movements in imports (volume and market share) and the movement in injury factors", their arguments in this regard generally focus almost exclusively on an analysis of correlations in import and industry trends within the same calendar year. This approach fails to appreciate that the full impact of an increase in import volumes or a decline in import prices in one calendar year may not be fully reflected in the condition of the industry until the next calendar year, or even the year after.[2110] The United States also argues that, in many instances, the complainants improperly focus solely on year-to-year correlations between changes in import volumes and changes in industry injury indicia without recognizing that changes in an industry's condition can be the result of both volume and price-based import competition.[2111] The United States argues that the sort of analysis urged by the complainants – that is, an examination only of the correlations between trends in import volume and industry profitability levels – would reflect an imprecise and demonstrably incomplete assessment of whether increased imports, and their pricing patterns, had seriously injured the domestic industry.[2112]

7.843 Korea argues that a lag or disconnect between the increased imports and the serious injury shows the high likelihood that the impact identified is caused by other external factors and not the increased imports. Furthermore, in such a case, the competent authorities should provide an

[2106] Switzerland's first written submission, para. 294; Norway's first written submission, para. 296.
[2107] Japan's second written submission, para. 114; Japan's written reply to Panel question No. 81 at the first substantive meeting; Brazil's written reply to Panel question No. 81 at the first substantive meeting.
[2108] United States' first written submission, paras. 402-403.
[2109] United States' first written submission, para. 425; United States' second oral statement, para. 63.
[2110] United States' first written submission, para. 446.
[2111] United States' first written submission, para. 448.
[2112] United States' first written submission, para. 449.

explanation why and how they still found a causation between the increased imports and the serious injury despite a lack of coincidence.[2113] Similarly, Japan and Brazil concede that it might be possible to find a correlation between increased imports and injury in situations where the effect is lagged. However, they argue that it would be for the "compelling analysis" to explain why such a lag exists and how it operates. In this respect, they assert that the existence of a causal lag is industry and market specific.[2114] The European Communities, Japan, Korea, New Zealand and Brazil argue that the more attenuated the occurrence of serious injury is from the increase in imports (that is, the greater the lapse of time) the more likely that the injury found is due to factors other than the increased imports.[2115] The authorities, therefore, have a higher burden to establish by compelling evidence that the relationship nonetheless exists in such circumstances.[2116]

7.844 In response, the United States argues that these complainants appear to agree with the United States that imports can have a direct, albeit lagged, impact on certain indicia of an industry's condition. In response to questions from the Panel, the United States notes that the complainants have conceded the Agreement on Safeguards does not require increased imports to have a direct and immediate impact on all indicia of an industry's condition in the same year when an import surge occurs. As recognized by the European Communities, under the Agreement on Safeguards, "there is no mathematical formula which dictates the applicable time frame for establishing [a] causal link" between imports and declines in the condition of the industry during the period of investigation. Similarly, Japan agrees that there is "no test for determining when the effect of increased imports on the domestic industry must materialize." In other words, like several other complainants, Japan and the European Communities clearly recognize that the nature of the temporal "correlation" between import increases and changes in an industry's condition is dependant upon the performance factors being examined and the manner in which imports affect those factors.[2117]

7.845 As a result, the United States argues that the complainants are mistaken when they argue that a competent authority must provide a "more compelling" causation analysis if there is a time lag between an increase in imports and declines in certain performance factors of the industry. According to the United States, it is simply not the case that a temporal lag between import increases and declines in industry performance factors indicates a lack of "correlation" or coincidence between the import increase and the performance declines. Natural business cycles or other external factors may cause imports to have a direct but delayed impact on one or more of an industry's performance indicia.[2118]

7.846 The United States argues that an import increase can have an immediate and direct impact on many performance factors for an industry, such as market share, production levels, or shipment

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[2113] Korea's written reply to Panel question No. 81 at the first substantive meeting; Korea's second written submission, para. 135; New Zealand's written reply to Panel question No. 81 at the first substantive meeting.

[2114] Japan's written reply to Panel question No. 81 at the first substantive meeting; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2115] European Communities' written reply to Panel question No. 81 at the first substantive meeting; Japan's written reply to Panel question No. 86 at the first substantive meeting; Korea's written reply to Panel question No. 86 at the first substantive meeting; Korea's second written submission, para. 140; New Zealand's written reply to Panel question No.86 at the first substantive meeting; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2116] Korea's written reply to Panel question No. 86 at the first substantive meeting; Norway's written reply to Panel question No. 86 at the first substantive meeting.

[2117] United States' second written submission at paras. 117-18.

[2118] United States' second written submission, para. 125.

levels.[2119] Notwithstanding this, an increase in imports can also have a direct but delayed impact on certain performance factors for an industry, such as the industry's employment levels, capital investment levels, or its research and development expenses. For example, a company affected by a substantial surge of imports in one year will not necessarily immediately go into bankruptcy.[2120] On the contrary, most companies will take every action possible to avoid entering bankruptcy because entering bankruptcy will have a substantial negative impact on their commercial reputation and their access to capital. Accordingly, companies may delay entering bankruptcy for a number of years, even after their business has been seriously harmed by a major event such as a sudden and serious surge in imports.[2121] The United States submits that similarly, a company may not immediately cut its workforce when imports first surge into a market. Instead, the company might reasonably take some time to assess whether import increases appeared to reduce its shipment or pricing levels over an extended period, which might indicate that a long-term reduction in the company's work force was necessary to reduce its costs.[2122] Indeed, it is possible that an increase in imports can have both an immediate and a delayed impact on one of the industry's performance factors.[2123]

7.847 In response to this particular argument, Japan argues that the United States offers the simplistic argument that bankruptcies and labour reductions are inherently delayed reactions to market-driven events. Japan argues that, however, this argument misses the point. The question is what caused the bankruptcies and labor reductions. The answer is a decline in sales revenue and profits, which was caused by a decline in prices, as the domestic industry argued and the USITC found.[2124] The USITC considered this as evidence of the industry's injury, but failed to correlate the declining domestic prices to increased imports, which, in fact, stopped increasing in 1998. The question that should have been asked, therefore, is what caused domestic prices to decline. As argued, price effects are far more immediate than bankruptcies and labour reductions, assuming there is no inventory overhang. As there was no inventory overhang in this case, the lack of correlation between import increases and domestic price declines shows that something other than the two-year-old increase in imports was affecting the industry. In proceedings before the USITC, respondents demonstrated the effects of other causes, with which there was a clear correlation with industry performance, but the USITC ignored these proven effects.[2125]

7.848 The United States notes that in the anti-dumping context, an adopted panel report has specifically found that there need not be an immediate temporal link between import trends and declines in an industry's condition to establish a causal link between imports and those declines. [2126] In *Egypt – Steel Rebar*, the Panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry, noting that this argument:

> "… rest[ed] on the artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing country. Such an assumption implicitly rests on the existence of so-called "perfect information" in the

[2119] United States' second written submission, para. 119.
[2120] Japan first written submission, para. 237.
[2121] United States' second written submission, para. 120.
[2122] United States' second written submission, para. 121.
[2123] United States' second written submission, para. 122; See also United States' written reply to Panel question No. 28 at the second substantive meeting
[2124] USITC Report at 62 and 63.
[2125] Japan's written reply to Panel question No. 28 at the second substantive meeting.
[2126] United States' second written submission, para. 123.

> market (i.e., that all actors in the market are instantly aware of all market signals.)" [2127]

7.849 According to the United States, in other words, the Panel concluded that a competent authority need not be expected to find that there is a direct and immediate causal link between imports and downward trends in an industry's condition, as the complainants consistently urge.

7.850 Accordingly, the United States contends, the complainants are mistaken when they argue that a competent authority must provide a "more compelling" causation analysis if there is a time lag between an increase in imports and declines in certain performance factors of the industry. It is simply not the case – as the complainants assume – that a temporal lag between import increases and declines in industry performance factors indicates a lack of "correlation" or coincidence between the import increase and the performance declines. Natural business cycles or other external factors may cause imports to have a direct but delayed impact on one or more of an industry's performance indicia.[2128]

7.851 In light of the foregoing, the United States submits that the Panel need not apply a heightened standard of scrutiny to the USITC's analysis simply because there is a temporal lag between an import increase and declines in certain of the performance factors for an industry. Instead, the sole inquiry for the Panel should be whether the USITC's explanation of the causal link between imports and the declines in the industry's condition is "reasoned", "adequate", and "clear" as established in *US Line – Pipe*.[2129]

7.852 Japan and Brazil also submit that in the case of the steel industry, there are active spot markets. In other words, they submit that sales are made on a "spot" basis rather than a contract basis. They argue that this is particularly true for CCFRS products. Thus, if imports themselves are having an effect on domestic prices, that effect will be seen quickly in changes in domestic industry spot market prices. For the same reason, volume effects also can be seen quickly. Japan and Brazil argue that while inventory is an important consideration, the inventory levels in this case do not suggest extended lingering effects. The inventory levels were approximately one month or less. Thus, according to the European Communities, Japan, Korea, New Zealand and Brazil, the United States argument that imports in 1998 could have lingering adverse effects at the end of 1999 is extremely remote and was certainly not proven by the USITC.[2130] Brazil argues that the data relied upon and arguments made by the United States, whether based on volume or price, do not support the "lingering effects" theory, and certainly not in a "compelling" way. Brazil submits that this is clear from a brief review of the volume and pricing information that was before the USITC and from the simplistic assumptions made by the USITC that are never substantiated.[2131]

7.853 The United States submits that while there is a substantial volume of spot sales in the CCFRS market, the market is characterised by a more substantial volume of sales. The United States submits

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[2127] Panel Report, *Egypt – Steel Rebar*, para. 7.129.

[2128] United States' second written submission, para. 124.

[2129] United States' second written submission, para. 125.

[2130] European Communities' written reply to Panel question No. 28 at the second substantive meeting; Japan's written reply to Panel question No. 86 at the first substantive meeting referring to USITC Report Vol. II at Table FLAT-49; Japan's written reply to Panel question No. 28 at the second substantive meeting; Korea's written reply to Panel question No. 28 at the second substantive meeting; New Zealand's written reply to Panel question No. 28 at the second substantive meeting; Brazil's written reply to Panel question No. 86 at the first substantive meeting; Brazil's written reply to Panel question No. 28 at the second substantive meeting

[2131] Japan's second written submission, para. 12; Brazil's second written submission, para. 69; Brazil's written reply to Panel question No. 27 at the second substantive meeting.

that, more specifically, of the 233 purchasers who reported making all or nearly all of their purchases on a spot or contract basis, 128 (or 54%) reported making all or nearly all of their purchases on a contract basis. Moreover, of the 73 purchasers who reported making substantial amounts of both contract and spot purchases, more than twice as many purchasers reported making the larger percentage of their purchases on a contract basis.[2132] In other words, the carbon flat-rolled market cannot be described as merely a spot market; indeed, the majority of purchase decisions in the market are made on a contract basis. Moreover, given the importance of contract sales in the market, it is incorrect for Brazil to suggest that spot prices are the main determinant of pricing levels in the market. Quite clearly, contractual pricing had an important role in market pricing as well.[2133]

7.854 Brazil further submits that the United States seemingly understands and appreciates the significance of the need to find a causal link between increased imports and serious injury to the domestic industry before a measure may be imposed.[2134] However, according to Brazil, the United States never meets its burden of showing how the USITC actually demonstrated a causal link in this case, nor does the attempt by the United States at rehabilitation of the USITC's "analysis" suffice. Brazil submits that increased imports did not "coincide" with a decline in the relevant injury factors of the domestic industry, and the USITC did not provide a "very compelling analysis" of why causation was still present (i.e., some correlation between increased imports and serious injury).[2135]

7.855 In addition, Japan, Switzerland and Brazil argue, that as a matter of law, there is a limit on any time-frame given the threshold requirement under Article 2.1 and Article XIX of the GATT 1947 that increased imports be recent.[2136] Japan, Korea and Brazil argue that a two-year lag, which they contend existed in this case, fails this requirement.[2137] Korea, Norway and Brazil submit that there was no compelling analysis supporting a lag effect and that, rather, the facts support the opposite conclusion. Similarly, Norway argues that the lag effect that has been put forward by the United States is not substantiated – product by product – by the "compelling analysis of why causation is still present" required by the Appellate Body.[2138] Brazil submits further that the United States authorities have provided what, at most, is only a theoretically possible explanation and that that explanation ignores other crucial evidence.[2139] Similarly, Korea argues that the United States has not demonstrated the "vehicle" or means by which the much earlier increase in imports resulted in the serious injury that occurred much later and the USITC certainly did not document that causal link.[2140] Korea adds that the required "compelling analysis" must be found in the USITC Report itself and cannot be offered by the United States via *ex post facto* justifications.[2141]

7.856 The United States also argues that the complainants routinely present causation arguments that are based primarily on comparisons of imports trends with a limited number of selectively chosen

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[2132] USITC Report, Vol. II, p. FLAT-61.

[2133] United States' written reply to Panel question No. 27 at the second substantive meeting.

[2134] Brazil's second written submission, para. 62.

[2135] Brazil's second written submission, para. 62.

[2136] Japan's written reply to Panel question No. 86 at the first substantive meeting; Switzerland's written reply to Panel question No. 86 at the first substantive meeting; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2137] Japan's written reply to Panel question No. 86 at the first substantive meeting; Japan's second written submission, para. 115; Korea's second written submission, para. 141; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2138] Korea's second written submission, para. 141; Norway's second written submission, para. 134; Brazil's written reply to Panel question No. 81 at the first substantive meeting.

[2139] Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[2140] Korea's written reply to Panel question No. 86 at the first substantive meeting.

[2141] Korea's second written submission, para. 142.

industry performance factors. The United States submits that these arguments are flawed because the Agreement on Safeguards requires not a focus on one or two selected criteria but on all of the relevant criteria bearing on the condition of the industry. The United States submits that, in fact, the failures of these arguments become even more evident when one recognizes that the complainants routinely change the indicia used in their causation arguments from product to product. For example, the United States submits that although the European Communities bases its "causal link" argument for CCFRS on an analysis of such injury factors as the industry's capacity, production, scrap costs, and profitability levels, it bases its "causal link" argument for tin mill products almost exclusively on a comparison of the AUV of imports and domestic merchandise. The United States submits that under the Agreement on Safeguards, it is the totality of industry trends, and their interaction, that must be taken into account when a competent authority performs its analysis in a safeguards action.[2142]

7.857 In counter-response, Brazil argues that for all of the complaints from the United States about the complaining party's use of too narrow a time frame or misleading "selected data" to refute the existence of a causal link, Brazil and the other parties have merely de-constructed the USITC's own analysis. Brazil and Korea submit that they have, in fact, examined the entire period of investigation in making their arguments. It was the USITC that focused on selective data and a narrow period. Brazil argues that, moreover, despite its talk about the need for a broader assessment of the industry and imports, the defence by the United States of the USITC Report focuses on the same few factors as the USITC Report itself: import volume, import price, and domestic industry profits.[2143] Similarly, New Zealand argues that the USITC itself focused on the effect of increased import volumes on domestic prices to the exclusion of other factors. Accordingly, it was this analysis which New Zealand took issue with.[2144]

(a) CCFRS

(i) Coincidence in time

7.858 According to Brazil, the USITC's finding of a "causal link" was inconsistent with the facts and, therefore, violated the requirements of Article 4.2(b) first sentence. Brazil argues that the trends in imports and the industry's performance do not provide the correlation demanded by Article 4.2.[2145]

7.859 Brazil and Japan argue that while the USITC alleges that the increase in imports and the decline in the domestic CCFRS industry performance occurred at the same time, the facts show that any injury by the domestic industry occurred only after imports already began to decline.[2146] More particularly, Brazil and Japan argue that the USITC's crucial assertion that in 1998 a surge in imports caused injury to the domestic industry is unsupported by its own data. According to Japan, Korea and Brazil, the evidence shows that when imports were increasing early in the period, the United States industry was not injured; later in the period, when the United States industry arguably was injured, imports were decreasing.[2147] Japan and Brazil argue that, therefore, there was a complete absence of any correlation in time between the increased imports and injury to the domestic industry. According

[2142] United States' first written submission, para. 450.
[2143] Brazil's second written submission, para. 68; Korea's second written submission, para. 133.
[2144] New Zealand's second written submission, para. 3.100.
[2145] Brazil's first written submission, para. 174.
[2146] Brazil's first written submission, para. 161: Japan's first written submission, para. 231.
[2147] Japan's first written submission, para. 232; Korea's first written submission, paras. 105-108; Brazil's first written submission, para. 162;

to the Appellate Body's jurisprudence, this fails the minimum requirement for establishing a causal link.[2148]

7.860 The European Communities, Korea and New Zealand argue that the USITC Report does not demonstrate in any plausible way, a coincidence of trends between increased imports and serious injury[2149] and that this calls into question whether there was a substantial relationship between serious injury and imports.[2150] The European Communities asserts that in the absence of a coincidence of trends, the Appellate Body has required "very compelling" evidence to demonstrate the existence of a causal link. The European Communities and New Zealand argue that the USITC has provided no such compelling evidence.[2151] In Korea's view, a proper analysis of trends would have revealed that imports declined for more than two and a half years, a decline that accelerated during the most recent 18-month period.[2152]

7.861 New Zealand argues that contrary to the Appellate Body's decision in *Argentina – Footwear (EC)*, which recognized that trends in both the injury factors and imports matter as much as absolute levels, and that it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that are central to a causation analysis and determination, the USITC did not make any serious comparison between the alleged serious injury factor of the inability of domestic production operations to function at a reasonable level of profit and trends in either volume or market share of imports. According to New Zealand, a proper comparison of these factors with the domestic operating margin shows no relationship between them. Indeed, according to New Zealand, they prove the opposite of what the USITC assumed.[2153]

7.862 New Zealand asserts in this regard that there is no relationship between import volumes and any injury resulting from declines in domestic operating margins. New Zealand submits that a 5% rise in import volume of CCFRS, from 1996-1997, coincided with a nearly 2% increase in domestic operating margin in 1997, a 31% rise in imports between 1997 and 1998 coincided with a 4% operating margin in 1998, and an 18% fall in imports between 1998 and 1999, which then stayed at the 1999 level through 2000, coincided with a decline, not an improvement, in the operating margin for 1999 and 2000.[2154] According to New Zealand, the interim (first half year) figures for 2000 and 2001 should have indicated to the USITC a trend showing the same lack of coincidence at the end of the period of investigation – a 40% decrease in imports between interim 2000 and interim 2001 coincided with a decline in operating margin to – 11.5% for the first half of 2001. The same trend indicated that the final 2001 import volume total would be over 30% lower than the 1996 total, when the domestic industry enjoyed an operating margin of 4.3%.[2155] According to New Zealand, an analysis of each individual product within the CCFRS category would produce essentially the same result. Thus, according to New Zealand, the USITC claim that increases in imports were linked to declines in domestic operating margins simply cannot be supported.[2156]

[2148] Brazil's first written submission, para. 161: Japan's first written submission, para. 231.

[2149] European Communities' first written submission, para. 471; Korea's first written submission, para. 104; New Zealand's first written submission, para. 4.123; New Zealand's written reply to Panel question No. 81 at the first substantive meeting.

[2150] Korea's first written submission, para. 104.

[2151] European Communities' first written submission, para. 471; New Zealand's first written submission, para. 4.123.

[2152] Korea's first written submission, para. 105.

[2153] New Zealand' first written submission, para. 4.125.

[2154] New Zealand's first written submission, para. 4.126.

[2155] New Zealand's first written submission, para. 4.127.

[2156] New Zealand's first written submission, para. 4.128.

7.863 Similarly, Brazil argues that imports of CCFRS increased from 10.0% of production in 1996 to only 13.2% of production in 1998, before dropping back to 10.5% of production in 2000, and declining even further in interim 2001. The same trend appears when imports are measured either as a percentage of the open market or as a percentage of apparent domestic consumption. Moreover, the USITC itself characterized 1996 operating income of 4.3% as "reasonable operating profits". Operating income in 1998 was virtually the same at 4.0%. Under the circumstances, it would be difficult to conclude that 1998 performance somehow constituted unreasonable operating profits, let alone serious injury. Perhaps appreciating the point, Brazil submits that the USITC sought to maximize its "sharp decline" theory by focusing on 1997 operating income, which was modestly better than 1996 or 1998 and constituted a record peak performance for the industry.[2157] Other indicia of industry performance can also be used to make the point. Moreover, the import and industry performance trends for the distinct CCFRS products – hot-rolled, plate, cold-rolled, and corrosion resistant – all share the same basic relationship.[2158]

7.864 New Zealand adds that the USITC's analysis of movements in import market share of domestic consumption is limited and misleadingly selective in that it highlights certain periodic increases rather than the overall decreasing trend in import market share. It also fails to examine any coincidence between movements in import market share and alleged injury factors.[2159]

7.865 The United States argues that the USITC established that there was a clear correlation between import trends and declines in the industry's condition. The United States notes that the USITC explicitly took into account factors that affected the competitiveness of domestic and imported merchandise in the US market, the trends in import volumes and market share during the period, the pricing effects of imports, and correlations between these trends and changes in the various indicia of the industry's condition.[2160] After conducting this examination, the USITC correctly found that there was a clear correlation between increases in low-priced imports and the substantial declines in the industry's condition during the period. In particular, after noting that the volume levels of imports remained essentially stable in 1996 and 1997[2161], the USITC found that a "dramatic increase in the volume of imports in 1998 – at the midpoint of the period examined – coincided with sharp declines in the domestic industry's performance and condition, which occurred despite growing US demand." Moreover, the USITC noted that this surge of imports in 1998 entered the market at prices that were "generally significantly lower-priced" than during the first two years of the period and that imports were priced significantly below domestic merchandise, thus leading to declines in domestic prices.[2162]

7.866 The United States argues that, as the USITC correctly noted in its analysis, the record showed that there was a direct correlation between changes in both the volumes and pricing patterns of imports during 1998, 1999 and 2000 and declines in the industry's operating margins in those years.[2163] According to the United States, the 1998 surge in import volume did indeed have a clear and adverse impact on the overall condition of the industry. In 1998 when import volumes increased by 31.3% and import sales values dropped by 8.4% the industry's share of the overall market fell by 2.5 percentage points, its share of the commercial market fell by more than 5 percentage points, its aggregate net sales value dropped by 3.0% (despite an increase in its overall net sales quantity of 0.5%), its average unit sales prices fell by 3.1%, its aggregate gross profits fell by 19.8%, its

[2157] USITC Report, Vol. I, p. 62.
[2158] Brazil's second written submission, para. 65.
[2159] New Zealand's first written submission, para. 4.129.
[2160] USITC Report, pp. 60-62.
[2161] USITC Report, pp. 59-60.
[2162] United States' first written submission, paras. 459-63.
[2163] United States' first written submission, paras. 449, 461-464.

aggregate operating income levels dropped by 36.9%, and its operating income margins fell by 2.1 percentage points from the previous year's level. These declines, argues the United States, occurred in a market in which demand grew by 3.2%.[2164] The United States argues that, moreover, there was a distinct correlation between the volume and price trends of imports and the continuing declines in the industry's condition that occurred in 1999 and 2000. In this regard, even though import volumes "slackened somewhat" in 1999 and 2000 from their 1998 surge level, import volumes in both years remained substantially above 1996 and 1997 levels. Indeed, in the year 2000, import volumes were 13.7% higher than in 1996. Moreover, these elevated levels of imports continued to be sold at prices that were substantially lower than domestic prices, and were, in fact, lower than their 1996 and 1997 levels. As a result of this continued and substantial underselling, imports depressed and suppressed domestic prices in both 1999 and 2000, and caused continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[2165] The United States submits that the USITC record supported these findings. The record showed and the USITC correctly found that there was a direct coincidence between the surge in low-priced imports and declines in the industry's condition in 1998.[2166]

7.867 In counter-response, the European Communities submits that the argument by the United States that it is sufficient to show "a direct correlation between changes in both the volume and pricing patterns of imports during 1998, 1999 and 2000 and declines in the industry's operating margins in those years" implies that it cannot establish increased imports for those years and thus has to rely on pricing patterns.[2167] The European Communities submits that it is quite clear in the Agreement on Safeguards that a competent authority is obliged to establish the existence of a genuine and causal link between increased imports and serious injury.[2168] According to the European Communities, pricing levels may be one of the mechanisms by which such increased imports transmit or cause injury. However, those pricing levels must be linked to increased imports which satisfy the requirements of the Agreement on Safeguards. Pricing levels existing two years after imports have peaked cannot be considered as being linked to the import peak.[2169]

7.868 New Zealand further argues that the United States' argument that the required coincidence can be established between the import increase from 1997-1998 and injury can be easily disposed of. The Agreement on Safeguards requires there to be a coincidence between increased imports and serious injury, not between increased imports and a decline in the industry's condition. There was no evidence of injury in 1998, only a slight drop in operating margins to a still healthy 4%.[2170] Finally, New Zealand argues that the argument that injurious effects from that increase in imports (i.e. between 1997 and 1998) was still occurring in 1999 and some years after that (if accepted as a valid basis for a finding of causation under the Agreement on Safeguards) would denude the coincidence in time requirement of any content. This coincidence did not exist, so the USITC was required to provide a "very compelling analysis" of why causation was still present. It could not and did not, and

[2164] United States' first written submission, para. 470; United States' second written submission, para. 126.

[2165] United States' first written submission, para. 271; United States' second written submission, para. 127.

[2166] United States' first written submission, para. 462.

[2167] European Communities' second written submission, para. 370.

[2168] Article 2.1 refers to imports "in such increased quantities" as to "cause or threaten to cause serious injury" while Article 4.2(a) refers to "increased imports" which have "caused or threatened to cause serious injury" and Article 4.2(b) refers to "the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof".

[2169] European Communities' second written submission, para. 371.

[2170] New Zealand's second written submission, para. 3.98.

indeed provided no evidence whatsoever either of delayed ongoing price effects or of the alleged injury this supposedly led to.[2171]

7.869 The United States illustrates its arguments regarding lag effects in paragraph 7.840 by stating that a number of CCFRS companies entered bankruptcy in 2000 and 2001[2172] even though imports first surged into the market in 1998.[2173] Similarly, the United States argues that the CCFRS industry did not immediately reduce the size of its work force in 1998, when CCFRS imports first surged into the United States market, even though the surge caused substantial market share losses, reduced prices, and reduced profits for the industry.[2174] Instead, the industry first substantially reduced the size of its work-force in 1999, when it became clear that imports would remain at elevated levels in the market and would continue to cause price declines in the market.[2175] [2176]

7.870 Brazil notes[2177] that the USITC stated that:

> "After the initial import surges in 1998, as noted, the volume of imports slackened somewhat but remained above the levels seen in 1996-1997. One way in which the impact of the massive import volume continued to reverberate beyond 1998 was through increased inventories. End-of-period inventories held by importers increased substantially in 1998, as did inventories held by service centers."[2178]

7.871 In light of the foregoing, Korea argues that the USITC's analysis that increased imports in 1998 had lingering effects hinges on the finding, *inter alia*, that importers maintained increased inventories.[2179] Korea argues that the data cited with respect to inventories does not support the USITC's conclusion. Inventory levels turned over rapidly. By way of example, Korea submits that the USITC Report shows inventory levels for all CCFRS inventories held by importers at year-end to range from 7% to 15% of total shipments between 1996 and 2000[2180] – between 0.6 and 1.2 months of inventory over the period. (For many individual CCFRSproducts, inventory levels never exceeded one month.) Thus, according to Korea, in less than three months, the volume effects of imports from the previous or ending quarter would have been depleted. Korea submits that since import volumes after 1998 declined[2181], those import volumes could not have lingering effects at the end of 1999, much less in 2000 or 2001 as suggested by the United States.[2182]

7.872 Similarly, Brazil notes that in 1999, with domestic shipments of CCFRS remaining basically stable compared to 1998, in virtually every product category the mills increased their shipments to

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[2171] New Zealand's second written submission, para. 3.99.
[2172] USITC Report, Table OVERVIEW-11.
[2173] INV-Y-209, Table FLAT-ALT7 (US-33).
[2174] INV-Y-209, Table FLAT-ALT7 (US-33).
[2175] The industry reduced its work force by 4.2% (a total of approximately 4.5 thousand workers) in 1999. INV-Y-209, Table FLAT-ALT7 (US-33). The industry kept its work force at essentially this level in 2000. Ibid.
[2176] United States' second written submission, para. 121.
[2177] Brazil's written reply to Panel question No. 28 at the second substantive meeting.
[2178] Views of the Commission – USITC Report, Vol. I at 60.
[2179] Korea's second written submission, para. 142; see also Japan's second written submission, para. 116.
[2180] USITC Report, Vol. II, Table FLAT-49 at FLAT -43 (Exhibit CC-6).
[2181] Ibid., The bulk, in absolute terms, of the CCFRS inventories held by importers are composed of slab, and slab inventories experienced the greatest growth after 1998 when other flat product inventories declined or stabilized. The "importers" of slab are domestic producers of other flat-rolled products.
[2182] Korea's second written submission, para. 143.

distributors both absolutely and relative to total shipments, indicating that the distributors were not carrying excess inventory as a result of the 1998 surge in imports and liquidating that inventory rather than buying from United States' mills. In addition, the mills themselves were not carrying aberrational levels of inventories as a result of the effect of the import surge in 1998 on the market. As a ratio to shipments, mill inventories of hot-rolled and cold-rolled products at the end of 1999 were below 1997 levels, inventories of slab were almost identical to pre-surge levels both absolutely and relative to shipments, imports of plate were up half a percentage point relative to shipments (because of a decline in consumption), and inventories of coated (corrosion resistant) CCFRS products were up slightly relative to shipments primarily because the industry increased production by over 3.3 million tons while shipments increased only 3.1 million tons. In short, according to Brazil, there is no evidence from distributors that the 1998 surge in CCFRS imports created an inventory problem either at the mills or at those customers that would be most affected by high inventory levels and decrease purchases as a result. In discussing inventories, the USITC also failed to note that the end of period inventories of the domestic CCFRS producers actually declined between 1998 and 1999, going from 10.5 million tons to 9.8 million tons.[2183] [2184]

7.873 Brazil also notes that the importer inventory data which appears in the USITC Report does not support a finding that the 1998 surge in CCFRS imports created a build-up of inventory at the importer level which hung over the market into 1999, 2000 and interim 2001. First, the CCFRS inventory levels of importers at the end of 1998 had only increased from 27 days to 32 days of shipments. By the end of 1999, the inventory levels of finished CCFRS products held by importers was only slightly above the level of 1997 and comparable relative to shipments to 1997 levels. The only apparent lingering inventory problem was a significant increase in inventories of slabs held by importers.[2185] Brazil submits that the only inventory information in the USITC Report or the Views of the Commission on Injury relating to a lingering effect of the 1998 import surge does not support the conclusion that the 1998 surge in imports led to inventory levels that continued to adversely affect the market into 1999 and beyond. While the United States may attempt in response to this question to rehabilitate the lack of facts and reasoning behind the USITC's claim, there is nothing in the record which supports the claim. There is a dearth of information on distributor inventory levels and, as indicated above, what there is does not support the USITC theory. The same is true for producer inventories. As for importer inventories, it is difficult to see how a five day increase in importer inventory levels in the aggregate could continue to have effects into 1999, 2000 and 2001. Furthermore, given that the inventory levels for finished CCFRS products had returned to 1997 levels by the end of 1999, the only possible lingering inventory effect could be from continued high levels of slab inventories. However, the United States has nowhere explained how slab imported and used exclusively to benefit United States producers of CCFRS products could injure those producers importing slabs, much less explained how increased inventories of slabs could adversely affect producers of CCFRS as a whole. Thus, in order to "buy into" the USITC lingering effects theory, the Panel would have to accept that a meager five day increase in inventories reverberated through the market for 30 months and caused serious injury, or that inventories of imported slabs used by the very industry that is claiming to be injured reverberated through the market for 30 months and caused serious injury.[2186]

7.874 The United States argues that the record clearly showed there was, in fact, a substantial increase in the inventory levels of importers during the period. Importer inventories of CCFRS grew from 788 thousand tons in 1997 to 1.322 million tons in 1998, for an increase of nearly 67.7% in that

[2183] Brazil's first written submission, Common Annex B.
[2184] Brazil's written reply to Panel question No. 28 at the second substantive meeting.
[2185] USITC Report, Vol. II at Table FLAT-49.
[2186] Brazil's written reply to Panel question No. 29 at the second substantive meeting.

one year. Similarly, in 1999, importer inventories increased by an additional 8.5% (to 1.434 million tons) from their 1998 levels, and then by an additional 19.2% in 2000 (to 1.709 million tons). Inventory levels increased between interim 2000 and interim 2001 as well. Moreover, the ratio of importers' inventories to their shipment levels also increased significantly during this period. Between 1997 and interim 2001, the ratio of importer inventories of CCFRS to importer shipments increased from 7.3% to 17.5%, more than doubling during this period.[2187] Indeed, the ratio increased during each year of this period, growing from 7.3% in 1997 to 8.6% in 1998, 11.0% in 1999, 15.1% in 2000, and 17.5 percent in 2001. In other words, the United States argues, the level of importers' inventories grew considerably, both on an absolute and a relative level, between 1998 and 2001, thereby placing substantial pressure on importers to reduce their pricing levels to move this merchandise out of inventory.[2188]

7.875 The United States also notes that the USITC did not rely upon importer inventories as a critical aspect of its causation analysis. Although the USITC did clearly note that the increased levels of inventories during the last three years of the period were an indication that imports were having substantial negative effects in the market during the last half of the period of investigation, the USITC did not rely on this fact as the sole, or even the most critical aspect, of its causation analysis for CCFRS products. Second, aside from ignoring completely the service center inventory data cited by the USITC, Brazil has also performed a series of calculations to support its arguments that result in a significant manipulation of the inventory data. For example, Brazil has removed slab inventory data from its calculations – something wholly without basis given that slab was an integral part of the CCFRS product and industry. When these numbers are included, the number of days on hand of inventory held by importers *more than doubles* from 1997 through 2000, from 27 days on hand to 55 days on hand. In other words, Brazil has reduced the number of days on hand for importer inventories by taking out that part of the inventory data that most directly contributed to the increase in importer inventories during the period, thus resulting in a calculation that would obviously and clearly reduce the number of days on hand. Third, Brazil's arguments only reference the importer inventory data from the USITC's report. The United States argues that Brazil completely ignores the fact that the USITC also relied upon the substantial increase in inventories of CCFRS at service centers in its causation discussion. In this regard, the USITC correctly recognized that inventories at service centers showed steady and significant increases throughout the period, going from 2.7 months of supply on hand in 1996, to 3.0 months in 1997, to 3.2 months in 1998 and 1999, to 3.7 months in 2000, to 3.8 months in interim 2001. In absolute terms, these inventories increased by 50 percent over the period of investigation, as shown in the following table:[2189]

Service center inventories of CCFRS (net tons)

1996	**1997**	**1998**	**1999**	**2000**
2.6 million	3.0 million	3.3 million	3.4 million	3.9 million

[2187] USITC Report, Vol. II, Table FLAT-49 (p. FLAT-43). For ease of reference, the United States is relying on the percentages set forth for importer inventories for all carbon flat-rolled products during these periods, which include small volumes of GOES and tin mill products. As can be seen, these percentages would not change more than minimally if the inventories of tin mill and GOES products were excluded.

[2188] United States' written reply to Panel question No. 71 at the second substantive meeting.

[2189] United States' written reply to Panel question No. 71 at the second substantive meeting.

7.876 Brazil and Japan argue that the USITC's difficulty with the timing of events also permeates its discussion of bankruptcies. According to Brazil and Japan, the data shows that the problems facing the domestic steel industry occurred much later in the period when imports were already declining, not during 1998. In particular, according to Brazil and Japan, a causation analysis demands assessment of when the relevant companies declared bankruptcy. Japan and Brazil assert that eight of the ten CCFRS producers declared bankruptcy after 1998. Most declared bankruptcy in 2000 and 2001, including the companies that were the larger of those producers that declared bankruptcy. On a tonnage basis, the firms declaring bankruptcy in 2000 and 2001 constituted nearly 83% of total tonnage of all the CCFRS mills declaring bankruptcy over the period.[2190]

7.877 The United States argues in response that companies who begin experiencing financial difficulties as a result, for example, of lost market share and lowered prices due to import competition would not be expected to immediately seek bankruptcy protection in the first year in which those difficulties occurred. Instead, due to the negative ramifications associated with bankruptcy (e.g., inability to obtain credit, imposition of higher credit costs, reluctance of suppliers to provide materials, and inability to attract other forms of capital), most companies spend several years struggling to regain their competitive footing before eventually entering the bankruptcy process. Indeed, because of the lag between initial declines in financial performance and a company's entry into bankruptcy, the fact that eight of ten companies entered bankruptcy in 2000 and 2001, rather than 1998, shows that there was, indeed, a likely correlation between the surge in low-priced imports that occurred in 1998 and thereafter and these bankruptcies.[2191]

7.878 In illustrating its argument in paragraph 7.846 that an increase in imports can have both an immediate and a delayed impact on one of the industry's performance factors contained**,** the United States submits that, as the USITC noted in its report, the massive surge in CCFRS imports in 1998 directly caused significant declines in the price of domestic and imported merchandise in that year, with AUV of imports falling by 8.4% and those of domestic commercial sales falling by 3.2%.[2192] Although there was a clear and direct impact of this surge on prices in 1998, the surge also had a lagged negative effect on domestic pricing levels in 1999 and 2000, in that elevated levels of low-priced imports were able to continue depressing prices from their already depressed 1998 levels. In this regard, the 1998 imports surge permitted elevated levels of imports in 1999 and 2000 to drive prices down to lower levels than would have occurred in the absence of the 1998 surge.[2193]

(ii) Relevance of volume and price effects of imports

7.879 New Zealand notes that central to the USITC's finding of causation is the claim that increased volumes of imports entered the market "at prices that undercut and depressed and suppressed domestic prices". This allegedly caused serious injury.[2194] Brazil further submits that the USITC used underselling, in part, as a proxy for the proposition that imports led pricing downward in the United States market.[2195] According to New Zealand, the USITC concluded that as a result of the fall in domestic prices from 1998, industry profits turned to losses in 1999, 2000 and the first six months of 2001.[2196] However, New Zealand asserts that the chain of causation is simply not there. Similarly,

[2190] Japan's first written submission, para. 237; Brazil's first written submission, para. 168; see also para. 7.847 , which provides Japan's written reply to Panel question No. 28 at the second substantive meeting.
[2191] United States' first written submission, para. 447.
[2192] INV-Y-209, Table FLAT-ALT7 (US-33) and USITC Report, p. 61.
[2193] United States' second written submission, para. 122.
[2194] New Zealand's first written submission, para. 4.132.
[2195] Brazil's second written submission, para. 72.
[2196] New Zealand's first written submission, para. 4.132.

the European Communities submits that an examination of the data suggests this assertion is barely credible.[2197]

7.880 According to New Zealand, in order to establish that imports drove down domestic prices, it would be necessary to show that imports led domestic prices down and that domestic products lost market share. However, New Zealand submits that neither of these things happened. In fact, what the data shows is that during the relevant period there was an increase in domestic product market share as domestic product prices decreased more sharply than import prices.[2198] New Zealand argues that close attention to the relationship between movements in market share, operating margins, and prices of a kind not found in the USITC's brief analysis – reveals that from interim 2000 – interim 2001, CCFRS domestic prices decreased more sharply than import prices in both percentage terms and absolute terms. New Zealand argues that the same trend is true for the period investigated as a whole.[2199]

7.881 In response, the United States argues that the above argument is premised on a mistaken reading of the record. During the period of investigation, imports of CCFRS undersold domestic merchandise by substantial margins in a substantial majority of possible price comparisons, even during the last year and a half of the period of investigation. More specifically, the public versions of the USITC's quarterly price comparisons for the slab, plate, hot-rolled and one cold-rolled price comparison products all show imports underselling domestic merchandise by substantial margins on the large majority of price comparisons through 2000. Moreover, on one of the two cold-rolled price comparison products, imports routinely undersold the domestic product through the first quarter of 2001. While the domestic product did undersell imports on these products in a majority of instances in interim 2001, this underselling only occurred after the domestic merchandise had pursued the imports downward on prices through the three years prior to that time.[2200] The United States acknowledges that for the remaining cold-rolled price comparison product, the industry undersold imports during 2000 and in interim 2001, usually by small margins. However, it argues that the record also shows that imports of this cold-rolled product nonetheless consistently undersold the domestic industry by substantial margins during 1998 and 1999, when the industry experienced substantial declines in its profitability levels.[2201]

7.882 Moreover, the United States argues that there was a clear correlation between the persistent underselling by imports and declines in the prices and profitability levels of the domestic industry.[2202] The United States argues that the record established that (1) the elasticity of substitution between imports and domestic merchandise was moderate to high; (2) imports routinely undersold the domestic merchandise throughout the period of investigation; (3) import prices fell substantially as imports surged in 1998 in response to the Asian crisis and the acceleration in the financial deterioration of the former republics of the Soviet Union, and generally continued to decline throughout the remainder of the period; (4) even though there was an improvement in import and domestic prices in 2000, imports continued to undersell domestic merchandise by substantial margins on most price comparisons during 2000; (5) domestic price declines followed decreases in import prices during the period; and (6) the moderate to high level of substitutability between imports and

[2197] European Communities' first written submission, para. 472.

[2198] New Zealand's first written submission, para. 4.133; See also Brazil's first written submission, paras. 74, 210-211.

[2199] New Zealand's first written submission, para. 4.134.

[2200] United States' first written submission, para. 475.

[2201] United States' first written submission, para. 476.

[2202] European Communities' first written submission, paras. 472 & 475; New Zealand's first written submission, para. 4.133.

domestic merchandise showed that domestic price declines were due, to a significant degree, to aggressive import underselling. As a result, the industry's revenues and profitability levels declined substantially from 1998 to 2000.[2203]

7.883 With respect to the argument that domestic prices were falling more quickly than import prices during the latter half of the period, the United States argues that this ignores the conditions of competition in the marketplace. According to the United States, it should not be surprising that domestic prices were falling faster than import prices, during a period when domestic producers were attempting to maintain market share by eliminating the substantial price undercutting that imports were engaged in throughout the period of investigation. In such a situation, the United States argues, domestic producers will be forced to cut their prices at a more rapid rate than imports to avoid a loss of additional market share. Given that domestic prices were routinely higher than imports throughout the period, such a decline does not indicate that it was domestic producers who were leading prices downward.[2204]

7.884 With respect to New Zealand's argument that the USITC's price suppression and depression findings are flawed because, "[t]o establish that imports drove down domestic prices, it would be necessary to show that imports led down domestic prices and the domestic product lost market share", the United States argues that that argument ignores basic economic reality. Although it is true that a combination of import and domestic price declines and a loss of domestic market share might be a good indication that imports have suppressed or depressed domestic prices, it is not the case that price-suppression or depression will necessarily be accompanied by market share losses. Instead, according to the United States, significant price-suppression or depression can occur without market share losses if the domestic producers choose to compete closely on price with imports rather than lose market share. In this situation, the domestic producers may maintain a relatively stable market share in the face of aggressive import pricing competition but experience significant pricing and profitability declines. Indeed, this is exactly what occurred in the CCFRS market in 1999 and 2000, after domestic producers realized that they had lost substantial market share in 1998 due to a massive influx of lower-priced imports. By lowering their prices in response to import price declines, the industry was able to limit their loss of market share.[2205]

7.885 In counter-response, New Zealand argues that what the relevant data reveals is domestic producers wresting market share from imports at the same time as domestic prices decreased more sharply than import prices.[2206] The United States' attempt at rebuttal conveniently ignores the facts. For example, by interim 2001 – the most recent period – domestic producers had increased their market share by a full 2.9% compared with interim 2000[2207] – a period when domestic prices fell by 13% as contrasted with 4% for imports. Put another way, by interim 2001 imports held a mere 6.9% of the market, compared with 9.3% in 1997 and 11.8% in 1998 – when no-one is claiming serious injury existed. Also, this interim 2000 – interim 2001 2.9% gain in domestic market share coincided with a sharp (14.9%) decline in domestic demand and a precipitous (40%) fall in imports. According to New Zealand, all of this points to price pressure coming from domestic producers, not imports.[2208]

[2203] United States' first written submission, para. 472.
[2204] United States' first written submission, para. 477.
[2205] United States' first written submission, para. 479.
[2206] New Zealand first written submission, paras. 4.132-4.136.
[2207] The United States cannot rationally discount the significance of a decrease of this magnitude in import market share while constantly stressing the significance of the 2.5% increase in market share from 1997 to 1998.
[2208] New Zealand's second written submission, para. 3.104.

7.886 Even assuming prices of imports to be lower than prices of domestically produced steel, the European Communities submits that low priced imports could only force down prices if imports had a role in setting prices on the United States market. However, other than an increase to 11.8% in 1998, imports did not have, during the investigation period, more than 10% of market share. Market share in 1999 and 2000, when the domestic industry allegedly suffered serious injury, was very close to that in 1996 and 1997 (9.04%, 9.32%, 9.57% and 9.54%). However, according to the European Communities, there is no suggestion that imports had a significant effect on domestic prices in 1996 and 1997. The European Communities further argues that the USITC does not explain how pricing on 10% of the products comprising the United States domestic market of CCFRS could have had more than a marginal effect on pricing on the overall market.[2209]

7.887 In response, the United States argues that in a relatively price-sensitive market like the CCFRS market, even a relatively small volume of low-priced merchandise can have a dramatic impact on pricing throughout the market. Accordingly, the fact that imports did not occupy a predominant share of the market during the period of investigation does not, by itself, indicate that imports could not have a significant effect on domestic prices.[2210] The United States argues that the complainants appear to recognize that a relatively small volume of merchandise can have a significant effect on prices in the CCFRS market since they argue that the domestic minimills were primarily responsible for price declines in the CCFRS market.[2211] The United States argues that, on a year-to-year basis, minimills shipped a substantially smaller volume of CCFRS to the commercial market than is accounted for by imports.[2212]

7.888 The United States also argues that a small volume of imports could have a substantial impact on prices in a market if the imports are substitutable for domestic merchandise, if they enter the market in increasing volumes, if they begin underselling the domestic merchandise to gain market share, and if they continue to maintain underselling margins in comparison domestic prices as domestic prices decline to meet import price competition. A similar set of circumstances occurred in the domestic CCFRS market between 1998 and 2001 and resulted in price declines in the market during those years. However, the volumes of imports of each of the ten products subject to the steel safeguards measures, including imports of CCFRS, cannot be termed "relatively low".[2213]

7.889 Korea states that it does not agree that imports can drive down prices through underselling *per se*. According to Korea, it is incorrect to presume that underselling, standing alone, demonstrates that imports drove down domestic prices. First, underselling only measures relative prices and demonstrates nothing *per se* about any effects on other prices. Second, changes in market prices are produced by price leaders. Therefore, the question of how imports drive down prices depends on more than just relative prices levels. Korea asserts that it is also noteworthy that the USITC relies only on hot-rolled prices and cold-rolled prices to show that imports drove down prices. However, the USITC staff specifically found that the economic model showed that cold-rolled imports did not have any effect on domestic cold-rolled prices. Moreover, the USITC does not establish that these prices are even representative of trends for slab, plate, or corrosion-resistant steel.[2214] Similarly, Japan

[2209] European Communities' first written submission, para. 472.
[2210] United States' first written submission, para. 473.
[2211] The United States refers in this regard to the European Communities first written submission, paras. 473-475.
[2212] United States' first written submission, para. 474.
[2213] United States' written reply to Panel Question 43 at the second substantive meeting.
[2214] Korea's written reply to Panel question No. 84 at the first substantive meeting

and Brazil argue that the United States methodology places far too much emphasis on underselling alone. They argue that the fact of underselling or overselling alone is of limited relevance.[2215]

7.890 In response, the United States argues that the United States does not agree with complainants that the USITC places too much emphasis on the existence of underselling when assessing whether imports have had an impact on domestic prices during the period of investigation. According to the United States, like the laws of supply and demand, it is an elementary concept of economic theory that purchasers are more likely to shift purchases between suppliers on the basis of price, if the products offered by those suppliers have similar characteristics and share similar conditions of sale.[2216] In other words, as an economist would say, when the elasticity of substitution between two products is reasonably high, a purchaser is likely to make his purchase decision on the basis of which supplier offers the lowest price.[2217] The United States submits that, accordingly, when there is a moderate to high elasticity of substitution between imports and domestic product (which is the case in the CCFRS market), the existence of underselling by imports is a strong indicator that purchasers are likely to shift purchases to imports from domestic producers, and that volume shifts are the result of low-priced import competition. Or, if imports and domestic merchandise are reasonably interchangeable, the existence of underselling is a good indicator that price declines in the market are the result of import price competition. Given these basic economic principles, the United States believes that the USITC places an appropriate amount of weight on underselling in its analysis.[2218]

7.891 Korea also submits that the USITC did not explain or justify its conclusion that imports led price declines.[2219] In this regard, Korea argues[2220] that a review of the USITC evidence cited on this issue does not support the USITC's conclusions that imports led price declines. First, the USITC refers to AUV data comparisons between imports and domestic prices.[2221] That data contains no volumes for either imports or domestic sales. There is also no analysis of how the AUV data establish that import prices led domestic prices down. In other words, the USITC does not describe the method by which lower import prices led domestic prices down. Finally, the USITC acknowledges the limitations with AUV data and state that it does not place "undue weight" on this data because AUVs may be affected by product mix.[2222] Second, the USITC relies on pricing data for hot-rolled and cold-rolled steel only (no other flat products). The non-confidential data in the charts referred to show domestic prices and volumes, but there is no import data whatsoever.[2223] It is not apparent, therefore, what the relationship is between imports and domestic prices during any particular quarter nor how this data establishes that imports of hot-rolled or cold-rolled "led down" prices of hot-rolled or cold-rolled. The USITC also fails to explain at all how the comparisons of hot-rolled and cold-rolled prices have impacted on "flat-rolled" domestic prices. Third, in terms of cold-rolled prices, the

[2215] Japan's written reply to Panel question No. 84 at the first substantive meeting; Brazil's written reply to Panel question No. 84 at the first substantive meeting.

[2216] For instance, USITC Report, pp. FLAT-60, footnote 42.

[2217] United States' second written submission, para. 142.

[2218] United States' second written submission, para. 143.

[2219] Korea's second written submission, para. 148.

[2220] Korea's second written submission, para. 147.

[2221] USITC Report, Vol. I, p. 61 (Exhibit CC-6).

[2222] USITC Report, Vol. I, p. 61, footnote 279 (Exhibit CC-6).

[2223] USITC Report, Vol. I, pp. 61 and 62 (Exhibit CC-6), citing to INV-Y-212 at Tables FLAT-ALT-69-71 (Korea Exhibit 9, "K-9"). While the price comparisons for products referred to appear in the Staff Report, that data is shown only for domestic and non-NAFTA imports. (USITC Report, Vol. II, Tables FLAT-68-71, pp. FLAT-65-68 (Exhibit CC-6)). But the USITC did not perform its causation analysis on non-NAFTA imports alone (USITC Report, Vol. I, pp. 59-66 (Exhibit CC-6)), so this data cannot support the USITC's conclusions with respect to "imports."

USITC refers to "dips" in import prices[2224] (no references to the periods) and historically large sales volumes[2225] (no reference to the period) and states that these were "followed by" sharp cuts in domestic prices[2226] (again, no reference to any periods). The import data is treated confidentially so it is not available to fix these relevant time periods. In other words, the USITC relies on its own assertions as to the relationship between import prices and domestic prices, but offers no evidence of an actual causal relationship between import prices and domestic prices. Moreover, the economic memoranda provided by both the petitioners and respondents to the USITC demonstrated that cold-rolled imports had no significant effect on domestic cold-rolled prices.[2227]

7.892 For the United States' response to the arguments summarized in paragraph 7.891, see paragraphs 7.881-7.890 above.

7.893 Korea also argues that in the case of CCFRS products, there was an alternative explanation of the price declines which the USITC did not adequately consider.[2228] After all, imports of CCFRS declined both absolutely and relative to domestic production between 1998-2001, while expanded minimill capacity gained substantial market share at the expense of both integrated producers on the one hand and imports on the other. This evidence suggests that price levels in the market declined as a result of minimills pricing as minimills expanded capacity and shipments while taking advantage of their increasing cost advantage over integrated producers.[2229] The "price effects" which impacted domestic producers were the price effects caused by the increased capacity and shipments – i.e., volumes – of minimills.[2230] [2231]

7.894 Similarly, New Zealand submits that, in this case, the price of imports did not play a critical or important role in the decline of industry performance indicators. "Other factors" internal to the domestic market were at work. As the USITC acknowledged, intra-industry competition by minimills, greatly increased domestic capacity, and declining demand were all exerting downward pressure on domestic prices. However, it failed to draw the obvious conclusion that there was, therefore, no genuine and substantial relationship of cause and effect between increased imports and serious injury to the domestic industry.[2232]

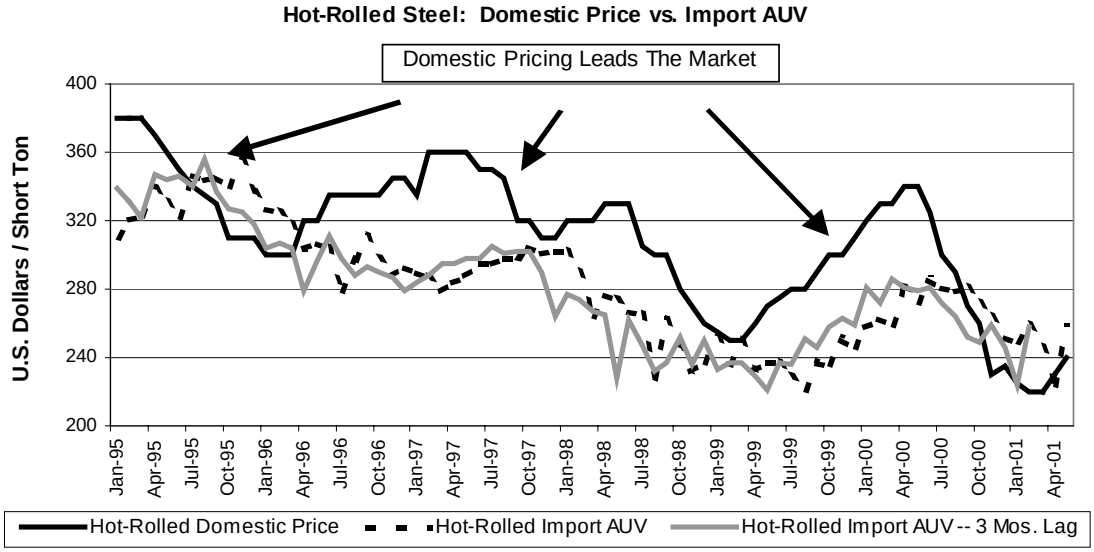
7.895 Japan and Brazil submit that, remarkably, given the emphasis placed by the USITC on price as an indicator of the industry's health[2233], it ignored the substantial amount of pricing data it was provided that demonstrated the relationships between domestic and import prices. Brazil further submits that in a steel market where spot sales are a healthy portion of overall shipments, and comprehensive data reflecting spot prices are readily available, the USITC did not pursue the obvious. Despite the fact that it had monthly spot transaction prices for plate, hot-rolled, cold-rolled and coated products, and actually graphed that data in its report[2234], it saw no reason to compare that data with

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[2224] USITC Report, Vol. I, p. 62 (Exhibit CC-6).
[2225] USITC Report, Vol. I, p. 62 (Exhibit CC-6).
[2226] USITC Report, Vol. I, p. 62 (Exhibit CC-6).
[2227] Assessment of Econometric Submissions on Flat-Rolled Steel, EC-Y-042 – Response to USTR Request for Additional Information (22 October 2001), p. 1 (Exhibit CC-10).
[2228] Korea's second written submission, para. 157-184.
[2229] Korea's second written submission, paras. 169-176.
[2230] Korea's discussion of the definition of a "market" in its written reply to Panel question No. 141 at the first substantive meeting with the parties, and, the discussion of price effects in Korea's second written submission.
[2231] Korea's written reply to Panel question No. 29 at the second substantive meeting.
[2232] New Zealand's written reply to Panel question No. 29 at the second substantive meeting.
[2233] USITC Report at 62.
[2234] USITC Report Vol. II at OVERVIEW-58.

import unit values. According to Brazil, if anything, a comparison of that data refutes the USITC and United States arguments with respect to price. Based on this more comprehensive data, it is apparent that domestic prices, not import prices, led the market.[2235] [2236] Instead, according to Japan and Brazil, the USITC focused on quarterly price series and simplistic assessments of underselling, not all of which revealed underselling by imports. Both are poor determinants of causation, particularly in light of the extensive and demonstrably reliable monthly pricing data available that showed how relative prices change over time, and whether domestic or import prices lead that trend.[2237]

7.896 Japan relies upon the charts below to argue that there is clear evidence that domestic pricing led import pricing. Building in a three-month lag for import pricing to take into account shipment time, domestic price decreases and increases tend to commence before similar movement in import pricing. Japan submits that this data was corroborated and was before the USITC.[2238] Japan argues that, yet, the USITC largely ignored this data in lieu of its "traditional" and overly simplistic approach.[2239]



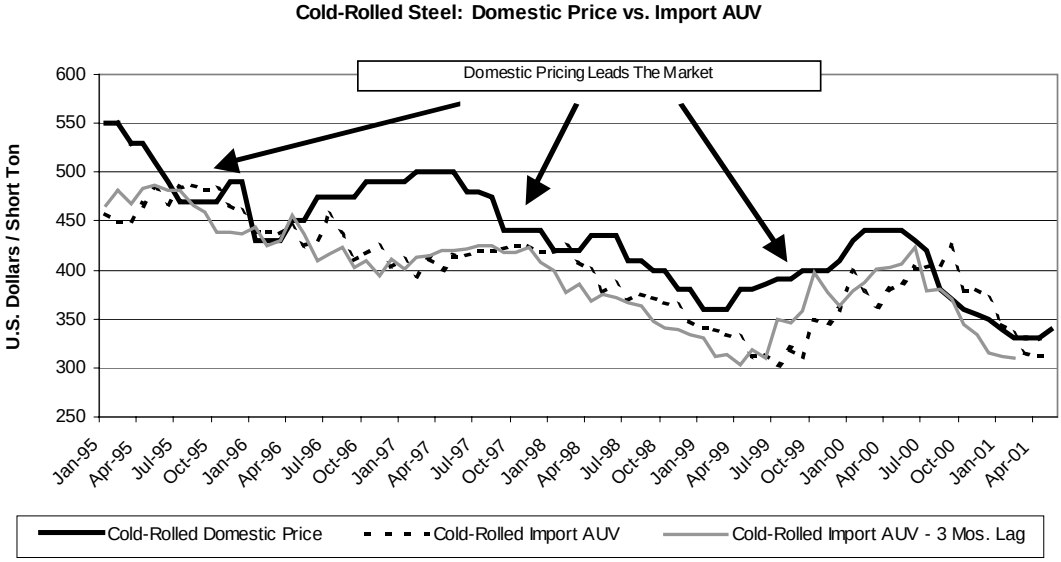
[2235] Japan's written reply to Panel question No. 84 at the first substantive meeting includes such a comparison.

[2236] Brazil's second written submission, para. 73.

[2237] Japan's second written submission, para. 121; Brazil's second written submission, para. 72.

[2238] Exhibits. CC-52 and CC-53

[2239] Japan's written reply to Panel question No. 84 at the first substantive meeting.



7.897 In response, the United States submits that Japan mistakenly tries to minimize the importance of consistent underselling by imports in the CCFRS market by asserting that domestic producers were the price leaders in the CCFRS market.[2240] However, an examination of the charts used by Japan to support this argument shows that the argument has no foundation in fact.[2241] Those charts show clearly that domestic producers attempted to initiate price increases for cold-rolled and hot-rolled steel at three points in the period of investigation but that domestic prices collapsed on each occasion due to persistent underselling by imports throughout the period of investigation.[2242] In sum, the charts relied on by Japan actually show that import underselling, not alleged domestic price leadership, caused the broad price declines in the CCFRS market during the period of investigation.[2243]

7.898 Japan and Brazil argue that the greatest flaw in the USITC's pricing discussion is the fact that the margins of underselling in 1997 were about the same as 1999 and 2000.[2244] In response, the United States asserts that Brazil appears to suggest that this indicates that imports were simply maintaining an appropriate price level below domestic producers in the market. The United States submits that what Brazil fails to acknowledge is that two critical developments occurred in the market in 1998 that dramatically affected conditions of competition in the market and resulted in the depression of domestic CCFRS prices. First, there was a sudden and massive surge of imports in that year as a result of the Asian financial crisis and the continued deterioration in the steel market in the former Soviet Union. Second, as a result of this surge, import prices declined precipitously during that year and continued to decline and remain at low levels through the end of June 2001. While it may be true, as Brazil asserts, that imports maintained a substantial and consistent margin of underselling during the last four years of the period, the record also established that the significant increase in the volume of increasingly low-priced imports in 1998 placed substantial downward pressure on prices during the last three and a half years of the period of investigation.[2245]

[2240] Japan's written reply to Panel question No. 84 at the first substantive meeting.
[2241] Japan's written reply to Panel question No. 84 at the first substantive meeting.
[2242] Japan's written reply to Panel question No. 84 at the first substantive meeting.
[2243] United States' second written submission, para. 144.
[2244] Japan's second written submission, para. 134; Brazil's first written submission, para. 211.
[2245] United States' first written submission, para. 478.

7.899 With respect to the volume effects of imports, Brazil submits that the United States repeats the "analysis" of the USITC, which focuses first on the increase year of 1998, then claims that import volumes in 1999 and 2000 "remained substantially higher" than in 1996 and 1997.[2246] According to Brazil, this statement is misleading. For CCFRS, imports were higher in 1999 and 2000 than in 1996 and 1997. The increase in absolute terms between the two periods was 11%.[2247] However, in terms of import volume relative to domestic production, over the 1996-1997 period, CCFRS imports averaged 10.1% of domestic production. Over the 1999-2000 period, CCFRS imports average 10.6% of domestic production.[2248] Brazil submits that to term this 0.5% increase as "substantially higher" is disingenuous. Indeed, when broken down into the distinct CCFRS products, the majority of products reflect no increase relative to domestic production.[2249]

7.900 Brazil contends that when imports remain a stable part of the overall market, it makes little sense from a volume perspective to blame increased imports for the industry's injury. However, Brazil submits that this appears to be the USITC's analysis – a simple assumption that if imports increase, they must be a cause of serious of injury to the domestic industry. According to Brazil, if the USITC was truly after volume effects, however, those effects can be seen in the steel market rather easily using more appropriate data. For example, in response to the lingering effects theory, there was no substantial build up in inventory levels that could have captured the increased import volume in 1998 and delayed its effects on the market until 1999 and 2000. A review of importers' inventories for each of the distinct CCFRS products reflects levels that were approximately one month or less throughout the period of investigation. The USITC reported that for CCFRS, inventory levels at year end ranged from 7% to 15% of total shipments. This translates into between 0.6 and 1.2 months of inventory.[2250] For many individual products, the inventory levels never exceeded one month.[2251] This means the increased imports in 1998 could not have lingering volume effects in 1999, much less 2000 or 2001.[2252]

7.901 For a discussion of the United States' response to the arguments summarized in paragraphs 7.896-7.900, see paragraphs 7.874 and 7.875.

7.902 Similarly to Brazil, Korea argues that it is axiomatic that the Agreement on Safeguards concerns serious injury caused by increasing import volumes. The import volumes must be increasing and the volumes must be the cause of serious injury. However, the USITC did not rely on increasing volumes of imports after 1998 as the cause of domestic price declines. On the contrary, the USITC acknowledged that import volumes were declining. The USITC cites the price differential itself and the pricing trends of imports as the cause of the industry's injury and concluding that:[2253] "Although the volume of imports was lower in 1999 and 2000, prices of those imports continued to decline".[2254]

[2246] United States' first written submission at para. 463.

[2247] This is based on a combined import tonnage of CCFRS in 1996 and 1997 of 37.7 million tons, versus a combine import tonnage of CCFRS in 1999 and 2000 of 41.7 million tons. See also Brazil's first written submission, Common Annex A

[2248] USITC Report Vol. II at FLAT 8-11, 13, 16-19, 21; See also Common ANNEX A.

[2249] Brazil's second written submission, para. 70; *see also* Japan's second written submission, para. 117.

[2250] USITC Report Vol. II at Table FLAT-49.

[2251] Ibid.

[2252] Brazil's second written submission, para. 71.

[2253] The USITC also relied on increased inventory levels which is discussed *infra*.

[2254] USITC Report, Vol. I, p. 62 (Exhibit CC-6).

Therefore, the United States failed to demonstrate that increased volume of imports led to domestic price declines.[2255]

7.903 In response, the United States submits that basic economic pricing theory indicates that prices can decline as a result of a number of different market conditions, even in the absence of underselling.[2256] For example, it is a basic principle of economic theory that prices can be affected by variations in supply and demand.[2257] In this regard, prices can be driven down when there is increased supply of the product in the market where demand is stable. Similarly, prices can be driven down in a market of stable supply if demand declines. In essence, basic economic theory holds that, when supply of a product outpaces demand (such as a situation where the supply of imports increases substantially in a slowly growing market), prices are likely to be affected by that change in supply.[2258]

7.904 According to the United States, the record showed that an increase in import supply had a substantial impact on pricing in the CCFRS market. Between 1996 and 2000, the market for CCFRS exhibited moderate but steady growth in demand on a year-to-year basis.[2259] On an overall level, the domestic industry's production levels also grew at a moderate and consistent rate between 1996 and 2000.[2260] Accordingly, as a matter of basic economic theory, if imports had grown at a similar consistent but moderate rate, prices in the market should have remained relatively stable during this period. The United States submits that, in fact, that is what happened in the CCFRS market between 1996 and 1997, when domestic production and imports both grew at rates that kept pace with the growth in demand, thus allowing the price of domestic and imported products to remain somewhat stable.[2261] According to the United States, in 1998, however, the stability of this supply and demand equation was fractured by a massive surge of imports into the CCFRS market. In that year, although domestic production grew at a slightly slower rate than demand in the United States market (which itself grew by 3.2%), import volume increased by an extraordinary 31.3%, thus outpacing the growth in demand in 1998 by 28.1 percentage points.[2262] Needless to say, this import surge was accompanied by a decline in CCFRS prices, with the average unit value of imports declining by 8.4% in that one year alone.[2263] At the same time, the AUV of domestic commercial sales fell by 3.1%[2264], even though demand had grown in that year. In essence, in 1998, the massive increase in the supply of imports resulted in a clear and serious depression of prices in the market, a set of circumstances that is again consistent with basic economic price theory.[2265]

7.905 According to Japan, the problem is that the United States does not appear to grasp that various factors cannot be analysed one by one, but must be viewed together to understand how they interact with one another. This is particularly true in this case. In the United States steel market, from 1999 to 2001, several factors converged: demand was stagnant or falling; domestic supply was increasing because of the dramatic increases in domestic capacity; and foreign supply was stable or falling. With

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[2255] Korea's second written submission, para. 146.

[2256] For instance, the European Communities', Japan's and New Zealand's, written replies to Panel question No. 84 at the first substantive meeting.

[2257] New Zealand's written reply to Panel question No. 84 the first substantive meeting.

[2258] United States' second written submission, para. 138.

[2259] INV-Y-209, Table FLAT-ALT7 (US-33).

[2260] INV-Y-209, Table FLAT-ALT7 (US-33).

[2261] INV-Y-209, Table FLAT-ALT7 (US-33). United States' second written submission, para.140.

[2262] INV-Y-209, Table FLAT-ALT7 (US-33).

[2263] INV-Y-209, Table FLAT-ALT7 (US-33).

[2264] USITC Report, p. 61. Although these percentages are derived using aggregate annual values, the product-specific pricing charts show similar declines. USITC Report, Tables FLAT-66-FLAT-71 & FLAT-73-74.

[2265] United States' second written submission, para. 141.

domestic firms capturing more and more of a declining market, it simply makes no economic sense to exonerate the growing domestic capacity and blame the stable or declining imports. Yet, that is precisely what the USITC did in this case.[2266]

7.906 Japan submits that, indeed, appropriate analysis would consider capacity relative to demand particularly in light of the already existing anti-dumping and countervailing duties orders or investigations that affected the competitive dynamics in the market for CCFRS steel products. The USITC largely ignored the role of anti-dumping and countervailing duties orders and investigations on hot-rolled and cold-rolled steel imports during this key period, and thereby failed to understand the role of expanding domestic capacity.[2267] According to Japan, given these economic forces, it is not at all surprising that domestic pricing generally led import pricing. The United States' claim to the contrary is wrong[2268], and relies on overly simplistic analysis of quarterly AUV, rather than monthly prices.[2269]

7.907 Similarly, the European Communities recalls that a competent authority is obliged to demonstrate, on the basis of objective evidence, a causal link between increased imports and serious injury. According to the European Communities, it is not enough to find a link between imports at low prices and serious injury. Nor is it enough to find a causal link between imports which have increased over a five-year period and serious injury. A competent authority must demonstrate a causal link between imports which have been sharp enough, sudden enough, recent enough and substantial enough and serious injury. Price will often be relevant to explain how the increased volume of imports caused serious injury. The European Communities further submits that price developments are indeed perhaps the most vital factor in determining the effect of increased imports on the domestic industry. This is because one of the most important indicators of injury is financial performance, which depends on the relationship between price and production costs. An analysis of price developments is therefore always important or critical. Having looked at price developments, the most vital issue is determining what is the cause of such developments.[2270]

7.908 The European Communities further submits that all other things being equal, if imports are sold at a higher price than domestic products, it is unlikely that such imports are responsible for any serious injury. Even if import prices are below domestic prices, it must also be shown that imports are the price leader – thus, where imports are say 10% of the market, the question must be asked if imports are capable of setting prices. That is, did imports force the domestic price down, resulting in a poor financial performance by the domestic industry? The USITC has generally failed to demonstrate, on the basis of objective evidence, through an analysis of underselling and market dynamics, the existence of a causal link.[2271]

7.909 Switzerland argues that, in making attacks on the pricing levels of imports that occurred in 1998 and after, the United States forgets that the principal focus of the safeguards investigation are the increased import quantities. While pricing is relevant to the overall analysis, it is not a surrogate for increased import quantities. If there are no increased imports, there cannot be a correlation because the Agreement on Safeguards, and even the United States' safeguards statute are volume driven

[2266] Japan's second written submission, para. 135.
[2267] Japan's second written submission, para. 136.
[2268] United States' first written submission, para. 494. Japan submits that the USITC had readily available monthly data to better understand pricing dynamics, but instead ignored that data in favor of the much more crude quarterly average unit value data that is uses in other cases. Japan's second written submission, para. 137.
[2269] Japan's second written submission, paras. 137 and 217.
[2270] European Communities' written reply to Panel Question 29 at the second substantive meeting.
[2271] European Communities' written reply to Panel Question 29 at the second substantive meeting.

mechanisms. Article 4.2 of the Agreement on Safeguards explicitly focuses on the quantity of imports, it does not mention anywhere the question of price.[2272]

(iii) Increased imports and industry's performance

7.910 Japan and Brazil argue with regard to CCFRS that there was no "dramatic increase" in imports in 1998.[2273] Japan and Brazil assert that although imports increased somewhat in 1998, imports fell in both 1999 and 2000. At the time of the alleged serious injury, imports were decreasing, not increasing.[2274] Japan adds that by 1999 and 2000, however, imports were being increasingly shut out of the United States market by anti-dumping and countervailing duty cases.[2275] According to Brazil, the same trends in import levels and import share of production appeared in relation to individual CCFRS steel products.[2276] Brazil further argues that when the domestic industry began to experience difficulties in 1999 and 2000, there were no increasing imports to blame.[2277]

7.911 Japan and Brazil also argue that the USITC's "sharp decline" in the domestic industry's performance in 1998 when imports peaked is also a fallacy. According to Japan and Brazil, whether considered as a single aggregate like product in the case of the USITC's analysis, or as individual like products, the domestic industry's performance in 1998 was stable and did not reflect any serious injury.[2278] Japan and Brazil note in this regard that operating profits in 1996, described by the USITC as "reasonable operating profits", were at virtually the same level in 1998. Japan and Brazil surmise that the USITC sought to maximize its "sharp decline" theory by focusing on 1997 operating income, which was modestly better than 1996 or 1998 and constituted a record peak performance for the industry.[2279] Japan and Brazil also argue that other indicia of domestic industry health, such as improving production and capacity expansions, refute the USITC's rush to find a causal link and serious injury based on 1998 trends.[2280] Japan and Brazil argue that the same flaws in the USITC's logic are demonstrated with respect to the individual CCFRS. In particular, Japan and Brazil argue that the 1998 results were often better than 1996.[2281]

7.912 Similarly, China argues that given that the market share of the domestic industry was 91% in 1996 and 93.1% in interim 2001, that net sales increased by 10.9%, and that domestic shipments increased by 7.2% from 1996 to 2000, it is questionable whether imports really caused injury.[2282] China argues that one would normally expect increased imports to cause injury by shaking the domestic industry's position on the market, which results in diminishing sales and revenues for the domestic industry. In China's view, it is, therefore, difficult to confirm any coincidence between imports and the bad performance of the domestic industry.[2283]

7.913 Japan argues that the only year in which imports had any material increase in market share was 1998 and even then, the increase was a mere 3.0 percentage points.[2284] There simply was no

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[2272] Switzerland's second written submission, para. 97.
[2273] Japan's first written submission, para. 233; Brazil's first written submission, para. 163;
[2274] Japan's first written submission, para. 240; Brazil's first written submission, para. 169.
[2275] Japan's first written submission, paras. 239 and 242.
[2276] Brazil's first written submission, paras. 170 and 171.
[2277] Brazil's first written submission, para. 172.
[2278] Japan's first written submission, para. 234; Brazils first written submission, para. 164.
[2279] Japan's first written submission, para. 235; Brazil's first written submission, para. 165.
[2280] Japan's first written submission, para. 236; Brazil's first written submission, para. 166.
[2281] Japan's first written submission, para. 238; Brazil's first written submission, para. 167.
[2282] China's first written submission, para. 378.
[2283] China's first written submission, para. 379.
[2284] USITC Report, Vol. II at Tables FLAT 8-11 and 13, and the complainants' Common ANNEX A.

"continued influx of import volumes" to cause any serious injury.[2285] Import volumes were at stable, historical levels.[2286] According to Japan, the United States highlights the fact that 1998 was a worse year than 1997.[2287] Given that 1997 was a peak year, it is obvious that 1998 measures would be down from 1997. Given the United States' insistence that Japan consider the whole period in context (which Japan does), the USITC should have, but did not, consider 1998 performance relative to 1996 – the best measure of the "pre-increase" period. Japan submits that, moreover, the test is not whether some indicia declined in 1998, but rather whether over the full period, the import increases correlate with declines in industry performance. The comparison between any two years is incomplete. Over the full period, the disconnect becomes quite apparent. In 1999 and 2000, imports levels were not substantially above prior years. Again, the United States argument is not about the volume and market share of imports, but rests squarely on its flawed conclusions with respect to import price levels.[2288]

7.914 Similarly, New Zealand argues that the United States makes no mention of changes in import market share throughout this period, and the only reference to 2001 – when, the United States says, imports from some years previously were still causing "suppression of prices"[2289] – conveniently omits any mention of the precipitous drop in import volumes at this point. According to New Zealand, these were down 40% on interim 2000 levels and over 30% on 1996 levels, a year when the industry nevertheless enjoyed an operating margin of 4.3%.[2290] [2291]

7.915 The United States notes that there was a demonstrable contemporaneous coincidence between increases in CCFRS imports and any declines in the industry's condition. The record clearly showed that the import surge in 1998 had a direct and negative impact on the market share, pricing, and profitability of the CCFRS industry in that same year. More specifically, when import volumes increased by 31.3% and import unit sales values dropped by 8.4% in 1998, the industry's share of the overall market fell by 2.5 percentage points, its aggregate net sales value dropped by 3.0% (despite an increase in its overall net sales quantity of 0.5%), its average unit sales prices fell by 3.2%, its aggregate gross profits fell by 19.8%, its aggregate operating income levels dropped by 36.9%, and its operating income margins fell by 2.1 percentage points. These declines occurred in a market in which demand grew by 3.2 percent. Given these trends, it is difficult to understand how the complainants could now argue that there were no declines in the industry's overall condition that were directly correlated to the 1998 surge.[2292]

7.916 The United States also argues that the record showed that there was also a clear correlation between the volume and price trends of imports and the continuing declines in the industry's condition in 1999 and 2000. Even though import volumes "slackened somewhat" in 1999 and 2000 from their 1998 surge level, import volumes in both years remained higher than their 1996 and 1997 levels, with import levels being 13.7 percent higher in 2000 than 1996. These elevated levels of imports in 1999 and 2000 continued to be sold at prices that were substantially lower than domestic prices, and were, in fact, lower than their 1996 and 1997 levels. As a result of this continued and substantial underselling, imports depressed and suppressed domestic prices in both 1999 and 2000, and caused

[2285] United States First Submission at para. 464.
[2286] Japan's second written submission, para. 119.
[2287] United States First Submission at para. 464.
[2288] Japan's second written submission, para. 120.
[2289] United States First Submission at para. 464.
[2290] New Zealand's first written submission, para. 4.127.
[2291] New Zealand's second written submission, para. 3.97.
[2292] United States' second written submission, para. 126.

continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[2293]

7.917 In addition, the United States asserts that the contention that the record showed that the industry was not injured by imports between 1996 and 2000, citing the fact that the industry's net commercial sales, domestic shipment, and production levels all grew during that period, is flawed in two respects. The United States submits, first, that while it may be true that the industry's sales, shipment, and production levels did, in fact, increase during the period between 1996 and 2000, the record reflects that these increases essentially tracked the growth in demand for CCFRS during the period from 1996 to 2000. More importantly, the record shows that the industry was only able to maintain its production, shipment and sales levels between 1999 and 2000 by cutting prices dramatically in response to the extraordinary declines in import pricing that began in 1998 and continued thereafter. As a result of this competitive strategy, the industry's pricing levels and operating income levels dropped precipitously during the period from 1996 to 2000. Accordingly, the industry confronted the Hobson's choice of either maintaining its market share at the expense of lower prices and profit margins or sacrificing sales, reducing production, and closing facilities.[2294]

(iv) Relevance of like product analysis for CCFRS

7.918 Korea notes that the USITC seems to conclude that there was coincidence of trends between the performance of the industry and the increase of imports and the decline of prices with respect to each type of CCFRS as well as for the CCFRS overall. However, in Korea's view, the analysis of trends in imports, prices and industry performance for each of the CCFRSdoes not support this conclusion by the USITC.[2295] According to Korea, in the latter part of the period of investigation, imports declined for each of the products.[2296] Further, Korea submits that the United States could not have shown a "genuine and substantial" causal relationship between imports and injury because the United States looked at an "industry" which was actually various industries in the case of CCFRS and welded pipe.[2297]

7.919 The United States argues that the Panel may not find that the USITC's causation analysis is flawed solely because the USITC's like product and industry analysis is flawed.[2298] First[2299], the Appellate Body has stated that a reviewing Panel should assume that an authority's findings on like product and industry are proper when reviewing that authority's causation findings.[2300] In its *US – Lamb* report, the Appellate Body made clear that it will review the various aspects of the USITC's safeguards decision (i.e., increased imports, injury, causation) as though the authority's decisions on earlier issues had been correct. More specifically, the Appellate Body noted that:

> "[N]otwithstanding the findings we have made previously in this appeal [invalidating the USITC's industry definition for example], we must *assume* in our examination:

[2293] United States' second written submission, para. 127.
[2294] United States' first written submission, para. 468.
[2295] Korea's first written submission, para. 109.
[2296] Korea's first written submission, para. 115.
[2297] The United States, for example, admits that increases in demand for LDLP "stabilized" overall United States demand for welded pipe. (United States first written submission, para. 381) However, if those demand trends, which were admittedly distinct for LDLP due to different end uses, had been considered for LDLP alone, the result might have been very different in terms of its effect on the industry producing that "like" product. Also note USITC Report, Vol. I, p. 166 (Exhibit CC-6).
[2298] United States' second written submission, para. 152.
[2299] United States' second written submission, para. 153.
[2300] Appellate Body Report, *US – Lamb*, para. 172.

> first, that the definition of the domestic industry given by the USITC is correct, and second, that the USITC correctly found that the domestic industry is threatened with serious injury. On this basis, we must examine whether the USITC properly established, in accordance with the Agreement on Safeguards, the existence of the causal link between increased imports and threatened serious injury."[2301]

7.920 The United States submits that, accordingly, even if the Panel were to conclude that the USITC's definition of like product and industry were flawed, it would still need to examine whether the USITC's existing causation analysis was proper under the Agreement; it could not declare the analysis flawed on the grounds that the USITC's like product analysis was found to be flawed.

(b) Tin mill products

(i) Coincidence in time

7.921 Japan and Brazil argue that the lone affirmative vote that found tin mill products to be a separate like product failed to satisfy the standards of Article 4.2(b). More particularly, the vote, by Commissioner Miller, failed to identify a sufficient causal link between increased imports and serious injury. While pointing to the modest increase in operating losses in 1999 when imports gained about 4.9 percentage points of market share, Commissioner Miller ignored the fact that these operating losses persisted in 2000 even when import market share decreased by 2.2 percentage points. Moreover, according to Japan and Brazil, she ignored the fact that the operating losses grew in 2001 even as import market share remained stable. In Japan's and Brazil's view, taken as a whole, these trends do not establish any correlation in time between the import increase and the allegedly injured condition of the industry, and thus fails to establish any causal link.[2302]

7.922 Norway argues that even if the President based his determination on Commissioners Miller, Bragg and Devaney and not just Miller[2303], as has been argued by the United States, Bragg and Devaney make no compelling analyses whatsoever for tin mill products as a separate product; it is simply not addressed.[2304] Norway submits that with different trends in increases between the tin mill products as a separate product on the one hand and as part of the CCFRS groups of products on the other hand, this cannot in any way fulfil the requirement of a "compelling analysis of why causation is still present", in 1999 or later for their part.[2305]

7.923 In response, the United States argues that the record showed a direct correlation between changes in import volumes and changes in the industry's operating margins between 1998 and 2000. For example, in 1998, when import market share increased by 2.8 percentage points, the industry's operating income margin dropped by 2.4 percentage points. Similarly, in 1999, when import volumes surged dramatically (growing by 45% on an absolute level and by 4.9 percentage points in market share terms), the industry's operating loss percentage nearly doubled, dropping from -3.7% in 1998 to -6.9% in 1999. In 2000, however, when import volumes and market share slackened somewhat between 1999 and 2000 (with import market share declining to a still elevated 15.5%), the relatively small improvement in import volumes relieved the pressure imposed by imports on the industry's

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[2301] Appellate Body Report, *US – Lamb*, para. 172.

[2302] Brazil's first written submission, para. 260, Japan's first written submission, para. 295

[2303] See paragraph 7.1228 *et seq* for details of this debate.

[2304] That is why their analyses is not discussed in detail by Norway, simply because their analyses are irrelevant, contrary to the argument by the United States in their first written submission, para. 541.

[2305] Norway's second written submission, para. 137.

operating income levels somewhat, allowing the industry's operating margins to increase slightly, to -6.1%, from a level of -6.9% in 1999.[2306]

7.924 Korea and China note that three USITC Commissioners found that: "The domestic industry experienced serious injury prior to the 1999 surge in imports and continues to experience such injury as imports have declined".[2307] Korea and China argue on the basis of these three USITC Commissioners' conclusions, that since there was no coincidence between imports and injury, there were serious doubts as to the existence of a causal link.[2308]

7.925 Korea submits that, in the end, the United States can point to the opinion of only a single Commissioner who determined that there was a coincidence of trends between imports and the serious impairment of the United States industry. According to Korea, that single Commissioner's evaluation is not supported by the evidence.[2309] China notes that in her separate views, Commissioner Miller also acknowledged that "the industry was unprofitable before and throughout the period". Yet, she stated that imports "are a substantial cause of serious injury" because the industry "suffered a serious downturn in 1999 as imports surged". However, China believes that, although increased imports may partially explain the situation in 1999, Commissioner Miller failed to explain why causation was present before 1999. Indeed, according to China, the industry was already injured in 1996 and 1997 when operating losses were recorded. Thus, in China's view, a very compelling analysis of why causation still is present was not provided although it should have been the case, since there was no coincidence in time between the injury and the increased imports.[2310]

7.926 In response, the United States argues that Commissioner Miller conducted a thorough and objective examination of the trends for imports and the industry's injury factors and reasonably concluded there was a clear correlation between increased import volume and declines in the overall condition of the industry. In particular, the United States argues, she reasonably found that, while the volume of imports increased overall, imports surged in 1999 when they increased by 45.0% from the prior year. She also correctly found that imports also showed their greatest market share gain in 1999, with their market share growing by 4.9 percentage points from 12.8% in 1998 to 17.7% in 1999. She also found that, while the industry had been unprofitable before 1999, it suffered a serious downturn in operating income in 1999 when imports surged into the market. In 1999, the industry's operating income margin dropped by 3.2 percentage points from its level in 1998, to -6.9%. She further found that the growth in imports, particularly the surge in 1999, placed downward pressure on the price of domestic merchandise, with import pricing declined throughout the period but at a more rapid rate than domestic pricing. Domestic prices declined through the period, and were at their lowest levels in 1999, when the import surge occurred.[2311]

7.927 The United States adds that she reasonably found that there was intense price competition between imports and domestic merchandise in contract negotiations during the period of investigation. These facts indicated that the industry's downward trends in 1999 were due directly to the surge in imports in that year. Although import volumes slackened somewhat in 2000 and interim 2001, they continued to exert substantial pricing pressure in the market because of the intense price competition in annual contract negotiations. As a result, the condition of the industry continued to deteriorate

[2306] United States' first written submission, para. 546.

[2307] Korea's first written submission, para. 117; Korea's second written submission, para. 152; China's first written submission, para. 525.

[2308] Korea's first written submission, para. 117; China's first written submission, para. 525.

[2309] Korea's second written submission, para. 153.

[2310] China's first written submission, para. 526.

[2311] United States' first written submission, para. 544.

during the last year-and-a-half of the period, with the industry's operating margin remaining at -6.1% in 2000 and declining to -7.4% in interim 2001. In sum, Commissioner Miller established that there was a genuine and substantial correlation between import trends and declines in the industry's condition during the latter half of the period of investigation.[2312]

7.928 In response to China's arguments, the United States argues that as the Appellate Body has stated, the appropriate consideration in a safeguards proceeding is whether imports have made a genuine and substantial contribution to a significant overall impairment in the condition of the industry during the period of investigation. A competent authority is not required to assess whether an industry's problems were first caused by imports or whether an industry was in a weakened state before an increase in import volumes during the period. Indeed, the fact that an industry is already in a weakened state does not mean that imports cannot enter the market in such volumes that they seriously injure the already weakened industry. On the contrary, it is precisely in such a situation, that is, when an industry is vulnerable to import competition because it is in an otherwise poor condition, that safeguard remedies are especially appropriate.[2313]

7.929 In counter-response, China submits that its argument that the industry was in an injured state before the increase of imports underlines the absence of coincidence between imports and negative performance of the industry. China argues that the absence of correlation is more obvious when one considers the declining imports towards the end of the period of investigation and notes that the industry is not recovering from injury in spite of the absence of the "substantial" cause of injury. China submits that it is, therefore, clear that there must be other factors responsible for the injury suffered by the domestic industry.[2314]

(ii) Relevance of prices of imports and domestic products

7.930 The European Communities and Norway argue that Commissioner Miller's analysis is predicated on the existence of severe price competition between imports and domestic products. However, according to the European Communities and Norway, the USITC's data does not show that imports undersold domestic products. Rather, it demonstrates that prices of imports were consistently above those of domestic products.[2315] Norway argues that there is no evidence of underselling, which would be necessary to show that increased imports drove the price down.[2316] The European Communities notes that Commissioner Miller states that the pricing data shows "some underselling" by imports on the specific data gathered by the USITC. While there is some underselling, none of it occurs in 1999, which is the period when the domestic industry is allegedly suffering.[2317]

7.931 In response, the United States argues that the complainants mistakenly believe that downward price pressure can only be exerted by means of underselling. The United States submits that, in fact, price-depression can occur when a producer that has been selling its product at a higher price in a market chooses to reduce its prices significantly in the market in order to gain market share. In this situation, to the extent that the higher prices reflect a premium paid by purchasers for the producer's merchandise, the producer's decision to sell its product at a lower price will exert a downward pressure on substitutable products in that marketplace. Accordingly, while it may be true that imports

[2312] United States' first written submission, para. 545.
[2313] United States' first written submission, para. 552.
[2314] China's second written submission, para. 276.
[2315] European Communities' first written submission, para. 483; Norway's first written submission, paras. 333 and 335.
[2316] Norway's first written submission, para. 334.
[2317] European Communities' first written submission, para. 482.

of tin mill steel had not been routinely underselling domestically produced tin mill products during the period, this lack of underselling does not preclude a finding that higher-priced tin mill imports caused price-depression in the market in 1999, 2000, and 2001, as they were sold at increasingly low prices.[2318]

7.932 The United States submits that the record establishes that the surge of imports into the market in 1999 did, in fact, have just such a downward impact on domestic prices. The annual average unit prices of domestic and imported tin mill steel remained relatively stable throughout the period from 1996 to 1998. In particular, the net AUV for domestic commercial sales of tin mill steel ranged between US$610 and US$616 per ton during this period, while the net AUV of imported tin mill steel ranged between US$657 and US$669 per ton.[2319] When imports of tin mill steel surged in 1999, however, the AUV of both domestic and imported merchandise dropped substantially from their levels during 1996 to 1998, with the AUV of imports falling US$73 per ton to US$596 in 1999, and the AUV of domestic merchandise falling by US$26 per ton to US$584 in 1999. In 2000, even though imports slackened somewhat but remained at elevated levels, the AUV of imports and domestic product both remained at depressed levels. Finally, in interim 2001, AUV of imports and domestic merchandise increased somewhat (after the imposition of the anti-dumping duty order on Japanese goods) but remained at levels that were substantially below the pricing levels seen in 1998, before the surge in imports. However, throughout this period, as import pricing declined, domestic pricing did as well, and caused substantial declines in the industry's operating loss levels.[2320]

7.933 In counter-response, the European Communities notes that there is nothing in the USITC Report which explains how serious injury to the domestic industry was caused by increased imports which were not underselling domestic produce. Since the reasoned and adequate explanation must be found in the USITC Report, and the United States has not cited to any such explanation, it must be concluded that the USITC Report does not provide such a reasoned and adequate as required by the Agreement on Safeguards.[2321]

(c) Hot-rolled bar

7.934 The European Communities and China argue that there is no clear coincidence in trends between increased imports of hot-rolled bar and the worsening of the position of the domestic industry.[2322] The European Communities submits that imports of this product increased in 1997 and 1998. However, the domestic industry made comfortable profits in both of those years. In 1999 when imports fell, the domestic industry's profits started also to decrease. According to the European Communities, such a movement is not consistent with imports being the cause of the decline in profits. The European Communities notes that although imports increased between 1999 and 2000, that increase in imports was substantially less than the increase between 1997 and 1998. Moreover, the domestic price fell massively in 1999, when imports were decreasing, and remained steady when imports moved upwards in 2000. Finally, according to the European Communities, United States producers made a larger operating loss in the six months of interim 2001 than in any full year examined, while imports fell massively. The European Communities submits that there is, thus, no

[2318] United States' first written submission, para. 547.
[2319] United States' first written submission, para. 548.
[2320] United States' first written submission, para. 549; United States' second written submission, para. 139.
[2321] European Communities' second written submission, para. 384.
[2322] European Communities' first written submission, para. 492; China's first written submission, para. 405.

clear coincidence in trends between increased imports and serious injury. As already noted, the absence of coincidence requires a "very compelling" explanation.[2323]

7.935 In light of the absence of coincidence, China also argues that "a very compelling analysis of why causation still is present" becomes necessary. China believes that the USITC failed to provide such an analysis.[2324] In this regard, China points out that, in its report, the USITC explained at length the "strategy" that domestic producers had recourse to, in order to compete with imports. China considers that this is not convincing. For example, the USITC states that in 1996, 1997 and 1998, the United States industry maintained its prices and thus lost market shares to imports, as imports undersold domestic production. China argues that if this were right, it would mean that price was a very important factor for purchasers. China questions how it could, therefore, be explained that in 1999, when prices of domestic production were lower than prices of imports, domestic producers did not gain back market shares but instead continued to lose some. In China's view, the truth is that pricing is not such an important factor after all and that if imports gained market shares during the period of investigation, independently of the prices of domestic products, imports cannot have played the role that the USITC states it played. China concludes that the explanation of causation provided by the USITC is wrong, biased and not compelling [2325]

7.936 In response, the United States submits that the two complainants that challenge the USITC's finding of causal link, do not address the USITC's analysis and findings. These complainants' arguments are limited to the observation that specific import levels did not produce specific domestic-industry operating income levels. However, the correlation between imports and domestic industry performance is not simply a matter of stating that import level 'X' must produce operating income 'Y'. Instead, imports affect the domestic industry's financial performance through their effects on factors such as output and prices. The USITC's analysis recognized this. Instead of the simplistic comparisons offered by China and the European Communities, the USITC provided a more sophisticated, and consequently, comprehensive, explanation of the correlation between the increased imports and the serious injury. It explained how the imports, and the domestic industry's competitive responses to the imports, affected factors – namely sales revenues and prices – that critically influenced the level of operating income.[2326]

7.937 With respect to the argument that the data do not indicate that there is any correlation between underselling of the domestically produced product by the imports and the domestic industry's market share, the United States submits that this is wrong. As the USITC found, the subject imports made their largest gains in market share during those portions of the period of investigation when there was pervasive underselling by the imports.[2327] Consequently, the United States submits that the arguments of China and the European Communities do not detract from the USITC's conclusion that there was a causal link between the increased imports and the serious injury suffered by the domestic hot-rolled bar industry.[2328]

7.938 In counter-response, the European Communities argues that it is not for the United States to provide an *ex post facto* explanation. The explanation should have been in the USITC Report but is

[2323] European Communities' first written submission, para. 493.
[2324] China's first written submission, para. 405.
[2325] China's first written submission, para. 406.
[2326] United States' first written submission, para. 575.
[2327] United States' first written submission, para. 576.
[2328] United States' first written submission, para. 577.

not there. Consequently, the USITC has failed to provide a reasoned and adequate explanation of its purported establishment of a genuine and substantial causal link.[2329]

(d) Cold-finished bar

7.939 The European Communities submits that it is patently obvious that a comparison of the import trends against financial performance, described by the USITC as the most "pertinent indicator of the industry's condition", shows that there is no correlation of trends which would indicate the presence of a causal link. According to the European Communities, there is a negative correlation. Profits increased as imports increased and decreased as imports decreased.[2330] The European Communities notes that in 2000, when imports were at their highest, the domestic industry improved its performance (operating income improved significantly), while in 1999, when imports were at their lowest level since 1996, the performance of the domestic industry was the worst in the whole period of investigation. 1997 had also seen an increase in imports. The European Communities reiterates that in the absence of coincidence of trends a Member imposing a safeguard measure must provide a very compelling explanation of the existence of a causal link.[2331] In the European Communities' view, there is again no very compelling explanation that establishes the causal link. A comparison of the trends in demand and the industry's financial performance suggests a closer link between demand and profits than exists between imports and profits.[2332]

7.940 In response, the United States submits that the argument the record does not indicate that increases in import volume were coincident in time with declines in industry financial performance ignores the explanation the USITC provided concerning the prevalence of contracts among cold-finished bar producers, which demonstrated why the effects of aggressive pricing by the imports were not immediately reflected in the market. Moreover, the United States submits that the European Communities' analysis is based on a mechanical year-by-year approach. By contrast, an examination of the final two full years of the period of investigation demonstrates that when import volume increased sharply, domestic financial performance declined sharply – exactly the type of temporal correlation that the European Communities contends is lacking.[2333]

7.941 In counter-response, the European Communities notes the United States uses the USITC's finding that 40% of the market for cold-finished bar was based on 6 month to one year contracts to explain the time lag between increased imports in 1998 and the poor performance of the industry in 1999. However, the European Communities notes that when it argued that the development in financial performance in 1999 and 2000 (where financial performance improved as demand increased and imports increased) was due to changes in demand, and that the USITC should have ensured the non-attribution of the injurious effects of changes in demand, the United States highlighted the USITC finding that the poor performance in 1999 was "…to a large extent attributable to declines in demand in that year…".[2334] Thus, the USITC did not consider, as the United States has argued, that the poor performance in 1999 was caused by imports. It considered that the performance in 1999 was due to demand declines. The USITC therefore, did not put any emphasis on the time lag effect.[2335]

[2329] European Communities' first written submission, para. 392.
[2330] European Communities' first written submission, para. 507.
[2331] European Communities' first written submission, para. 507.
[2332] European Communities' first written submission, para. 508.
[2333] United States' first written submission, para. 590.
[2334] United States first written submission, para. 596. USITC Report, Vol. I, p. 107.
[2335] The European Communites notes that the phrase which the United States quotes with respect to long term buying does not support the United States conclusion that this explains the time lag between increased imports and poor financial performance. The sentences before state "The market did not react immediately to the price reductions by the imports. Indeed, neither the absolute volume of the imports nor their market share

Therefore, according to the European Communities, the United States cannot invent, *ex post facto*, the time lag factor. This means that there is no reasoned and adequate explanation, indeed no very compelling analysis, of how, when financial performance improved contemporaneously with increased imports, increased imports could cause serious injury.[2336]

7.942 With respect to the argument that "a comparison of the trends in demand and the industry's financial performance suggests a closer link between demand and profits than exists between imports and profits", the United States submits that this is wrong. For example, although demand increased between 1997 and 1998, profits declined. The enormous 82.3% decline in profits between 1998 and 1999 does not track the far more modest 3.6% decline in demand between those years. By the same token, between 1998 and 2000, when demand declined by only 1.7%, operating income dropped by a very substantial 58.5%. The European Communities' simplistic and incorrect year-by-year comparisons of various indicators, which ignore conditions of competition indicating why certain effects of imports may be lagged, does not in any way demonstrate that the USITC's far more detailed and comprehensive analysis was defective or lacked objectivity.[2337]

(e) Rebar

7.943 China argues that there is an absence of coincidence between the increase in imports of rebar and the decline in the relevant injury factors.[2338] Indeed, according to China, imports mostly increased in 1997, 1998 and 1999, yet, during these 3 years, the industry had a positive operating income.[2339] China argues that moreover, in 1996, before imports surged, the industry had an operating loss of US$76,000 and in 2000, as imports had decreased by 162,779 short tons, the industry had an operating loss of US$24,869,000. Also, prices only began to fall in the last quarter of 1998 and they stopped their fall in the middle of 1999. This means that prices have fallen during only 9 months over a period of three years of increasing imports.[2340] China argues that not only did the industry experience very important profits as imports were increasing and prices were falling, but the industry experienced losses even before imports started to increase. Given the difficult situation of the industry before the decline in prices, and given that the industry experienced its best financial results of the period of investigation as imports were increasing, there is clearly no coincidence between the increase in imports and the alleged decline in the relevant injury factors.[2341]

7.944 The European Communities and China further argue that given the absence of coincidence between the movements in imports and injury factors, the USITC had the obligation to provide a compelling analysis of why causation is still present. Since the USITC did not correctly evaluate the complexity and roles of all relevant factors, China believes that such an analysis has not been provided.[2342] According to China, a 'very compelling analysis' is absent from the USITC Report. China submits that this failure cannot be cured by the extensive and often speculative interpretation of the United States in its submissions.[2343]

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increased in 1999. The lack of immediate reaction by the market may reflect extensive contract sales […]" USITC Report, Vol. I, p. 106. (United States' first written submission, para. 586) .

[2336] European Communities' second written submission, para. 396.

[2337] United States' first written submission, para. 591.

[2338] China's first written submission, para. 433.

[2339] China's first written submission, para. 434.

[2340] China's second written submission, para. 240.

[2341] China's first written submission, para. 435.

[2342] European Communities' first written submission, para. 518; China's first written submission, para. 436.

[2343] China's second written submission, para. 244.

7.945 According to the European Communities, the United States builds an argument of the domestic industry lowering prices to recapture market share. Even if this were true (and it is not reflected in operating income in 1998 or 1999 which were the first years in which imports increased) it is not discussed in the USITC Report.[2344] The European Communities also argues that while the USITC notes a decline in prices in 1999 and 2000, operating losses only started to appear in 2000.[2345] China also submits that it does not agree with the USITC's conclusion that injury was being suffered by the industry because imports lead prices to decrease. According to the USITC, that decrease prevented the industry, on one hand from benefiting from cost reductions during some periods of the period of investigation and, on the other hand, from recovering from increases in costs during the other periods.[2346]

7.946 The United States responds by stating, as the USITC explained, once imports surged in 1998, the domestic industry's loss in market share was immediate. The domestic industry subsequently reduced its prices in an attempt to mitigate further losses in market share. Consequently, the industry's declines in financial performance were more gradual than its declines in market share. An examination of the industry over the final two full years of the period of investigation – 1998 to 2000 – demonstrates that imports increased by 35.8% and the domestic industry's operating income deteriorated from a US$88.2 million operating profit to a US$24.7 million operating loss. According to the United States, this is precisely the type of temporal correlation that is said to be lacking.[2347]

7.947 China argues that the United States has failed to rebut China's argument that there is no coincidence of trends between the increase in imports and the domestic industry decline.[2348] China argues that a coincidence of trends should be found on the basis of movements of injury factors during the whole period of investigation. China contends that what the United States did was to choose a short period of time within the period of investigation. China submits that this arbitrary choice of a period within the wider period of investigation cannot be a reasonably acceptable basis for the examination of the correlation of trends.[2349]

7.948 Also in counter-response, the European Communities argues that neither the USITC nor the United States satisfactorily explain how it can be the case that, after imports having increased each year from 1996 to 1999, in each year gaining more market share, and the domestic industry's operating income also increasing every year over the same period, in 2000, when imports start to decrease, and the domestic industry's market share increasing, the domestic industry crashes to substantial losses.[2350]

7.949 In the absence of a direct correlation, the Appellate Body has required a "very compelling analysis". According to the European Communities, no such analysis appears in the USITC Report. The United States builds an argument of the domestic industry lowering prices to recapture market

[2344] United States' first written submission, para. 603 which does not contain any reference to the narrative section of the USITC Report. Note USITC Report, Vol. I, p. 114, where the USITC discusses the industry's performance in 2000 without suggesting that the industry lowered prices in order to obtain market share.

[2345] European Communities' first written submission, para. 518.

[2346] China's first written submission, paras. 432 and 433.

[2347] United States' first written submission, para. 603.

[2348] China's second written submission, para. 238.

[2349] China's second written submission, para. 239.

[2350] European Communities' second written submission, para. 404.

share. Even if this were true (and it is not reflected in operating income in 1998 or 1999 which were the first years in which imports increased) it is not discussed in the USITC Report.[2351]

7.950 China submits that since argumentation by the United States is groundless and the data clearly shows that the coincidence between the movements in imports and injury factors was absent, the USITC had the obligation to provide a compelling analysis of why causation is still present.[2352] However, according to China, such a "very compelling analysis" is absent from the USITC Report. China submits that this failure cannot be cured by the extensive and often speculative interpretation of the United States in its submissions.[2353]

(f) FFTJ

7.951 The European Communities argues that the United States has not made an adequate and reasoned determination of the existence of a causal link.[2354] In particular, the European Communities argues although the product group is characterised by a high degree of heterogeneity, most products are manufactured to conform to specific standards, and once such conformity is achieved price is the major competitive issue. The USITC's findings on price competition are, therefore, vital. Such findings are, however, seriously lacking.[2355]

7.952 In response, the United States submits that the USITC did not rely exclusively on the pricing data for its conclusions on causal link, as the European Communities mistakenly represents. Instead, the USITC explained that a wide variety of domestic industry's performance factors declined while import penetration increased. The USITC's findings concerning the FFTJ industry's many declines in performance were based on questionnaire data covering the entire industry that no complainant contends was not representative.[2356]

7.953 The United States further argues that the record evidence showed that there was a clear and direct correlation between increases in imports of FFTJ and declines in the FFTJ industry's overall condition during the period of investigation. During the last three full years of the period, 1998 through 2000, imports increased in absolute terms by 28.4% and increased their market share by 11.1 percentage points to 45.6%.[2357] During the same period, the industry experienced substantial and consistent declines in its United States shipments, commercial sales values, employment levels and profitability levels. For example, in 1998 – the mid-point of the period of investigation – the volume of imports increased on an absolute level by 11.2% from their 1997 levels, the ratio of imports to domestic production increased by 7.6 percentage points, and import market share increased by 2.6 percentage points.[2358] In that same year, the industry's condition declined. There was a similar correlation between import increases and declines in the industry's condition in 1999. In that year, import volumes further increased their ratio to domestic production by 7.7 percentage points over

[2351] United States' first written submission, para. 603 which does not contain any reference to the narrative section of the USITC Report. See, USITC Report, Vol. I, p. 114, where the USITC discusses the industry's performance in 2000 without suggesting that the industry lowered prices in order to obtain market share.

[2352] China's second written submission, paras. 242 and 243.

[2353] China's second written submission, para. 244.

[2354] European Communities' first written submission, para. 552.

[2355] European Communities' first written submission, para. 542.

[2356] United States' first written submission, para. 649.

[2357] USITC Report, Table TUBULAR-C-6.

[2358] USITC Report, Tables TUBULAR-8 (p. TUBULAR-10), TUBULAR-45 (p. TUBULAR-38) & Table TUBULAR-C-6. The ratio of FFTJ imports to domestic production increased from 47.7% in 1997 to 55.3% in 1998 while import market share increased from 32.9% in 1997 to 35.5% in 1998.

their 1998 levels and their share of the overall FFTJ market by 2.2 percentage points over their 1998 levels.[2359] At the same time, the industry's condition further declined. Finally, in 2000 – the last full year of the period – import volumes increased on an absolute level by a further 15.3% from their 1999 levels, saw their overall ratio to domestic production increase by 6.7 percentage points, and increased their share of the overall FFTJ market by a further 4.0 percentage points over their 1999 levels.[2360] In that year, the industry's condition further declined.[2361]

(g) Stainless steel bar

7.954 The European Communities argues that there is no coincidence in trends between increased imports and serious injury.[2362] In particular, the European Communities asserts that the USITC clearly considered that it was the increase in imports in 2000 which met the standard for increased imports required by the Agreement on Safeguards. However, according to the European Communities, the USITC itself admitted that until 2000 the level of imports fluctuated. A glance at the data shows that imports decreased from 1997 levels in both 1998 and 1999. Yet, according to the European Communities, it is precisely in this period when imports decreased that the domestic industry registered its worse results.[2363] In particular, imports decreased from 1997 to 1999, when the domestic industry apparently suffered its worse results, and then moved upwards in 2000, when the domestic industry regained profitability, before falling off in interim 2001, when the domestic industry once more fell into loss.[2364] The European Communities argues that given that there is thus no coincidence of trends between increased imports and the serious injury allegedly suffered by the domestic industry, the competent authority must present very compelling arguments to show that increased imports are in fact responsible for the alleged serious injury. According to the European Communities, the USITC did not present such data.[2365] Further, the European Communities argues that the USITC failed to provide a reasoned and adequate explanation of any causal link between increased imports and serious injury suffered by the domestic industry.[2366]

7.955 In response, the United States contends that the European Communities' argument is based on a misleading reading of the record. As can be seen from the USITC's decision, it was true that the absolute quantity of imports "fluctuated somewhat (declining slightly in 1998 and 1999)" as the European Communities asserts. However, the record also showed that apparent United States consumption of stainless steel bar fluctuated during the period although more significantly than imports. As a result, while import quantities on an absolute level may have fluctuated "somewhat" between 1997 and 1999, the market share of imports increased consistently and substantially throughout the period of investigation, as did the ratio of imports to domestic production. Moreover, the record showed that, while imports made these market share gains, they also continued to undersell the domestic producers at significant margins throughout the period. Given this uncontroverted record evidence, the United States submits that it should not be surprising that the USITC found that the substantial increases in import market share that were accompanied by substantial underselling

[2359] USITC Report, Tables TUBULAR-8 (p. TUBULAR-10), TUBULAR-45 (p. TUBULAR-38) & Table TUBULAR-C-6. The ratio of FFTJ imports to domestic production increased from 55.3% in 1998 to 63.0% in 1999 while import market share increased from 35.5% in 1998 to 37.7% in 1999.

[2360] USITC Report, Tables TUBULAR-8 (p. TUBULAR-10), TUBULAR-45 (p. TUBULAR-38) & Table TUBULAR-C-6. The ratio of FFTJ imports to domestic production increased from 63.0% in 1999 to 69.7% in 2000 while import market share increased from 37.7% in 1999 to 41.7% in 2000.

[2361] United States' written reply to Panel Question No. 39 at the second substantive meeting.

[2362] European Communities' first written submission, para. 562.

[2363] European Communities' first written submission, para. 564.

[2364] European Communities' first written submission, para. 564.

[2365] European Communities' first written submission, para. 567.

[2366] European Communities' first written submission, para. 562.

had an increasingly injurious effect in the industry during the period of investigation. In essence, by focusing on minor fluctuations on the absolute quantities in imports during a selected time during the period of investigation, the United States argues that the European Communities is simply hoping to distract the Panel's attention from the larger picture: import market share grew substantially over the period of investigation as a result of underselling and, during that period, the industry's market share, production and shipment levels, and profitability levels went into a free-fall.[2367]

7.956 The United States argues that, moreover, the European Communities' argument also misconstrues the USITC's findings. The USITC did not find, as the European Communities asserts, imports only caused injury to the industry in the year 2000. While it is true that the USITC acknowledged that imports surged to their highest levels of the period of investigation in 2000 and that they caused the industry's condition to deteriorate substantially in that year, the USITC also explicitly found that imports had increased their market share throughout the period and that they had, through increased volumes and underselling, significantly and adversely impacted the industry's condition during the years before 2000.[2368]

7.957 The United States also argues that the European Communities makes much of the fact that the industry managed to return to profitable operating income margins in 2000, despite the fact that imports made their largest surge into the market in that year. Their argument has two flaws. First, even aside from the industry's profitability levels, the industry's market share reached its lowest level of the period of investigation in the face of this import surge. Accordingly, even aside from the declines in the industry profitability levels, imports had a significant negative impact on the industry's condition in that year.[2369] The United States submits that, moreover, the European Communities' argument ignores the fact that the industry's operating income margin was substantially lower in 2000 than in 1996, 1997, and 1998, the first three years of the period of investigation. Although the exact numbers are confidential, the USITC explicitly stated that the industry's operating margins declined "consistently and significantly" through the period of investigation, noting that operating margins fell in 1997 and in 1998, and then dropped to a loss in 1999. Although the industry's margins returned to a profit in 2000, the USITC explicitly noted that this increase was only "slight" and that it was followed by a drop to the lowest margin of the period in interim 2001. Although the exact data is confidential, the industry's operating income level remained substantially below its levels in 1996, 1997 and 1998. Accordingly, the record clearly indicates that there was not a substantial improvement in the industry's injured condition in 2000, as the European Communities suggests; instead, the record shows that the industry's condition continued to remain poor in the face of import competition.[2370]

7.958 In counter-response, the European Communities re-iterates that an increased imports finding required by the Agreement on Safeguards could only potentially be made for 2000. However, injury was determined to exist during the entire period, and was not linked to the increase of imports in 2000. According to the European Communities, the United States does no more than claim that it was justified in finding that the injury suffered before the increase in imports was caused by imports, because imports increased their market share.[2371] However, it is only if imports increased, not increased their market share, that the conditions of the application of safeguard measure can be met. The European Communities submits that the USITC was not charged with finding a causal link between changes in market share and serious injury, but rather between increased imports and serious

[2367] United States' first written submission, para. 667.
[2368] United States' first written submission, para. 668.
[2369] United States' first written submission, para. 669.
[2370] United States' first written submission, para. 670.
[2371] United States' first written submission, para. 667.

injury. In the light of the foregoing, the European Communities submits that the United States has not shown that there was a correlation between import trends and serious injury and has not provided a compelling analysis in the absence of such a correlation.[2372]

(h) Stainless steel wire

7.959 The European Communities argues that Commissioner Koplan did not deal with the correlation of trends, even though three other Commissioners had found that despite consistent underselling there was no correlation between pricing of imports and domestic products. The European Communities notes[2373] that Chairman Koplan's conclusions are directly contradicted by the opinion of the majority. With most relevance to his conclusion that increased imports are the cause of a threat of serious injury, is the conclusion that:

> "[W]e find that stainless wire imports have not had a clear adverse impact on the price of domestic stainless wire during the period of investigation. Although the record indicates that imports consistently undersold domestic wire products the record also indicates that price movements for domestic stainless wire did not clearly correlate with the existence or significance of underselling by imported stainless wire."[2374]

7.960 In order to provide a reasoned and adequate explanation of Chairman Koplan's findings there would have to be a clear rebuttal of this finding. According to the European Communities there is none, and this brings into question, therefore, the basis for the finding of a causal link between increased imports and a threat of serious injury. For this reason, the European Communities submits, the safeguard measures imposed on this basis are unjustified and are thus inconsistent with Articles 2.1 and 4.2(b) of the Agreement on Safeguards, and additionally Articles 3.1 and 4.2(c).

7.961 In response, the United States submits that Commissioner Koplan established that there was a genuine and substantial cause and effect relationship between increased imports and the threat of serious injury to the domestic industry. His analysis established a direct link between increases in the volume of imports during interim 2001 and the significant declines in the overall condition of the stainless steel wire industry during the interim period. He also reasonably found that these trends indicated that there was an imminent threat of serious injury from imports. Finally, he conducted a thorough and objective examination of the effects of other factors and ensured that he did not attribute the negative effects of these other factors to imports in his analysis.[2375]

7.962 The United States also argues that Commissioner Koplan's findings of a correlation between import trends and declines in the industry's condition are not "directly contradicted" by the finding of Commissioners Miller, Hillman, and Okun that stainless steel wire imports had not had a clear adverse impact on domestic prices during the period. The United States notes that the Agreement on Safeguards does not require that all six individual decision-makers reach the same conclusion, or that the individual Commissioners must rebut the findings of others with different conclusions, but requires that the determination, as the Appellate Body said in *US – Line Pipe*, meets the obligations contained in the Agreement on Safeguards. The fact that Commissioners Miller, Hillman, and Okun

[2372] European Communities' second written submission, para. 422.
[2373] European Communities' first written submission, para. 580.
[2374] USITC Report, Vol. I, p. 238 (footnotes omitted).
[2375] United States' first written submission, para. 721.

disagreed with Commissioner Koplan no more makes his analysis unreasonable than his disagreement with them makes their analysis unreasonable.[2376]

7.963 The United States also argues that Commissioner Koplan's pricing analysis is not inconsistent with the pricing findings of Commissioners Miller, Hillman and Okun. Like these three Commissioners, Commissioner Koplan specifically found that imports had consistently undersold domestic stainless steel wire during the period from 1996 to 2000, but that this consistent underselling had not impacted domestic pricing adversely because the "domestic industry had kept prices of the domestic [wire] product in line with its costs" during that five year period. However, unlike the other three Commissioners, Commissioner Koplan focused his analysis on pricing data for imports and domestic product in interim 2001 and noticed that lowered import pricing had begun interfering with the ability of domestic industry to keep its prices in line with its costs. In particular, he found that, in combination with declining demand, the increase in import volumes and market share caused the price of domestic wire to fall during a period of rising costs and led directly to a decline in the industry's operating income levels in interim 2001. As a result, he reasonably found, the increase in imports and their concurrent underselling had caused the substantial declines in the industry's condition in the final months of the period of investigation, thus showing that imports threatened the industry with imminent serious injury. In other words, Commissioner Koplan's findings about price competition in the market during the first five years of the period were, in fact, consistent with the findings of the other three Commissioners. However, Commissioner Koplan simply placed more emphasis than the other Commissioners on the pricing effects of imports during the last six months of the period, which is a reasonable choice given his finding that imports threatened serious injury to the stainless steel wire industry.[2377]

7.964 The United States claims that the finding of the other three commissioners did not cover interim 2001, while Commissioner Koplan focussed on interim 2001. However, the European Communities submits that the finding quoted by the European Communities in its first written submission was of a general nature and was not limited to a period excluding interim 2001. Moreover, Commissioner Koplan did not discuss underselling at all in his discussion of interim 2001 developments, and thus did not explain in a reasoned and adequate manner, how there was a correlation between pricing for imports and domestic pricing sufficient to establish a causal link.[2378]

(i) Stainless steel rod

7.965 The European Communities argues that as a result of the blanket confidentialization of information, it is practically impossible to determine whether the USITC has provided a reasoned and adequate explanation of the existence of a genuine and substantial causal link. The European Communities argues that the coincidence of trends cannot be assumed. The European Communities submits that imports were relatively close to 1996 levels in 1999. In 1996 the domestic industry made profits. However, in 1999 operating margin "dropped dramatically". According to the European Communities, operating margins were at their worst in interim 2001, a period in which imports had greatly decreased, returning, on the basis of extrapolations, to 1996 levels. The European Communities argues that this does not seem to indicate a coincidence of trends. Therefore, the European Communities submits that the USITC has not provided a reasoned and adequate explanation of its determination of the existence of a causal link between increased imports and serious injury.[2379]

[2376] United States' first written submission, para. 732.
[2377] United States' first written submission, para. 733.
[2378] European Communities' second written submission, para. 434.
[2379] European Communities' first written submission, para. 574.

7.966 According to the European Communities, therefore the United States, in imposing safeguard measures, consequently acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards as well as with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

7.967 The United States argues that the USITC established that there was a clear correlation between the growing volumes of low-priced imports in the market and the substantial declines in the industry's condition throughout the period of investigation. In particular, the industry experienced substantial declines in its market share, operating income margins, operating income, production levels, sales revenues, and shipments during the period of investigation, particularly during 1999 and 2000, as import quantities and market share grew considerably from their levels in 1998 and as imports continued to undersell the domestic industry and lead domestic prices downward. The largest declines in the industry's condition during the period occurred in 2000, when the largest import increase occurred. Given the very clear correlation of import volume and pricing trends and industry declines in these years, the United States asserts that the USITC correctly found there was a genuine and substantial correlation between import volume increases and the serious injury being suffered by the domestic industry during the period of investigation.[2380]

7.968 In response, the United States argues that, despite the clear correlation between import volume and pricing trends and declines in industry condition, the European Communities nonetheless contends that the record failed to establish a substantial causal link between movements in import volumes and declines in the stainless steel rod industry's condition. The United States submits that although the European Communities can perhaps be forgiven for basing their arguments on data that was redacted from the opinion as confidential, it is nonetheless clear from the available data and the face of the opinion that their argument is factually mistaken.[2381]

7.969 The United States submits that the argument with respect to the relationship of profits and import levels in 1999 is flawed because imports were not "relatively close" to their 1996 levels in 1999, as the European Communities suggests. Instead, import volumes and market share were both substantially higher in 1999 than 1996, with the absolute quantity of imports being 8.9% higher than 1996 and their market share in 1999 being substantially higher than in 1996. In addition, as the USITC clearly explained in its analysis (even with the redaction of confidential data), imports undersold domestic merchandise in every period of the period of investigation, including 1999, which resulted in the suppression and depression of domestic prices during the last two-and-a-half years of the period of investigation, thus preventing the industry from keeping its prices at a level that would allow it to recoup its nickel costs during this period, including 1999. In other words, the USITC correctly found that, in 1999, the industry's operating income margins fell in direct correlation with the substantial increase in the volume and market share of imports that occurred during that year, and as a direct result of the persistent underselling by imports that occurred throughout the period.[2382] In fact, the USITC specifically noted that the "record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry", finding in particular that the industry's operating income level declined in 1999 in conjunction with an increase in import volumes. Given this direct statement on the matter, it is clear not only that the USITC considered the issue raised now by the European Communities but squarely rejected it because it was not consistent with the record evidence.[2383]

[2380] United States' first written submission, para. 699.
[2381] United States' first written submission, para. 700.
[2382] United States' first written submission, para. 701.
[2383] United States' first written submission, para. 702.

7.970 The United States argues that, similarly, the European Communities' argument that import volumes fell back to their 1996 levels in interim 2001 is misleading. The record showed that the decline in absolute import volumes in interim 2001 was related to the decline in demand in interim 2001 and had little impact on the elevated market share of imports or their continued underselling of domestic stainless steel rod. More specifically, while it is true that import volumes on an absolute level fell substantially in interim 2001 from the comparable period in 2000, the decline in import volumes between those two periods was essentially similar to the decline in demand between interim 2000 and 2001, resulting in a minimal decrease in import market share between interim 2000 and 2001. Further, as the USITC noted, imports also undersold domestic merchandise in interim 2001, thus further suppressing and depressing United States prices in that period. Thus, imports retained their substantially increased market share even in the face of declining demand. Again, the record showed, as the USITC found, that there was a clear correlation between import volumes and pricing in interim 2001 and the declines in industry profitability in that year. The European Communities' arguments to the contrary are simply wrong, and can be seen as such from the face of the USITC's opinion, even with certain confidential data redacted.[2384]

7.971 In counter-response, the European Communities submits[2385] that the United States' response to the European Communities' argument that there was no correlation of trends is unpersuasive. According to the European Communities, imports developed as follows from 1996:

Table 2: Stainless Steel Rod – Import Volumes (1996-2001)

	1996	**1997**	**1998**	**1999**	**2000**	**2000 I**	**2001 I**
Imports (vol.)	60,503	78,264	61,439	65,882	82,344	45,647	31,365

7.972 The European Communities argues that losses were apparently "dramatic" in 1999, a year when imports did not particularly increase, and after a year in which imports fell substantially. The European Communities submits that all the United States can do is claim that the level of imports in 1999 could be considered as an increase in imports and that the USITC's statement that "the record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry" was sufficient to reject the European Communities arguments.[2386] According to the European Communities, such an assertion does nothing to explain how the underlying facts, which clearly suggest that there is no correlation, can possibly be considered a "clear and direct correlation". There is, therefore, no reasoned and adequate explanation of the existence of a correlation. The Panel should find the USITC's findings insufficient.[2387]

3. Non-attribution

(a) Definition and scope

7.973 The European Communities, Switzerland, New Zealand, Japan and Brazil submit that the mere existence of a coincidence between the increased imports and the decline in industry performance is not enough to establish the existence of a causal link.[2388] Brazil argues that while a

[2384] United States' first written submission, para. 703.
[2385] European Communities' second written submission, para. 429
[2386] United States' first written submission, paras. 701 and 702.
[2387] European Communities' second written submission, para. 430
[2388] European Communities' first written submission, para. 452; Japan's first written submission, para. 217; Switzerland's first written submission para. 294; New Zealand's first written submission, para. 4.113; Brazil's first written submission, para. 151.

correlation between imports and serious injury is relevant and necessary, it is by itself insufficient evidence for imposing safeguards measures.[2389]

7.974 In Brazil's view, the second sentence of Article 4.2(b) appreciates that other factors may be causing the decline in domestic industry performance. Thus, authorities must take the added step of investigating other possible causes, and the injury from those alternative causes "shall not be attributed" to imports.[2390] Similarly, the European Communities, Switzerland and Norway argue that for a causal link to exist, it must be shown that increased imports are responsible for the serious injury. In other words, once the effect of alternative causes has been factored out, the nature of such increased imports must be such as to transmit serious injury to the domestic industry. According to the European Communities, this typically requires a demonstration that the conditions of competition are such that increased imports are responsible for injury suffered.[2391]

(i) The obligation to "separate" and "distinguish"

7.975 The complainants rely upon Appellate Body jurisprudence to argue that in order to comply with the non-attribution requirement, an authority must "separate" and "distinguish" the injurious effects of factors other than increased imports to ensure they are not attributed to imports.[2392] It has been argued that, moreover, a reasoned and adequate explanation must be offered, explicitly establishing how this was accomplished.[2393]

7.976 In this regard, the European Communities, Switzerland and Norway argue that a competent authority must permit a demonstration, as a matter of substance, that: (i) the injurious effects of factors considered to be causing injury have been distinguished from each other; (ii) these injurious effects have been attributed to the factors which are causing them; and (iii) the competent authority has determined, after having attributed injury to all causal factors present, whether increased imports are a "genuine and substantial" cause of serious injury.[2394] Similarly, according to Brazil and Japan, the analytical framework established by the aforementioned cases requires, first, that authorities identify the injurious effects of the known factors other than increased imports and, secondly, that authorities explain satisfactorily the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.[2395] Relying upon Appellate Body jurisprudence[2396], China argues, *inter alia*, that as a first step in the examination of causation, the injurious effects caused to the domestic industry by increased imports must be distinguished from the injurious effects caused by other factors. Then, as a second step, the authorities must attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors. 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.

[2389] Brazil's first written submission, para. 151.

[2390] Brazil's first written submission, para. 151.

[2391] European Communities first written submission, para. 452; Switzerland's first written submission, para. 294; Norway's first written submission, para. 295.

[2392] See, for example, European Communities' first written submission, para. 442; Brazil's first written submission para. 153.

[2393] Brazil's second written submission, para. 75.

[2394] European Communities' first written submission, para. 442; Switzerland's first written submission, para. 284; Norway's second written submission, para. 108.

[2395] Brazil's first written submission, paras. 154-155; Japan's first written submission, paras. 218-227.

[2396] China's first written submission, para. 352.

(ii) Identification of the nature and extent of injurious factors

7.977 The European Communities notes that the Appellate Body referred, in *US – Line Pipe*, to the need to explain satisfactorily the "nature and extent" of injurious factors other than increased imports. The European Communities submits that the Appellate Body did not explain further what was meant by this term. One understanding could be that, in order to ensure non-attribution and thus the existence of a causal link, a competent authority must, at least approximately, estimate the effects of alternative factors on the domestic industry, and in so doing ensure that such injury is not attributed to increased imports, such that a final determination of the existence of a causal link, on the basis of objective evidence, can be made. This may be a comparatively simple operation where only one other factor is determined to be causing injury at the same time. This will inevitably become a more complex analysis, necessitating more sophisticated tools, in the event that two or more other factors are causing injury.[2397] For further discussion of the meaning of nature and extent see paragraph 7.989 *et seq*.

7.978 The United States notes that, under the second sentence of Article 4.2(b) of the Safeguards Agreement, a competent authority must also ensure that the "injury caused by factors other than the increased imports . . . [is] not . . . attributed to increased imports."[2398] The United States adds that, although the Appellate Body has explained this requirement in different ways in its prior safeguard reports[2399] it made its clearest statement about the requirements of this provision in its *US - Line Pipe* report.[2400] In that report, the Appellate Body reiterated its prior statements that the second sentence of Article 4.2(b) requires that:

> "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 . . . . The non-attribution language in Article 4.2(b) . . . [thus] 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."[2401]

7.979 The United States further notes that, in light of this, the Appellate Body has stated, the competent authorities should "identify the nature and extent of the injurious effects of the known factors other than increased imports," and "explain satisfactorily" how they have distinguished the effects of those factors from the effects of increased imports.[2402] Accordingly:

> "[T]o fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must established explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."[2403]

[2397] European Communities' written reply to Panel question No. 31 at the second substantive meeting.
[2398] Appellate Body Report, *US – Line Pipe*, para. 208.
[2399] *See, e.g.*, Appellate Body Report, *US - Wheat Gluten*, para. 70.
[2400] Appellate Body Report, *US – Line Pipe*, paras. 200-217.
[2401] United States first written submission, para. 404.
[2402] Appellate Body Report, *US – Line Pipe*, para. 213. The lack of textual basis for a requirement of an "explicit" finding is discussed in Section F.
[2403] Appellate Body Report, *US – Line Pipe*, para. 217.

(iii) Contribution

7.980 The United States relies upon *US – Line Pipe* and *US – Wheat Gluten* to argue that the Appellate Body has consistently found that imports need not be the "sole cause of serious injury" under Article 4.2(b). Instead, the Appellate Body has stated that the Agreement on Safeguard's requirement of a "genuine and substantial" causal link between imports and serious injury is satisfied if imports simply "contribute to 'bringing about,' 'producing' or 'inducing' the serious injury" being suffered by an industry. In other words, "…the causation requirement of Article 4.2(b) can be met where the serious injury [suffered by an industry] is caused by the interplay of increased imports and other factors". Thus, it is permissible under the Agreement on Safeguards for a competent authority to conclude that increased imports are causing serious injury to an industry, even if other factors are also causing injury, so long as imports themselves contribute substantially to bringing about serious injury.[2404] Accordingly, the Appellate Body has clearly found no fault with the United States statute's "substantial cause" test insofar as it permits the USITC to make an affirmative causation finding if increased imports have made an "important" contribution to serious injury, rather than requiring them to be the "sole" cause of serious injury.[2405]

7.981 Korea and New Zealand agree that increased imports alone do not have to cause serious injury, but they must have a "genuine and substantial relationship".[2406] While the Agreement on Safeguards does not require the demonstration that increased imports alone caused the serious injury, the Agreement does obligate the United States to not attribute injury caused by other factors to imports. If that obligation is met, then there must be a genuine and substantial relationship between the increased imports and the serious injury.[2407] New Zealand adds that while the Appellate Body has said that increased imports do not need to be the sole factor causing serious injury[2408], it has not said that increased imports need only be one cause among many. Article 4.2(b) refers to "the" causal link, not "a" causal link, and the Appellate Body has repeatedly affirmed the requirement for a genuine and substantial relationship of cause and effect between increased imports and serious injury.[2409] [2410]

7.982 Japan and Brazil accept that it may be that a slight increase in imports only aggravates circumstances in which an industry is already experiencing serious injury. While the increased imports did not help the industry, the domestic industry would have been suffering serious injury with or without the increased imports. They submit that in such a case, once the effect of other factors has been separated and distinguished, the connection between the imports and the serious injury is ascertained and the imports cannot be blamed for the serious injury. However, Japan and Brazil argue that the United States seems to be advocating a contributory cause standard. It appears to believe that as long as imports are having some impact no matter how negligible and the industry is suffering serious injury, then imports can be blamed. Japan and Brazil believe this is inconsistent with the obligation of Article 4.2(b) not to attribute other causes to imports. Article 4.2(b) does not allow imports to become the scapegoat for other factors. A competent authority must still find a "genuine

[2404] United States' first written submission, paras. 407, 434 and 441.
[2405] United States' first written submission, paras. 434 and 441.
[2406] Korea's written reply to Panel question No. 87 at the first substantive meeting; New Zealand's written reply to Panel question No. 87 at the first substantive meeting.
[2407] Korea's written reply to Panel question No. 87 at the first substantive meeting.
[2408] Appellate Body Report, *US – Wheat Gluten*, para 67.
[2409] Appellate Body Report, *US – Wheat Gluten*, para 69 confirmed in *US – Lamb*, paras. 168, 177 and 179 and in *US – Line Pipe*, para 211.
[2410] New Zealand's second written submission, para. 3.92.

and substantial" causal link between increased imports and serious injury. According to Brazil, this is certainly more than a contributing cause standard.[2411]

7.983 In response, the United States submits that it does not believe that imports may be considered to be contributing in a "genuine and substantial" way to serious injury if they are having only a "negligible" impact on the industry.[2412] The United States statute itself requires that imports be an "important", that is, a "substantial", cause of the serious injury being suffered by the domestic industry.[2413] Accordingly, to the extent that imports were only contributing "negligibly" to serious injury – that is, in a "small" or "insignificant" way [2414] – the USITC would not be permitted by the United States statute to find that imports are an "important" cause of injury.[2415]

7.984 The United States argues that by requiring the USITC to find that increased imports are an "important" cause of injury and as important as any other cause, the United States statute ensures that the USITC will find there is a "genuine and substantial" causal link between imports and serious injury before issuing an affirmative safeguards finding, as the Appellate Body has stated. In this regard, the United States notes that the standard dictionary definitions of the words "substantial" and "important" show that the words have essentially the same meaning when used to defined the degree of weight that must be given a particular factor in a decision or analysis. The United States asserts that given the ordinary meaning of these two words, it is clear that, by requiring imports to be an "important" cause of serious injury, the United States statute contemplates that the USITC will assess whether there is at least a "genuine and substantial" causal relationship between imports and serious injury in a safeguards proceeding, as required by the Agreement on Safeguards .[2416] The United States adds that, since the Appellate Body has found that the Agreement requires that increased imports "contribute" to "bringing about" or "producing" serious injury in a "genuine and substantial" way, which indicates that imports may be found to have the requisite link to serious injury even when they are not the most important cause of such injury, the Agreement on Safeguards would, therefore, permit a competent authority to find imports are causing the requisite level of serious injury even when they are not the most important cause of such injury. The United States argues that, accordingly, it is clear that, in this respect, United States law contains a more rigorous causation standard than the Agreement on Safeguards.[2417]

7.985 The United States further argues that the requirement to conduct a detailed assessment of the nature and extent of the injury caused by both imports and other non-import factors is not applicable to a factor if that factor is not contributing to serious injury. Accordingly, to the extent that the USITC finds that a factor was not contributing significantly to serious injury, the sole issue for review is whether the USITC's conclusion in this regard was reasoned and supported by the record, not

[2411] Japan's written reply to Panel question No. 87 at the first substantive meeting; Brazil's written reply to Panel question No. 87 at the first substantive meeting.

[2412] Japan and Brazil written replies to Panel questions No. 87.

[2413] 19 U.S.C. §2252(b)(1)(B).

[2414] In this regard, the word "negligible" is defined in the *New Shorter Oxford English Dictionary* as "[a]ble to be neglected or disregarded; unworthy of notice or regard; so small and insignificant as to be ignorable." The *New Shorter Oxford English Dictionary*, 1993 Edition, p. 1900 (US-86). This definition clearly contrasts with the same Dictionary's definition of "important" as "having great significance, carrying with it great weight or consequences, weighty, momentous...." Ibid., p. 1324; United States' first written submission, para. 442.

[2415] United States' second written submission, para. 147.

[2416] United States' first written submission, para. 442.

[2417] United States' first written submission, para. 443.

whether the USITC performed the non-attribution analysis described by the Appellate Body in the *US – Wheat Gluten* case.[2418]

7.986 In counter-response, Korea argues that the United States apparently misunderstands the non-attribution requirement. The Appellate Body has made clear that all factors causing injury must be examined since the only means by which a causal relationship between imports and serious injury can be established is by measuring that causal relationship independent of other factors.[2419] Otherwise, the causal relationship between serious injury and imports is merely assumed, not demonstrated.[2420]

(iv) Quantification

7.987 The European Communities and Brazil suggest that Article 3.5 of the AD Agreement imposes an identical obligation to that contained in the Agreement on Safeguards not to blame imports for other causes before imposing anti-dumping duties and that that Article entails a quantification requirement.[2421] Relying upon the Appellate Body decision in *US – Hot-Rolled Steel* which interpreted that Article, the European Communities and Brazil argue that the USITC's analysis fails to meet the standards set out in the Agreement on Safeguards because it is exclusively based on a relative comparison between individual causes of serious injury and increased imports. It does not involve, therefore, a separation and distinction of the injurious effects of other factors. Nor does it involve the attribution of serious injury suffered by the domestic industry to the various causes of injury individually, thus permitting a determination whether there is a "genuine and substantial" relationship between increased imports and serious injury. The European Communities, Brazil and Japan argue that although the task of non-attribution may be a difficult one, it is the price paid to justify application of trade remedy measures and one to which Members of the WTO agreed.[2422]

7.988 The United States argues that neither the Appellate Body nor previous panels have required that a competent authority "quantify" the precise amount of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b). To the contrary, the *US – Lamb* and *US – Wheat Gluten* Panels have both stated specifically that a "Member is not necessarily required to quantify on an individual basis, the precise extent of 'injury' caused by each other possible [injurious] factor". Indeed, in its most recent discussions of the attribution issue, the Appellate Body has explained that the Agreement on Safeguards requires only a "reasoned and adequate explanation" not a "quantitative" valuation, of the effects attributable to imports and other factors. Thus, the Agreement plainly permits a qualitative, rather than quantitative, assessment of the "nature and extent" of the injury caused by both imports and other factors in its causation analysis.[2423]

[2418] United States' first written submission, para. 408.

[2419] See Appellate Body Report, *US – Line Pipe*, para. 211 (affirming Appellate Body Report, *US – Lamb*, para. 179, footnote 38).

[2420] Korea's second written submission, para. 154.

[2421] European Communities' first written submission, para. 445; Brazil's first written submission, paras. 156 and 157.

[2422] European Communities' first written submission, para. 445; Japan's second written submission, para. 150. Japan refers to Appellate Body Report, *US – Hot Rolled Steel*, para. 228; Brazil's first written submission, para. 157.

[2423] United States' first written submission, paras. 410 and 435.

7.989 In counter-response, a number of complainants submit that quantification is, in fact, required. China refers[2424] to the following quote from the Appellate Body Report in the recent dispute of *US – Line Pipe*:

> "As ruled in *US – Hot Rolled Steel* with respect to the similar requirement in Article 3.5 of the Anti-Dumping Agreement, so, too, we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."[2425]

7.990 China also notes that the New Shorter Oxford Dictionary defines the words 'nature' and "extent" as follows:[2426]: "Nature: The inherent or essential quality or constitution of a thing, also, an individual element of character, disposition etc.; a kind, a sort, a class". "Extent: The amount of space over which a thing extends, size, dimensions, amount".[2427] China submits that taking the literal meaning of these terms, the word "nature" would obviously stand for the "quality" of a factor, and the word "extent" – synonymous with size, amount – then means the "quantity" of a factor.[2428] Therefore, in China's view, if the Appellate Body requires the identification of the nature and extent of the "other" known factors, it means both the quality and quantity of the injurious effects of the "other" factors. China does not consider, however, that the assessment of the extent to which "other factors" are causing injury necessarily requires a mathematical examination. However, the importance of increased imports in the causation of injury compared to the importance of other factors must be examined so that it can be ensured that there is no manifest error of appraisal. This, says China, has not been done by the United Stataes.[2429] Accordingly, and to that extent, China disagrees with the United States' statement that the prior Appellate Body reports did not require competent authorities to "quantify" the actual effects of the factors on the industry's overall condition, and that the Agreement on Safeguards suggests a qualitative, rather than quantitative assessment of the effects causing injury to the domestic industry.[2430]

7.991 In response, the United States submits that it does not agree with China's interpretation. The substantive Article 4.2(b) obligation with regard to other factors causing injury is a negative one, namely, not to attribute injury caused by such factors to increased imports. Thus, analysis of these other causal factors is needed only to the extent necessary to establish that the injury they are causing has not been attributed to increased imports. The Agreement on Safeguards does not require any particular form of analysis, and if the competent authorities can comply with Article 4.2(b) without evaluating both the quality and quantity of injurious effects attributable to other factors, that analysis would be sufficient.[2431]

7.992 The United States also notes that China is using a dictionary to define terms set forth in an Appellate Body report, rather than a provision of the Agreement on Safeguards .[2432] The findings and conclusions in those reports, however, are not treaty text, nor do they create obligations under the

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[2424] China's second written submission, para. 174; Norway's second written submission, para. 120.
[2425] Appellate Body Report, *US – Line-Pipe*, para. 215 (emphasis added)
[2426] *The New Shorter Oxford English Dictionary*
[2427] China's second written submission, para. 175.
[2428] China's second written submission, para. 176.
[2429] China's second written submission, para. 177.
[2430] China's second written submission, para. 178.
[2431] United States' written reply to Panel question No. 31 at the second substantive meeting.
[2432] China's second written submission, paras. 173-179.

covered agreements, and they should not be interpreted as if they were or did. China errs in attempting to apply to Appellate Body reports an analysis that appears to reflect customary rules of international law for the interpretation of treaties. Moreover, the United States notes that the dictionary definition of the term "extent" used by China in its discussion does not indicate that "extent" means "quantity", as China asserts. Instead, the dictionary definition cited by China indicates that the word "extent" means "[t]he amount of space over which a thing extends, size, dimensions, amount".[2433] This definition simply indicates that "extent" can mean the general "amount" or "size" of a factor; it does not indicate that the size or amount of a factor must be specifically quantified. As long as the competent authorities examine the data relating to the "extent" of an other factor sufficiently to establish that they have not improperly attributed injury associated with that factor to increased imports, they have properly considered the "extent" to which that factor has caused injury to the industry. On the basis of the foregoing, the United States submits that it is not true, as China asserts, that the Appellate Body has, by using this word in its prior reports, suggested that a competent authority must precisely "quantify" the effects of non-import factors in its causation analysis.[2434]

7.993 The European Communities also argues that a competent authority is required to "quantify" factors. Specifically, Article 4.2(a) of the Agreement on Safeguards refers to "factors of [a] quantifiable nature". A competent authority cannot assess serious injury, for instance, without quantifying profit levels, or capacity utilization. An assessment of causal link must inevitably involve assessing such developments, contemporaneously, on a qualitative and quantitative basis.[2435] However, the European Communities understands the United States as arguing that it is not subject to an obligation to accept econometric analyses which would allow it to quantify "how much" injury is caused by increased imports. The European Communities is mildly surprised that the United States, when taking a safeguard measure of the scale of the present steel safeguard measure (with an effect on the lives of many workers and consumers in the United States and all over the world) would not want to use and take advantage of any means offered to it which might permit a more accurate determination[24362437]

7.994 Switzerland refers[2438] to the Appellate Body' decision in *US – Wheat Gluten* where it said that:

> "Article 4.2(a) sets forth the factors which the competent authorities "*shall evaluate*" in "determin[ing] whether increased imports have caused or are threatening to cause serious injury to a domestic industry…". Under that provision, the competent authorities must evaluate "all relevant factors ... having a *bearing* on the situation of [the] industry". In evaluating the relevance of a particular factor, the competent authorities must, therefore, assess the "bearing", or the "influence" or "effect" that

[2433] China's second written submission, para. 175 (citing *The New Shorter Oxford English Dictionary*).
[2434] United States' written reply to Panel Question No. 31 at the second substantive meeting.
[2435] European Communities' second written submission, para. 356.
[2436] In this context, the European Communities notes that neither the panel, nor the Appellate Body in *US – Line Pipe* felt the need to discuss the issue of quantification in order to find that the USITC's causation analysis was inconsistent with the Agreement on Safeguards. The Appellate Body did, however, state (para. 215) that the competent authority should:

> "[I]dentify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."

[2437] European Communities' second written submission, para. 357.
[2438] Switzerland's second written submission, para. 92.

> factor has on the overall situation of the domestic industry, against the background of all the other relevant factors."[2439]

7.995 Switzerland argues that even though the Appellate Body did not require a quantification of the precise amount, it required the competent authorities to evaluate all relevant factors. Switzerland further argues that an evaluation implies a certain quantification.[2440]

7.996 New Zealand notes that it has never argued for some kind of "pure quantification" standard, although it notes that the United States sensibly does not attempt to deny that quantification must play, at a minimum, a major role in any non-attribution analysis. However, the problem is that the USITC did not come close to meeting the minimum standards which the Appellate Body has established in a line of cases. In short, the United States approach fails in any substantive way to ensure "non-attribution".[2441]

7.997 The United States argues that there is a sound rationale for not requiring a competent authority to "quantify" the effects of imports and other factors on the industry in a safeguards analysis.[2442] In particular, the United States argues that, given the significant number of industry and import factors that must be considered under the Agreement on Safeguards and the United States statute, it is clear that, to "quantify" the effects of imports and other factors, a competent authority would need to develop an economic model to address – that is, "quantify" – the effects of imports and other factors on all factors required to be considered under the Agreement on Safeguards and the United States statute.[2443] The United States submits that the USITC is unaware of any existing individual economic model and analytical structure that accurately and effectively quantifies the effects of imports and other factors on all of the industry indicia that must be analysed under the Agreement on Safeguards or the United States statute. Moreover, the United States argues that, to date, no representative of any party has offered such a model to the USITC during the course of its safeguards proceedings, or even during the course of proceedings before WTO panels. In other words, no one has yet presented to the USITC a single economic model that would adequately and accurately address in a consistent fashion all of the individual industry factors that must be assessed under the Agreement on Safeguards and the United States statute.[2444]

7.998 The United States argues that, moreover, the conclusion that a competent authority must quantify the effects of imports and other factors for only one or two selected criteria of industry condition, would not be consistent with the requirement under Article 4.2(a) that the competent authority assess the effects of imports on all relevant factors having a bearing on the condition of the industry, including its employment levels, productivity levels, or profitability levels. Indeed, according to the United States, picking a criterion (like profits or revenues or production) as a "proxy" for the overall injury being suffered by an industry simply places weight on that particular factor to the exclusion of other important indicia of the industry's condition (such as employment, capacity utilization, or capital investments). The Agreement on Safeguards does not permit such a restricted analysis. Given the foregoing, the United States asserts that it is clear that the Panel should not find

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[2439] Appellate Body Report, *US – Wheat Gluten*, para. 71. (emphasis in original)
[2440] Switzerland's second written submission, para. 92.
[2441] New Zealand's second written submission, para. 3.109.
[2442] United States' first written submission, para. 411.
[2443] United States' first written submission, para. 413.
[2444] United States' first written submission, para. 415.

that the USITC is required to "quantify" the effects of imports on the industry because it would reflect only an imprecise measurement of the overall level of injury suffered by an industry.[2445]

7.999 Brazil submits that the United States' position that qualitative and quantitative analyses are effectively mutually exclusive undertakings, and that one need never inform the other, does harm to the Appellate Body's findings in *US – Wheat Gluten*, *US – Lamb*, and *US – Line Pipe* with respect to non-attribution. Switzerland agrees with Brazil that this case is a perfect exhibition of why "qualitative" analysis, alone, cannot always justify a causation finding under Article 4.2(b) given the many counter-intuitive results that are evident in the USITC's "qualitative" findings.[2446] Brazil further argues that the United States not surprisingly wants to avoid any serious consideration of econometric evidence in this case, since that evidence so completely undermines the simplistic conclusions reached by the USITC.[2447] In effect, the United States contends that if one cannot simultaneously consider every causal factor and every indicator of injury, quantitative analyses are unable to satisfy the non-attribution requirement.[2448] According to Brazil, the argument begs a question that the United States seeks to obscure, namely why should econometric analyses be discredited if they can help inform the qualitative assessment of at least some of those causal factors?[2449]

7.1000 With respect to the argument made by the United States that quantification exercises are invalid unless such an approach quantifies the effects of imports and every conceivable other factor on each and every indicia of injury, Brazil submits that this is a transparent attempt to reduce the quantification requirement to an absurd exercise. Some injury indicia are more amenable to econometric methods (e.g., price, sales) while other injury indicia (e.g., employment) may only be able to be fully measured in conjunction with a large body of descriptive and other evidence.[2450] According to Brazil, the correct interpretation of the econometric approach is that one must incorporate all key relevant variables.[2451] Brazil submits that a reliable statistical regression analysis must use the qualitative descriptions of the industry and product in order to include all important explanatory factors. The fact that there may be other relatively unimportant factors not included in the regression analysis does not make it invalid, it simply is a recognition that, qualitatively and intuitively, based on the evidence these factors had a marginal effect, if any, on industry performance.[2452]

7.1001 Similarly, Japan and Switzerland submit that econometeric studies need not simultaneously consider all indicia of injury (e.g., price, profits, capacity utilization, etc.), to meaningfully contribute to the analysis. In fact, it is quite appropriate to use various approaches to shed light on various factors. If an econometric model allows one to better understand the factors affecting domestic price levels, for example, then it is perfectly acceptable and appropriate to isolate price and perform a regression analysis on those variables that affect price. No one has argued that such a model replaces other modes of analysis for the other factors. However it would be wrong to dismiss data that more accurately assesses particular industry injury indicia.[2453]

[2445] United States' first written submission, para. 416.
[2446] Brazil's second written submission, para. 81; Switzerland's second written submission, para. 94.
[2447] United States' first written submission, paras. 411, 413, 415-416; United States' written reply to Panel question No. 88 at the first substantive meeting.
[2448] United States' first written submission, paras. 413 and 416.
[2449] Brazil's second written submission, para. 82.
[2450] Brazil's second written submission, para. 91.
[2451] Brazil's second written submission, para. 93.
[2452] Brazil's second written submission, para. 94.
[2453] Japan's second written submission, para. 156; Switzerland's second written submission, para. 94.

7.1002 The United States submits that it has not stated that it was "physically" or "theoretically" impossible to develop an economic model that would quantify the effects of imports in some approximate fashion. However, the United States notes that modelling exercises would have significant limitations from the perspective of the Agreement on Safeguards. The development and use of a series of related models suffers from the flaw that the individual models would be generated using different inputs, thus limiting the extent to which the models reflected the same set of factual assumptions. Similarly, a model that focused on one or two specific factors would, by definition, not take account of all of the factors required under the Agreement on Safeguards. Thus, while such a model might accurately reflect the impact of imports on particular indicia of injury, it would only imperfectly reflect the complex economic relationships of factors required to be considered by the Agreement on Safeguards. The use of economic models, with their inherent imprecisions, are no more precise, accurate or "quantitative" an assessment of the injurious effects of imports than the analysis performed by the USITC.[2454]

7.1003 Japan and Brazil argue that quantifying the economic effects of various factors has been undertaken by competition authorities in the United States for some time now, using tools developed by economists and statisticians over many decades. The econometric models are designed specifically to achieve two important goals: (i) to disentangle the relative roles of different factors; and (ii) to quantify the relative importance of each factor. Brazil submits that, in this case, the exercise is less complex than in other settings. The argument made by the United States, both the USITC's during its investigation and now before the Panel, is based primarily on price. According to the United States, the effect of import volumes on pricing is a major source of injury. Thus, the relevant question for the United States in this case concerns the role of increased imports and the extent to which they affected domestic price levels. Japan and Brazil argue that all of the econometric models presented to the United States authorities focused on explaining domestic price levels. The models measured the extent to which import prices and import quantities had any discernible effect on domestic price levels. The models also measured other factors that might be affecting domestic prices, and indicated the relative magnitude of each factor, holding all other factors constant. These models established that domestic price decreases and increases, not import price decreases and increases, were the dominant factor explaining domestic price levels.[2455] Brazil notes that both the domestic industry's model and the foreign producers' model agreed that with respect to two of the three products modelled – hot-rolled, cold-rolled and corrosion resistant CCFRS products – there was no strong statistical evidence that imports had a major effect on price.[2456]

7.1004 Brazil also notes that nowhere in the USITC Report or the Views of the Commission on Injury is there any discussion of: slab – whether and how slab imports could have or did have an effect on prices, given the lack of any market for domestically produced slab and any significant merchant sales of domestic slab; plate – how, given the more than 50% decline in non-NAFTA imports between 1996 and 2000 (1.8 million tons to 0.8 million tons)[2457], and the three million ton increase in domestic capacity over the same period[2458], plate imports can have had any adverse impact on domestic plate prices in any recent period; and hot-rolled – how, given the fact that by interim

[2454] United States' written reply to Panel question No. 88 at the first substantive meeting.

[2455] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's second written submission, paras. 83 and 84; Brazil's written reply to Panel question No. 85 at the first substantive meeting.

[2456] Brazil's written reply to Panel question No. 26 at the second substantive meeting

[2457] Brazil's first written submission, Common Annex A.

[2458] Brazil's first written submission, Common Annex B.

2001 import volume was roughly one-eighth the volume seen in 1998, hot-rolled imports could have had any adverse effect on prices.[2459] [2460]

7.1005 In response, the United States submits that it disagrees with Brazil's assertion that the record evidence in the steel investigation, including the models submitted by the foreign producers and the domestic industry, established that imports were a minor or insignificant factor in explaining domestic pricing levels for CCFRS. The United States reiterates that the record clearly established that imports of CCFRS had a serious and adverse impact on domestic pricing during the period of investigation, and Brazil has not come forth with a fact-based prima facie case to the contrary. Second, the economic model submitted by the foreign producers contained serious methodological flaws that rendered its results inconclusive from an economic perspective, which means that it did not "establish" that imports were a minor determinant of domestic pricing levels, as Brazil contends. Third, not all of the models submitted during the investigation claimed that imports had only a minimal or insignificant effect on domestic pricing, as Brazil has consistently and mistakenly asserted in this proceeding. On the contrary, the model submitted by the domestic industry claimed that imports were the most important determinant of pricing in the market.[2461]

7.1006 Japan and Brazil do not argue that the Agreement on Safeguards requires econometric models in every case. They submit, however, that where the data is readily available, and particularly when much of that data is sourced from the industry itself, it is WTO-inconsistent for a competent authority to dismiss models based on that data and not use them in its assessment and decision-making.[2462] Brazil argues that economic models can be used to evaluate and refine the qualitative conclusions and to measure the relative magnitude of various factors on the main problem of the domestic industry, price. Particularly where a qualitative conclusion appears to have little support (i.e. it is counterintuitive), one would expect quantitative analysis to justify this conclusion.[2463]

7.1007 The European Communities argues that since the burden of demonstrating the existence of a causal link, on the basis of objective evidence, lies with the Member imposing safeguard measures, it should be expected that the causation analysis must become more sophisticated as the complexity of the factual situation to be examined increases. Depending on the complexity of the factual situation, the European Communities submits that it may be the case that only econometric studies, taken together with quantitative and qualitative analysis of the facts, will permit a competent authority to establish, on the basis of objective evidence, the existence of a causal link. Remaining passive in the face of econometric studies which tend to show that there is no causal link must mean that a competent authority has failed to demonstrate, on the basis of objective evidence, the existence of a causal link.[2464] [2465]

7.1008 The European Communities notes that the Appellate Body, in *US – Wheat Gluten* pointed to one means of analysing a factual situation without the use of econometric modelling to estimate the quantification of injurious effects. In analysing the effect of capacity increases it posited two counterfactuals. In one counterfactual, capacity was held constant and in the other imports were held

[2459] USITC Report, Vol. II at Table FLAT-6.

[2460] Brazil's written reply to Panel Question 38 at the second substantive meeting.

[2461] United States' written reply to Panel Question 38 at the second substantive meeting.

[2462] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's second written submission, paras. 83 and 84; Brazil's written reply to Panel question No. 85 at the first substantive meeting.

[2463] Brazil's written reply to Panel question No. 85 at the first substantive meeting.

[2464] Appellate Body Report, *US – Wheat Gluten*, para. 55.

[2465] European Communities' written reply to Panel question No. 33 at the second substantive meeting

constant. In so doing the Appellate Body was able to isolate the effect of capacity increases.[2466] In that investigation, as for many determinations before this Panel, rising input costs were recognized as an alternative cause In such a case, it is possible to hold costs constant, and analyse the profitability of the domestic industry if input costs had not increased. If one were to factor in a further adjustment in fixed costs to take account of increased costs resulting from over-capacity, one could start to isolate the injurious effects of other factors and ensure that such effects are not attributed to increased imports. The European Communities submits that the table below provides an example of such an analysis for increased factory costs, and shows clearly the inadequacies of the USITC's investigation.[2467]

Table 3: Cold-Finished Bar – Unit Value of commercial sales and costs (1998-2001)[2468]

	1998 (actual)	**1999 (actual)**	**1999 (constant)**	**2000 (actual)**	**2000 (constant)**	**2001 (actual)**	**2001 (constant)**
Net. comm. sales	711	667	667	668	668	671	671
Raw materials	480	347	347	368	368	364	364
Direct labor	45	51	51	54	54	58	58
Other factory costs	98	212	***98***	184	***98***	203	***98***
COGS total	623	609	**496**	605	**520**	625	**520**
Gross profit	88	57	**171**	63	**148**	47	**151**
SG&A	44	49	**49**	44	**44**	48	**48**
Operating income (loss)	44	8	**122**	19	**104**	(1)	**103**

7.1009 The European Communities submits that if production had also decreased with a fall in demand, one can determine if the decrease in production is due to decreased sales caused by increased imports or the fall in demand, by holding the market share constant and then determining the extent to which production decreased beyond what it would have been if its market share was constant.[2469]

7.1010 In the following table, Brazil presents the statements that the United States makes underlying why econometric methods should not be relied upon. Brazil states that it concurs with these statements, as they are basic lessons taught in introductory statistics and econometrics courses. Brazil submits that, however, they do not imply that quantification is impossible or unreliable nor do they justify the USITC's decision to disregard the evidence presented in this case. In the second column, Brazils submits that it contains a report of what was actually done in this case using recognized econometric tools to control for the areas of United States' concern.

[2466] Appellate Body Report, *US – Wheat Gluten*, paras. 81-91.
[2467] European Communities' written reply to Panel question No. 33 at the second substantive meeting.
[2468] European Communities' written reply to Panel question No. 33 at the second substantive meeting, The table is based on USITC Report, Vol. II, p. LONG-34, table LONG-28. In the columns marked "constant" the data for "other factory costs" has been kept constant. Figures which have been kept constant have been italicised, and figures which change as a result of the simulation are put in bold.
[2469] European Communities' written reply to Panel question No. 33 at the second substantive meeting.

Statements by United States as to why the econometric approach toward quantification are unreliable	*Relevance for the evidence* presented *in this case*
Regression studies need "a large number of observations"[2470] and that "econometricians strive for at least 30 data point."[2471]	None – Foreign respondents' studies contained 65 data points[2472];
Models must control for the fact that some of the causal factors may be dependent on other variables[2473] (*e.g.*, hot-rolled prices may influence cold-rolled prices, but one must incorporate the fact that hot-rolled prices depend on scrap prices).	None – Foreign respondents studies controlled for the fact that certain factors are dependent on other factors by "nesting" a series of models[2474];
Regression studies must control for statistical issues such as serial correlation and stationarity.[2475]	None – Foreign respondents studies controlled for stationarity and serial correlation by first differencing and AR1 adjustments.[2476]

7.1011 Japan and Brazil contend that given that that foreign respondents' models used statistical techniques that accounted for all of the United States' stated concerns there is no basis for the United States' conclusion that "…given these limitations, a regression model would be no more useful as a means of satisfying the requirements of the Agreement on Safeguards than any other economic model".[2477] Japan and Brazil submit that concerns expressed by the United States were controlled in the model, making its results reliable.[2478]

7.1012 The United States responds by noting that the foreign respondents model did not addresses the issues associated with linear regression models outlined in the United States' written responses to the Panel's first set of questions. As the Panel is aware, in its response to question No. 88 of the Panel's first set of written questions to the parties, the United States noted that linear regression

[2470] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2471] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2472] Brazil's first written submission, Common Exhibits CC-52, 53, 54.
[2473] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2474] Brazil's first written submission, Common Exhibits CC-52, 53, 54. See pp. 227-229 in Orley Ashenfelter, Phillip B. Levine, David J. Zimmerman, *Statistics and Econometrics: Methods and Applications*, (New York, John Wiley and Sons, Inc.), 2003 for a discussion of the statistical basis for "nesting" the endogenous variables. In technical terms, this is referred to as using the "fitted" or "predicted" endogenous variables. *See also* Chapter 15 in Jeffrey M. Wooldridge, *Introductory Econometrics*, (Stamford: Southwestern College Publishing) 2000; pp. 366-369 in G.S. Maddala, *Introduction to Econometrics*, 2nd edition, (New York: Macmillan Publishing),1992.
[2475] United States' written reply to Panel question No. 88 at the first substantive meeting.
[2476] Brazil's first written submission, Common Exhibits CC-52, 53, 54. A discussion of these techniques can be found in many undergraduate textbooks and in nearly every introductory graduate textbook. See W.H. Greene, *Econometric Analysis, 4th edition*, Prentice Hall, 2000; E.R. Berndt, *The Practice of Econometrics*, Addison-Wesley, 1991; W.E. Griffiths, R.C. Hill and G.G. Judge, *Learning and Practicing Econometrics*, John Wiley & Sons, 1993; Peter Kennedy, *A Guide to Econometrics, 4th edition*, MIT Press, 1998.
[2477] Japan's second written submission, paras. 158 and 159; Brazil's second written submission, para. 86.
[2478] Japan's second written submission, paras. 158 and 159; Brazil's second written submission, para. 90.

models had inherent limitations that would complicate their use in a safeguards proceeding, including the fact that linear regression models involving multiple variables are able to estimate the likely effects of individual independent variables in an equation only to the extent that those effects are attributable solely to the independent variable, that is, to the extent that they do not move in tandem with the effects of other independent variables. According to the United States, Brazil appears to misunderstand this problem. Brazil confuses the second limitation outlined by the United States – which is a limitation inherent in multiple variable linear regression models which cannot be specifically controlled for – with the issue of "endogeneity," which is a limitation that a properly designed linear regression models *can* control for. "Endogeneity" is a term used to describe the fact that certain independent variables used in a linear regression may be dependent on other independent variables in the equation. As Brazil appears to recognize, a linear regression model can be properly designed to resolve the endogeneity issue. However, endogeneity does not address the second limitation described by the United States in its response to question No. 88. As that response showed, regression models involving multiple variables are only able to estimate the effects of these individual variables to the extent that those effects are attributable solely to that independent variable. A multiple variable regression analysis would not include in this estimate the effects attributable to such a variable to the extent those effects move in tandem with, and cannot be disentangled from, the effects of other independent variables. These movements in tandem can occur, *whether or not the independent variables are related*. Thus, in a situation in which various factors combine to increase (or decrease) the injury suffered by the industry, a multiple variable regression model would underestimate (or overestimate) the injurious effects of imports because it would not provide an estimate for the effects that imports have in common with other injury factors. Moreover, this limitation of linear regression models is a limitation inherent in every multiple variable linear regression model and simply cannot be controlled for by designing the model in a particular way. The model submitted by the foreign producers simply does not control for this problem.[2479]

7.1013 The United States argues that no complainant has actually provided the Panel with a technical description of an economic model that quantifies the overall level of injury caused by imports.[2480] Moreover, complainants have not provided a technical explanation of the manner in which a competent authority can perform such a quantification. Instead, they have made bald assertions that economists and statisticians have been developing models and techniques to answer these sorts of questions "for more than 100 years".[2481] After noting that the foreign steel producers provided the USITC with an econometric model that quantified the effects of imports in the steel safeguards investigation, they contend that the USITC was required by the Agreement on Safeguards to use the model or develop its own econometric analysis to rebut it.[2482] [2483]

7.1014 In any event, the United States argues that the complainants are mistaken when they imply that the USITC failed to perform a quantitative analysis of the effects of imports on the industry.[2484] The USITC clearly performed a quantitative assessment of the manner in which imports and other factors affected the condition of the industry during the period of investigation. According to the United States, the USITC collected extraordinary volumes of quantitative data concerning the prices and volume of imports, the prices of domestic merchandise, the trade and financial operations of the

[2479] United States' written reply to Panel question No. 38 at second substantive meeting.

[2480] United States' second written submission, para. 130.

[2481] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's written reply to Panel question No. 85 at the first substantive meeting.

[2482] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's written reply to Panel question 85 at the first substantive meeting.

[2483] United States' second written submission, para. 131.

[2484] Brazil's first oral statement, para. 34.

domestic industry, the effect of imports and other factors on the industry's operations, and the conditions of competition in each of the markets in question. After collecting this data, the USITC examined in detail the manner in which imports affected each of the industry's injury indicia and examined the extent to which other factors adversely affected those data. According to the United States, it is clear that this analysis was both detailed and based primarily on quantitative data.[2485]

7.1015 Finally, the United States submits that it is not true that the United States is "eager" to avoid the use of economic models in safeguards investigations. It notes in this regard that it has developed and used such models in its anti-dumping and safeguards investigations. The United States believes, however, that it is important to dispel the notion that the use of economic modeling lends any more accuracy or scientific certainty to the assessment of the amount of injury caused by imports or other injury factors than that afforded by the USITC's current analysis. Economic models are subject to substantial ranges of error due to variations in the reliability, consistency, or amount of statistical data used in them. Moreover, many economic models rely on quantitative inputs (like elasticities of supply or substitution) that are only, in essence, numerical assessments of qualitative judgments about condition of competition in the market. In sum, economic models will generally only result in quantitative estimates of the likely effects of imports on particular indicators of an industry's condition.[2486] The United States points out that economic models are no more precise a method in assessing injury than the examination of hard, quantitative market data that the USITC now performs when conducting its causation analysis.[2487]

7.1016 Japan and Brazil also argue that it is possible to quantify the effects of different factors given that the United States undertook such a quantification exercise in relation to Article 5.1 of the Agreement on Safeguards.[2488] Korea argues that if it can be determined what level of relief is necessary to repair injury caused by imports alone, surely it can be determined what level of injury was caused by imports alone. Korea further submits that it is rather noteworthy that the United States has been able to develop an *ex post facto* economic analysis to attempt to justify its remedy but cannot perform an economic analysis to identify the injury caused by various factors. This is particularly problematic when, according to the Appellate Body in *US – Line Pipe*, the permissible extent of the measure should be found in the analysis of increased imports, causation, and serious injury.[2489]

7.1017 The United States argues that in contrast to the type of quantification envisioned by some complainants, the numeric exercises in the United States' first written submission with respect to Article 5.1 did not purport to measure injury as a whole, or even the actual effect of imports on a particular factor or factors. The United States recognized that the calculations would reflect the underlying qualitative assumptions or qualitative inputs and, as a result, would at best estimate the magnitude of effects, rather than their actual values. However, within these confines, the United States calculations provide a useful confirmation of the qualitative conclusion reached by the United States that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy the injury attributable to imports. The United States submits that only a qualitative

[2485] United States' second written submission, para. 135.
[2486] United States' second written submission, para. 136.
[2487] United States' second written submission, para. 137.
[2488] Japan's written reply to Panel question No. 88 at the first substantive meeting; Brazil's written reply to Panel question No. 88 at the first substantive meeting.
[2489] Korea's written reply to Panel question No. 88 at the first substantive meeting; Korea's second written submission, para. 156; see also Norway's second written submission, para. 159; Norway's first oral statement on behalf of the complainants, paras. 18-20.

evaluation of the effects of imports and other factors of the sort used by the USITC would provide the necessary level of certainty. [2490]

(v) Consistency of the causation test applied by the USITC with WTO jurisprudence

7.1018 Japan and Brazil note that, in this case, the USITC applied the "substantial cause" test prescribed by the United States' statute, which defines "substantial cause" as "a cause which is important and not less than any other cause". They assert that the USITC's limited and narrow causation analysis in the instant case according to which the USITC found that increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause is essentially the same as its causation analyses in *US – Wheat Gluten*, *US – Lamb*, and *US – Line Pipe*.[2491] The European Communities, Japan, China, Switzerland, Norway, New Zealand and Brazil argue that the Appellate Body found that causation analysis insufficient to meet the requirement of non-attribution under Article 4.2(b) in each of those cases.[2492]

7.1019 Japan argues that, as a growing body of WTO jurisprudence demonstrates, mere compliance with United States law most definitely does not ensure compliance with international obligations of the United States under the WTO Agreement.[2493] The European Communities, Switzerland and Norway note that while they are not challenging, in this dispute, the legislation on the basis of which the United States applies safeguard measures but rather the application of this legislation in this particular safeguard investigation, they cannot but point out that such application continues the practice criticised by the Appellate Body.[2494] Switzerland adds that there can be little doubt that the reason why the United States has been found in successive WTO disputes to have failed to properly ensure the non-attribution of injury caused by other factors to increased imports is the fact that the USITC applies standards which do not meet those of the Agreement on Safeguards.[2495]

7.1020 The European Communities, Japan, Norway, New Zealand and Brazil assert that in each case, the Appellate Body held that the analysis violated the non-attribution requirement because the USITC failed both to "separate" and "distinguish" the injurious effects caused by factors other than imports.[2496] Brazil submits that there is nothing in the USITC's report in this case that distinguishes it from the USITC's prior three reports. The general framework is the same. The USITC employed its "substantial cause" test as it did in the prior three cases, setting forth other causal factors of injury other than increased imports and then individually "examining" their relative causal importance vis-à-vis increased imports to determine if increased imports are important and no less important than each of those causes. As the Appellate Body has stated, such an examination is not enough. According to

[2490] United States' written reply to Panel question No. 88 at the first substantive meeting.

[2491] Japan's first written submission, para. 249; Brazil's first written submission, para. 176.

[2492] European Communities first written submission, paras. 435 and 457; Japan's first written submission, para. 249; Japan's second written submission, para. 105; China's first written submission, para. 425; Switzerland's first written submission, para. 278; Norway's first written submission, para. 301; New Zealand's first written submission, para. 4.120; Brazil's first written submission, para. 176.

[2493] Japan's first written submission, para. 248.

[2494] European Communities first written submission, para. 454; Switzerland's first written submission, para. 297; Norway's first written submission, para. 298.

[2495] Switzerland's first written submission, para. 297.

[2496] European Communities first written submission, paras. 435 and 457; Japan's first written submission, para. 249; Norway's second written submission, para. 115; New Zealand's second written submission, para. 3.110; Brazil's first written submission, para. 177.

Brazil, Article 4.2(b) requires something more to establish a genuine and substantial relationship of cause and effect between increased imports and serious injury.[2497] [2498]

7.1021 Japan and Norway argue that although an examination of the relative causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the Agreement on Safeguards. Japan asserts that a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors.[2499] Norway argues that since the methodology used to analyse causation is itself flawed, it is not a surprise that the explanation by the USITC of its conclusions is also flawed.[2500] Norway further argues that the United States does not in its first written submission try to explain how they assessed the relative importance of the various factors that they admit contributed to the alleged serious injury, to ensure that increased imports were not attributed the injury caused by other factors.[2501] China also argues that the USITC failed to explain adequately, as required by Article 4.2(b), that injury caused to the domestic industry by other factors has not been attributed to increased imports, and, in consequence, the USITC could not establish the existence of the causal link, as it Article 4.2(b) requires, between increased imports and serious injury.[2502]

7.1022 Japan, Korea, Norway and Brazil argue that in this case the USITC made no attempt to rigorously "separate" or "distinguish" the serious injury caused by factors other than imports or to evaluate the extent these factors injured the domestic industry.[2503] Rather, according to Japan and Brazil, the USITC merely speculated that imports were a "substantial cause" of serious injury, a cause no less important than any other cause.[2504] By way of illustration, New Zealand argues that it is simply not enough to come to some vague and indeterminate conclusion that domestic capacity increases "were likely to have some effect on prices"[2505] but then take the analysis no further.[2506] Korea and Brazil submit that a "mere assertion" used to support a finding of a genuine and substantial causal link "does not *establish explicitly*, with a *reasoned and adequate explanation*, the injury caused by factors other than the increased imports was not attributed to increased imports".[2507] [2508]

7.1023 The European Communities, Switzerland and Norway argue that the USITC's analysis also fails to meet the standards set out in the Agreement on Safeguards because it is exclusively based on a relative comparison between individual causes of serious injury and increased imports. It, therefore, does not involve a separation and distinction of the injurious effects of other factors. Nor does it involve the attribution of serious injury suffered by the domestic industry to the various causes of

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[2497] Appellate Body Report, *US – Lamb*, para. 184.

[2498] Brazil's second written submission, para. 76.

[2499] Japan's first written submission, para. 250; Norway's second written submission, para. 115. Norway refers in this regard to Appellate Body, *US – Lamb*, para. 184.

[2500] Norway's second written submission, para. 115.

[2501] Norway's second written submission, para. 119.

[2502] China's second written submission, para. 190.

[2503] Japan's first written submission, para. 249; Korea's first written submission, para. 121; Norway's first written submission, para. 288; Brazil's first written submission, para. 160.

[2504] Japan's first written submission, para. 247; Brazil's first written submission, para. 175.

[2505] United States first written submission, para 494.

[2506] New Zealand's second written submission, para. 3.124.

[2507] Appellate Body Report, *US – Line Pipe*, para. 220 (emphasis in original).

[2508] Korea's first written submission, para. 119; Brazil's first written submission, para. 177; Brazil's second written submission, para. 77.

injury individually, which would permit a determination whether there is a "genuine and substantial" relationship between increased imports and serious injury.[2509] The European Communities submits further that this relative comparison does not permit the USITC to "establish, explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports".[2510] [2511]

7.1024 Similarly, Brazil argues that finding that increased imports are important and no less important than another cause is not the same as finding a genuine and substantial causal link.[2512] New Zealand argues that according to the USITC's approach, which requires a mere comparison between the causal effect of imports and other factors, as long as no single factor is more important than increased imports, the substantial cause test is met, even though collectively the other factors may be of far greater importance than increased imports. New Zealand submits that this does not require an overall evaluation of whether there is a genuine and substantial relationship between increased imports (as distinguished from other factors) and serious injury. In short, the USITC test allows a conclusion that causation exists even without proof of that genuine and substantial relationship.[2513] Relying upon the Appellate Body decision in *US – Lamb*, a mere "relative causation" assessment by itself does not comply with the requirement to assess the "nature and extent" of the "injurious effects" caused by a non-import factor as distinguished and separated from increased imports.[2514]

7.1025 More particularly, Korea argues that the United States still has not explained the method by which it "disentangled" the injurious effects of other factors from the injurious effects of imports[2515] and it has not explained how it has distinguished the effects of those other factors from imports. Merely commenting on the significance of another factor relative to imports either by comparison ("not less than any other cause") or by degree ("minor") is not sufficient because it does not separately consider or disentangle the effects of each factor in a straightforward and unambiguous manner.[2516]

7.1026 China notes that, as was decided in the *US – Lamb* dispute, an examination of the relative causal importance of the different factors does not satisfy the requirements of the Agreement on Safeguards. However, according to China, the investigating authority can nevertheless comply with Article 4.2(b) of the Agreement on Safeguards by establishing explicitly, with a reasoned and adequate explanation, that injury caused by other factors was not attributed to increased imports.[2517] China argues that in order to do this, in cases where the investigating authority believes that an alleged factor is not causing injury, it must explicitly, clearly and unambiguously state it and explain the reasons why. The explanation must be reasoned and adequate. To proceed otherwise would not ensure that alleged factors have been examined closely enough to establish that they are not contributing to the injury and as a result, there would be no guarantee that injury caused by other factors has not been wrongfully attributed to increased imports. On the other hand, if the investigating authority believes that an alleged factor is causing injury, it must assess that injury and not attribute it to increased imports.[2518] Nevertheless, in China's and Norway's view, when the USITC placed

[2509] European Communities' first written submission, para. 457; Switzerland's first written submission, para. 278; Norway's first written submission, para. 299.
[2510] Appellate Body Report, *US – Line Pipe*, para. 217.
[2511] European Communities' second written submission, para. 336.
[2512] Brazil's first written submission, para. 177; Brazil's second written submission, para. 77.
[2513] New Zealand's first written submission, para. 4.122.
[2514] New Zealand's second written submission, para. 3.124.
[2515] Appellate Body Report, *US – Line Pipe*, para. 211 (affirming Appellate Body Report, *US – Lamb*, para. 179, footnote 38)
[2516] Korea's second written submission, para. 155.
[2517] China's first written submission, para. 425.
[2518] China's first written submission, para. 426.

emphasis on the substantial cause methodology, it failed to fulfil the requirements of Article 4.2(b) of the Agreement on Safeguards since its conclusions regarding the effect of imports as compared to other factors were not clear, unambiguous nor straightforward and further, they did not establish that other factors did not cause injury and that injury caused by other factors was not attributed to increased imports. Moreover, the explanations given by the USITC to support its conclusions were not clear, straightforward, unambiguous. Further, according to China they were not reasoned and adequate.[2519]

7.1027 In response, the United States notes that, to date, the Appellate Body has issued four reports which describe the general principles applicable to a causation analysis in a safeguards proceeding. Nonetheless, the Appellate Body has specifically conceded that the standards it has announced in these reports leave "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)". Thus, according to the United States, it is clear that the Appellate Body has left to the discretion of the competent authority the job of developing the appropriate analytical methodologies needed to satisfy the requirements of Article 4.2(b).[2520]

7.1028 The United States also argues that, as can be seen from an examination of the explicit language of the Appellate Body's three prior reports (*US – Lamb*, *US – Wheat Gluten* and *US – Line Pipe*), the Appellate Body has never stated, as the complainants argue, that the USITC's causation methodology is inconsistent with the basic requirements of Article 4.2(b). Instead, on the three occasions that it addressed the USITC's causation analysis, the Appellate Body has faulted the USITC not for its choice of a particular causation analysis or for applying the "substantial cause" standard set forth in the statute, but because the USITC did not perform a "reasoned and adequate" explanation of the nature and extent of the injury caused by non-import factors in those particular cases, in the view of the Appellate Body. The United States submits that in these reports, the Appellate Body has simply found that the USITC should have discussed in more detail its analysis of the causal nexus between imports and injury.[2521]

7.1029 The United States argues that, in fact, the Appellate Body has actually approved the USITC's general analytical approach in several significant respects. For example, in *US- Lamb*, the Appellate Body explicitly noted that, by "examining the relative causal importance of different causal factors" as required under the United States' statute, the USITC clearly engages in the sort of "process to separate out, and identify, the effects of the different factors, including increased imports" that has been required by the Appellate Body in *US – Wheat Gluten*. Although the Appellate Body went on to state that it was, nonetheless, required to examine the USITC's reasoning in detail to assess whether it complied with the analytical guidelines announced in *US – Wheat Gluten*, the United States argues that it is clear from this statement that the Appellate Body does not believe that the "substantial cause" test set forth in the statute and applied by the USITC is inherently inconsistent with the Agreement on Safeguards .[2522]

7.1030 In counter-response, New Zealand concedes that the Appellate Body has observed that the Agreement on Safeguards allows a competent authority appropriate discretion to craft its own methodology. However the United States, in seizing on this point, ignores the fact that the Appellate Body has, nevertheless, gone on to find that the USITC violated the Agreement on Safeguards by

[2519] China's first written submission, paras. 374,464, 480, 497, 520; Norway's first written submission, para. 329.
[2520] United States' first written submission, paras. 417 and 436.
[2521] United States' first written submission, paras. 431, 432 and 437.
[2522] United States' first written submission, para. 433.

failing to provide for a correct non-attribution. In other words, a competent authority has discretion to develop and apply an appropriate methodology – so long as it delivers a result which complies with the Agreement on Safeguards.[2523] [2524]

7.1031 Similarly, the European Communities agrees that the Agreement on Safeguards does not expressly proscribe certain methodologies. However, according to the European Communities, it does prescribe certain functions that any methodology must satisfactorily execute (e.g. ensure non-attribution). The European Communities states that its charge against the United States is not that it is required to apply one methodology or another. Rather, the charge is that the methodology applied by the United States does not permit it to satisfactorily carry out the non-attribution analysis required by the Agreement on Safeguards.[2525] The European Communities requests the Panel to find that, in failing to "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports", the United States has failed to establish the existence of a genuine and substantial relationship of cause and effect between increased imports and serious injury. Since the USITC applied the same methodology in each of its determinations, the European Communities submits that the methodological flaws that have been identified, by necessity, vitiate each of the individual determinations.[2526]

7.1032 Also in counter-response, the European Communities further argues that it is clear that while panels and the Appellate Body have found that the USITC did not provide a reasoned and adequate explanation, the reason for such findings is that the relative comparison methodology used by the USITC does not permit it to properly establish that the injurious effects of other factors are not attributed to increased imports. [2527] The European Communities states[2528] that it cannot fault the United States for referring to what must be the one remotely positive comment by the Appellate Body with respect to its causation practice. However, the United States can only qualify the statement in *US – Lamb* as "approving" the USITC's causation methodology by quoting very selectively from what the Appellate Body actually said. The European Communities submits that it sees nothing in the USITC Report to indicate how the USITC complied with the obligation found in the second sentence of Article 4.2(b). According to the European Communities, the USITC Report, on its face, does not explain the process by which the USITC separated the injurious effects of the different causal factors, nor does the USITC Report explain how the USITC ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports. The USITC concluded only that each of four of the six "other factors" was, relatively, a less important cause of injury than increased imports.[2529]

7.1033 The European Communities also argues[2530] that the United States stretches the language of the Appellate Body in arguing that the Appellate Body actually "approved" the USITC's "general analytical approach". The USITC's general analytical approach, based as it is on a relative comparison, does not permit the USITC to make a reasoned and adequate explanation of how it separated and distinguished the injurious effects of other factors from the injurious effects of increased imports. Indeed, the Appellate Body quoted approvingly the Panel finding:

[2523] Appellate Body Report, *US – Lamb*, para. 181.
[2524] New Zealand's second written submission, para. 3.111.
[2525] European Communities' second written submission, para. 320.
[2526] European Communities' second written submission, para. 355.
[2527] European Communities' second written submission, para. 347.
[2528] European Communities' second written submission, para. 348.
[2529] Appellate Body Report, *US – Lamb*, paras. 184, 185. Footnotes omitted, italicisation in the original, underlining shows the text the United States has quoted in United States' first written submission, para. 433.
[2530] European Communities' second written submission, para. 349.

> "[T]hat the USITC's application of the 'substantial cause' test in the lamb meat investigation as reflected in the USITC Report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports."[2531]

7.1034 The European Communities submits[2532] that three panels have found the application of the relative comparison methodology to be WTO inconsistent. While two of the panels were reversed on some specific aspects of their reasoning with respect to causation, the Appellate Body did not reverse their ultimate conclusions that the USITC had failed to establish a causal relationship.[2533] The European Communities notes that, in *US – Line – Pipe*, the Panel, with the benefit of the clarifications offered by the Appellate Body's reports in *US – Wheat Gluten* and *US – Lamb,* found:

> "[I]t 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 United States 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 USITC 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 USITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. The USITC'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 *United States – 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 *United States – Lamb Meat*, such an assumption is inconsistent with Article 4.2(b). The same assumption was effectively made by the USITC in respect of the other causes of injury identified above, since its analysis of those factors was also confined

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[2531] Appellate Body Report, *US – Lamb*, para 187.
[2532] European Communities' second written submission, para. 351.
[2533] In the Panel Report *US – Wheat Gluten*, para. 8.154, the Panel found:

> "[T]hat the USITC examination into whether increased imports were 'a cause that is important and not less than any other cause' of serious injury and the resulting conclusion of the USITC that increased imports are 'an important cause of serious injury and a cause that is greater than any other cause' are not consistent with Article 4.2(b) SA as they do not ensure the non-attribution to imports of injury caused by other factors."

In the Panel Report, *US – Lamb*, para. 7.277 the panel concluded:

> "That the determinations by the USITC in respect of four of the six "other factors" examined do not constitute determinations that these factors made no appreciable contribution to the threat of serious injury. Rather, the USITC found that these four factors were "less important" causes than increased imports of the threat of serious injury, which in our view means that they were contributing in a more than insignificant way to that threat. Therefore, we conclude that the USITC's application of the "substantial cause" test in the lamb meat investigation as reflected in the USITC Report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports."

> to a determination of whether the injury caused by the relevant factor was not a more important cause of serious injury than increased imports."[2534]

7.1035 The European Communities argues[2535] that the Appellate Body upheld this analysis, expressed in the conclusion of the panel that the USITC "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.[2536] The Appellate Body specifically quoted the findings of the USITC in the *US – Line Pipe* investigation, that:

> "Respondents also argued that we may not attribute injury caused by these factors to the imports. We have not done so. As required by the statute, after evaluating all possible causes of injury, we have determined that imports are an important cause of injury and are not less than any other cause."[2537]

7.1036 The European Communities submits[2538] that this did not "establish explicitly, with a reasoned and adequate explanation, that injury caused by factors other than the increased imports was not attributed to increased imports".[2539] In so doing, the Appellate Body considered the USITC's assertion that it had not attributed injury caused by other factors to increased imports. The European Communities submits that in the present case, the USITC does not even assert, in any of its product bundle determinations, that it has not attributed injury caused by other factors to imports. It simply states, on an individual basis, that other causes are not as important a cause as increased imports. Taken together with the statement of the Appellate Body in *US – Lamb* quoted above, this finding of the Appellate Body is a clear indication that the relative comparison carried out by the USITC does not permit it to provide the reasoned and adequate explanation of separation, distinction, and non-attribution which the Appellate Body has found that Article 4.2(b) of the Agreement on Safeguards requires.

7.1037 The United States points out that the "substantial cause" test set forth in the United States statute does not merely require the USITC to perform a "relative comparison" of injury caused by imports and non-import factors, as has been asserted by the complainants. Instead, the United States statute requires the USITC to make two separate findings when analysing the nature and extent of the injury caused by imports and other factors. First, the USITC must determine that increased imports are in and of themselves an "important" cause of serious injury to the domestic industry. Secondly, the USITC must also determine that imports are as "important" or "more important" a cause of injury than any other factor. Accordingly, it is clear that it is not sufficient under the United States statute for the USITC to find simply that imports are causing more injury than other factors. Instead, the United States statute specifically requires that the USITC must find that imports are an "important" cause of serious injury as well.[2540] The United States submits that, in light of these requirements, it is also clear that the "substantial cause" test does, in fact, require the USITC to identify the nature and extent of the individual factors causing injury to the industry, including increased imports. The statute first requires the USITC to identify the nature and extent of the injury caused by imports by assessing whether increased imports are an "important" cause of serious injury. The statute also requires the

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[2534] Panel Report, *US – Line Pipe*, para. 7.288.
[2535] European Communities' second written submission, para. 352.
[2536] Panel Report, *US – Line Pipe*, para. 7.290; Appellate Body Report, *US – Line Pipe*, para. 222.
[2537] P. I-30 of the USITC Report in the Line Pipe investigation, quoted by the Appellate Body in Appellate Body Report, *US – Line Pipe*, para. 218.
[2538] European Communities' second written submission, para. 352.
[2539] Appellate Body Report, *US – Line Pipe*, para. 220 (emphasis in original).
[2540] United States' first written submission, para. 439.

USITC to "examine factors other than imports" that are causing injury and to compare the "importance" of that injury to that caused by imports.[2541]

7.1038 In counter-response, the European Communities argues that two conclusions can be drawn from comments made by the United States in its submissions and in the USITC Report: the USITC determines the existence of a "substantial" causal link between increased imports and serious injury and thereafter the USITC determines whether, on an individual basis, alternative factors cause injury which is "equal to or greater than" that caused by increased imports.[2542] According to the European Communities, this is not consistent with Article 4.2(b) of the Agreement on Safeguards when the ordinary meaning, viewed in the light of its object and purpose is examined.[2543] More particularly, the European Communities submits that such an approach renders the non-attribution analysis nugatory, and is clearly inconsistent with Article 4.2(b) of the Agreement on Safeguards. It is incorrect to determine that there is a causal link before carrying out the non-attribution analysis. Moreover, the non-attribution analysis requires the separation and distinction of the injurious effects of, on the one hand, all alternative factors, and, on the other hand, increased imports.[2544]

7.1039 The European Communities submits[2545] that the Appellate Body clearly considers that the causal link determination can only be conclusively made after the non-attribution exercise has been carried out. Japan, Korea, China, Norway and New Zealand agree.[2546] According to the European Communities, the panel in *US – Line Pipe* recognized this failing in the United States' methodology:

> "We further note that the USITC 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 […] 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."[2547]

7.1040 In light of the foregoing, the European Communities argues that the USITC, therefore, ignored clear instructions from the Appellate Body, and the Panel's analysis in *US – Line Pipe.*[2548] [2549]

7.1041 In particular, the European Communities argues that in the following instances, the USITC determines that there is a causal link before purporting to examine the injurious effects of other factors:

[2541] United States' first written submission, para. 440.

[2542] European Communities' second written submission, para. 326.

[2543] European Communities' second written submission, paras. 328-331.

[2544] European Communities' second written submission, paras. 327 and 328.

[2545] European Communities' second written submission, para. 332; The European Communities refers additionally to Appellate Body Report, *US – Wheat Gluten*, para. 69 and Appellate Body Report, *US – Lamb*, para. 179.

[2546] Japan's written reply to Panel question No. 41 at the second substantive meeting; Korea's written reply to Panel question 41 at the second substantive meeting; China's first written submission, para. 352; China's written reply to Panel question No. 41 at the second substantive meeting; Norway's written reply to Panel question No. 34 at the second substantive meeting; New Zealand's written reply to Panel question No. 34 at the second substantive meeting.

[2547] Panel Report, *US – Line Pipe*, para. 7.289.

[2548] "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." Appellate Body Report, *US – Gasoline*, page 23.

[2549] European Communities' second written submission, para. 333.

Hot rolled bar

"We consequently conclude that the increased imports were an important cause of the serious injury sustained by the domestic hot-rolled bar industry".[2550]

Cold rolled bar

"Because the imports succeeded in increasing their share of the United States market in 2000, the domestic industry's production and shipments declined from 1999 levels notwithstanding the increase in United States apparent consumption."[2551]

Certain tubular products

"We find that imports have had a negative effect on the domestic industry over the period we have examined, particularly during the recent years of the period."[2552]

"We further find that increased imports are likely to cause serious injury to the domestic industry in the imminent future." [2553]

Carbon and alloy fittings (FFTJ)

"We find that imports are a substantial cause of serious injury." [2554]

Stainless steel bar

"In sum, we find that increased quantities of imports of stainless steel bar during the period were a substantial cause of the declines in the industry's trade and financial condition during this period." [2555]

Stainless steel rod

"In sum, we find that the increased quantities of imports of stainless rod during the period of investigation were an important cause of the declines in the industry's trade and financial conditions during this period." [2556]

Tin mill products

"I also find that increased imports are a substantial cause of serious injury to the domestic industry in that they are a cause which is important and not less than any other cause." [2557]

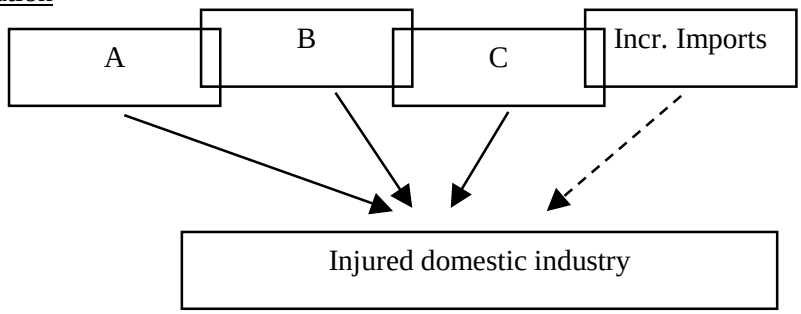
7.1042 According to the European Communities, a Member could not determine that there is a causal link if it cannot determine that imports could have caused the injury which has been observed

[2550] USITC Report, Vol. I, p. 97
[2551] USITC Report, Vol. I, p. 106
[2552] USITC Report, Vol. I, p. 163
[2553] USITC Report, Vol. I, p. 164
[2554] USITC Report, Vol. I, p. 177
[2555] USITC Report, Vol. I, p. 212
[2556] USITC Report, Vol. I, p. 221
[2557] USITC Report, Vol. I, p. 308

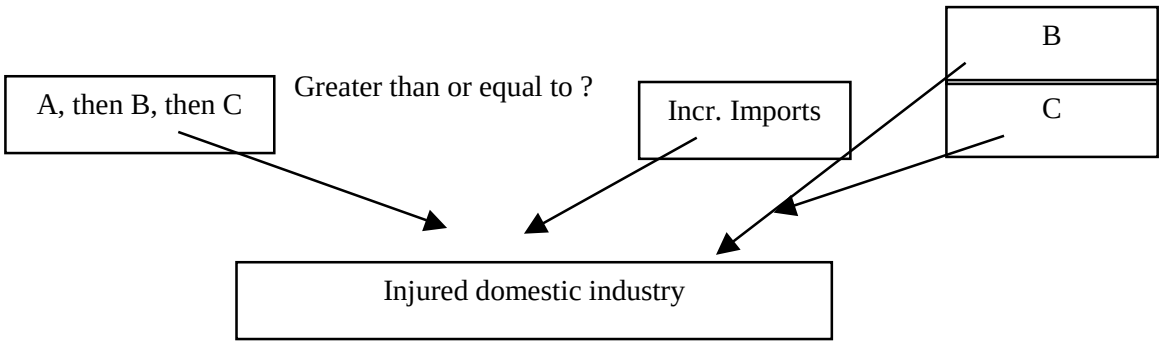
(necessitating the temporal correlation). Nor could it determine that a causal link exists if it only compared the injurious effects which it hypothesised are caused by increased imports with one other factor, because it may be the case that the observed injury is being caused by another factor.[2558] Similarly, Norway argues that the USITC examination of relative causes on an individual basis renders no determination of whether the aggregate effect of other causal factors is such that there is a "genuine and substantial causal link" between imports and injury.[2559]

7.1043 The European Communities submits that it is only by determining whether all of the other factors are, or are not, causing all of the observed injury, that a Member may appropriately ensure that it has not attributed injury caused by other factors to increased imports and thus ensured the existence of a genuine and substantial causal link between increased imports and the serious injury.[2560] The European Communities states that this approach, and the approach taken by the USITC, can be illustrated diagrammatically as follows (where A, B and C are alternative causes of injury):[2561]

Overall situation



USITC examination



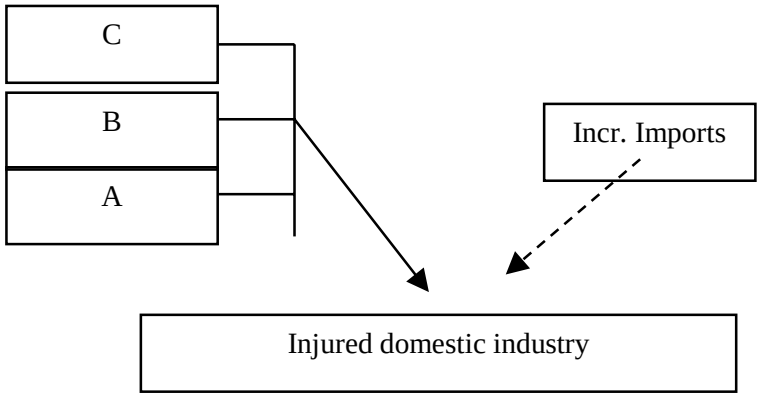
7.1044 According to the European Communities, the injurious effects of A are compared to the injurious effects of increased imports while the injurious effects of B and C are ignored (while the injurious effects of increased imports are assumed). Then the injurious effects of B are compared to the injurious effects of increased imports while the injurious effects of A and C are ignored. Finally,

[2558] European Communities' second written submission, para. 338.
[2559] Norway's second written submission, para. 115.
[2560] European Communities' second written submission, para. 337.
[2561] European Communities' second written submission, para. 338.

the injurious effects of C are compared to increased imports while the injurious effects of A and B are ignored.[2562]

7.1045 By way of example, New Zealand takes the case of a finding by the USITC that five factors are causing serious injury to the domestic industry, only one of which is increased imports. Proper analysis of the relevant data suggests that three of these causes, including increased imports, are particularly important and roughly equivalent to each other in causal effect. Yet, according to New Zealand, the USITC would claim that increased imports, contributing by less than a third to serious injury, met the "genuine and substantial relationship of cause and effect" standard under the Agreement on Safeguards.[2563]

Analysis required by the Agreement on Safeguards



7.1046 The European Communities notes that in its final diagram (above), the combined effects of A, B and C are assessed together, and in this manner it can be determined whether, once the effects of these other factors have been isolated, the hypothetical relationship of cause and effect between increased imports and serious injury is, in fact, genuine and substantial.[2564]

7.1047 The European Communities submits that it is quite clear that this is the analysis which is required by the Agreement on Safeguards. This follows from an interpretation of Article 4.2(b). Article 4.2(b) refers to the situation "when factors other than increased imports are causing injury [...] such injury shall not be attributed to increased imports". The phrase "such injury" is clearly a reference to the injury caused by "factors other than increased imports". A consideration of the object of Article 4.2(b), suggests that all factors must be considered collectively, otherwise it is not possible to determine with certainty the existence of a genuine and substantial relationship of cause and effect.[2565] According to the European Communities[2566], this has also been established by the Appellate Body. In *US – Wheat Gluten* the Appellate Body held, after requiring that the injurious effects of increased imports be distinguished from the injurious effects of other factors that:

[2562] European Communities' second written submission, para. 339.
[2563] New Zealand's second written submission, para. 3.89.
[2564] European Communities' second written submission, para. 340.
[2565] European Communities' second written submission, para. 341.
[2566] European Communities' second written submission, para. 342.

> "[T]he competent authorities can then […] attribute to increased imports, on the one hand, and , by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors, including increased imports."[2567]

7.1048 The European Communities and Norway argue[2568] that, by analysing the injurious effects of each other factor individually against the injurious effects of increased imports, the USITC is acting inconsistently with Article 4.2(b) of the Agreement on Safeguards. The European Communities and Norway refer to the Panel's decision in *US – Line Pipe*. It stated:

> "[T]he USITC 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."[2569]

7.1049 In response, the United States submits that the USITC simply does not find that there is a genuine and substantial causal link between imports and serious injury before assuring that other non-import factors are not being attributed to imports. Instead, the USITC first examines whether there is a correlation of trends between increased imports and declines in the overall condition of the domestic industry and then separates and distinguishes the effects of imports from those of other factors before concluding whether there is a "genuine and substantial" causal link between increased imports and serious injury. In other words, the USITC performs both of these analytical steps before ultimately concluding that imports have caused serious injury to the domestic industry.[2570]

7.1050 The United States submits that the European Communities also appears to misunderstand the Appellate Body's guidance concerning a proper causation analysis in a safeguards proceeding. First, the European Communities fails to recognize that the Appellate Body has stated that the "central" consideration in a competent authority's causation analysis is an assessment whether there is a "relationship between the movements in imports (volume and market share) and the movement in injury factors".[2571] Indeed, the USITC examines whether there is such a correlation as the first step in its analysis because the existence of a correlation between import trends and movements in the industry's performance factors is generally a strong indication of a causal link between imports and serious injury. Second, the European Communities' argument also appears to be premised on a mistaken reading of the Appellate Body's discussion of the principles that should guide a competent authority's non-attribution obligation. Although the Appellate Body stated in its *US – Wheat Gluten* report that "Article 4.2(b) presupposes ... *as a first step* in the competent authority's examination of causation that the injurious effects caused to the domestic industry by increased imports are

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[2567] Appellate Body Report, *US – Wheat Gluten*, para. 69.

[2568] European Communities' second written submission, para. 343; Norway's second written submission, para. 118.

[2569] Panel Report, *US – Line Pipe*, para. 7.289. (emphasis added)

[2570] United States' written reply to Panel question No. 41 at the second substantive meeting.

[2571] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

distinguished from the injurious effects caused by other factors", the Appellate Body did not state that this "first step" requires the competent authority to identify the nature and extent of non-import factors *before* assessing whether there was a correlation between increased imports and declines in the condition of the industry. On the contrary, the Appellate Body has expressly stated that the analytical steps satisfying the non-attribution obligation outlined in *US – Wheat Gluten* "simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b)" and are not actually "legal 'tests' mandated by the text of the Agreement on Safeguards".[2572] Moreover, the Appellate Body has specifically stated that it is not "imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities".[2573] In other words, the Appellate Body has not stated that the competent authorities must first isolate and distinguish the effects of non-import factors before assessing whether there is a correlation between import trends and declines in the industry's condition. Rather, the particular sequence of analytical steps does not matter as long as the analysis as a whole complies with the obligations of the Agreement on Safeguards , in line with reports adopted by the Appellate Body.[2574]

7.1051 China makes a similar argument to that put forward above by the European Communities. China refers[2575] to the Appellate Body's finding in *US – Line Pipe* that:

> "The causation requirement in Article 4.2(b) can be met where the serious injury is caused by the interplay of increased imports and other factors." [2576]

7.1052 China submits that the word "interplay" was appropriately chosen as there are several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry. Interaction of all the various factors influences the positive or negative developments in the domestic industry. China submits that it would, therefore, be misleading to make a comparison between increased imports and each of the factors only, instead of analysing the "injurious imports" and the injury caused by the interplay of other factors.[2577]

7.1053 China also refers[2578] to the Appellate Body's finding in *US – Wheat Gluten:*

> "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 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."[2579]

7.1054 China submits that, accordingly, investigating authorities have to distinguish the effects of increased imports from the effects of all the other relevant interacting factors in relation to the determination as to whether there is a genuine and substantial relationship of cause and effect between the increased imports and serious injury.[2580]

[2572] Appellate Body Report, *US – Lamb*, para. 178.
[2573] Appellate Body Report, *US – Lamb*, para. 178.
[2574] United States' written reply to Panel question No. 41 at the second substantive meeting.
[2575] China's second written submission, para. 181.
[2576] Appellate Body Report, *US – Line Pipe*, para. 209 (emphasis added).
[2577] China's second written submission, para. 182.
[2578] China's second written submission, para. 182.
[2579] Appellate Body Report, *US – Wheat Gluten*, para.91 (emphasis added).
[2580] China's second written submission, para. 183.

7.1055 China notes that the USITC essentially determines whether the imports are as important or more important cause of injury than any other factor. According to China, the USITC basically takes one factor from the group of "other factors" and compares individually their importance, one by one, with the importance of the effects of imports. The United States based its determination on a mere comparison between increased imports and each of the factors taken individually. Such an analysis allowed the United States to artificially identify the existence of a genuine and substantial causal link between imports and injury, without taking into account that the aggregated effect of other factors was a greater cause of injury than increased imports. [2581]

7.1056 China argues, firstly, that the examination on a factor-by-factor basis does not reflect completely the interplay of the factors, and thus, does not show and distinguish the aggregate effect of other causes of the injury suffered by the domestic industry.[2582] Similarly, Norway argues that the USITC looks at imports as one factor to be measured not against the collective weight of the other factors causing injury, but only measured against the other factors one by one.[2583] [2584] Norway submits that whenever there are two or more other factors, the United States is bound to get it wrong. Norway argues that even where there is only one other factor, this other factor will still be discounted should it be "equal to but not greater cause than imports". This is clearly explained by Commissioner Miller in the USITC Report, where she states that: "I thus find that increased imports are a substantial cause of serious injury in that they are a cause which is important and not less than any other cause …". [2585] [2586]

7.1057 Brazil believes that the interplay of various factors on the performance of the domestic industry in the importing country should be analysed.[2587] Similarly, the European Communities submits that assessing the cumulated effects of alternative factors is necessary in order to determine if a causal link exists.[2588] Japan states that separating and distinguishing causes should include consideration of the interplay of factors in the sense that injury caused by the collective interaction of other factors on the one hand, and injury caused by increased imports on the other need to be distinguished.[2589] It would be highly artificial to solely examine each factor separately if it was found that the interplay of various factors affected the industry. It may be that the combined effects of several factors is greater than any factor considered separately. For example, a fall in market demand at the same time that mini-mills added more capacity would produce a much more profound effect on sales and profits of the integrated sector than either single factor considered separately.[2590]

7.1058 China argues, secondly, the factor-by-factor examination is limited to a comparison of the causal importance of each of the factors. It is not a distinction of the mutually reinforcing effects of other relevant factors causing the injury from the imports factor.[2591] China submits that, therefore, by failing to distinguish the injury caused by the collective interaction of other factors on the one hand, from the injurious effects of increased imports on the other, the USITC did not have a proper basis for the determination of existence of a "genuine and substantial causal link" between imports and injury

[2581] China's second written submission, paras. 184 and 185; China's reply to Panel question No. 32 at the second substantive meeting.
[2582] China's second written submission, para. 186.
[2583] United States' first written submission, para. 423.
[2584] Norway's second written submission, para. 116.
[2585] USITC Report, Vol. I, p. 308. (Exhibit CC-6)
[2586] Norway's second written submission, para. 117.
[2587] Brazil's written reply to Panel question No. 32 at the second substantive meeting.
[2588] European Communities' written reply to Panel question No. 32 at the second substantive meeting.
[2589] Japan's written reply to Panel question No. 32 at the second substantive meeting.
[2590] Korea's written reply to Panel question No. 32 at the second substantive meeting.
[2591] China's second written submission, para. 187.

suffered by the domestic industry, and could not have come to the conclusion that imports contributed "substantially"[2592] to the serious injury.[2593] China argues that, accordingly, this approach does not ensure that the serious injury caused by other factors than increased imports that are causing injury to the domestic industry at the same time – simultaneously – is not attributed to imports, as required by Article 4.2(b) of the Agreement on Safeguards.[2594]

7.1059 In response, the United States argues that a competent authority is not required to assess whether imports are a more important cause of serious injury than all other possible factors before imposing a safeguards remedy. The Agreement on Safeguards simply does not contain a requirement that a competent authority find that the injurious effects of imports are greater than the cumulated effects of all other injurious factors. In fact, the Agreement contains no language requiring a competent authority to weigh the importance of the injurious effects of increased imports against any factor, either individually or collectively. Instead, as long as there is a "genuine and substantial" causal relationship between increased imports and a significant overall impairment in the condition of the industry, and as long as the competent authority does not attribute the effects of other factors causing injury to imports, the requirements of the Agreement on Safeguards are satisfied. Indeed, even the Appellate Body has interpreted the Agreement as requiring a competent authority to "separate and distinguish" the injurious effects of individual factors causing injury from one another when performing its injury analysis. Even though this separation and distinction of individual injury factors may be "difficult," the Appellate Body has directed that it be done.[2595]

7.1060 The United States also contends that, in its steel determination, the USITC has taken great pains to identify the nature and scope of the injury caused by both imports and other individual factors, to assess the extent of injury, if any, that each of these individual factors has caused to the industry, and to ensure that it does not attribute the effects of non-import factors to imports in its causation analysis. Indeed, even Japan appears to concede that the United States did actually "isolate" the injurious effects of each of the factors by evaluating the importance of each factor in relation to increased imports. The USITC's efforts in this regard are in full compliance with the principles outlined by the Appellate Body in *US -Wheat Gluten* and other cases, i.e., that competent authorities "separate" and "distinguish" the effects of increased imports from those of all other individual injury factors in safeguards investigations.[2596]

7.1061 In response, the United States submits that a "reasoned and adequate" explanation of the injurious effects of imports and non-import factors will properly take into account the manner in which the interplay of various factors (both import and non-import) have caused injury to an industry. The United States also believes that the USITC's analysis of the injurious effects of imports and non-import factors for all steel products covered by remedies appropriately identified the nature and extent of the injury attributable to all non-import factors, and therefore adequately assured that injury caused by other factors was not attributed to the imports.[2597]

(vi) Treatment of imports from free-trade areas

7.1062 The European Communities, Japan, China, Norway, New Zealand and Brazil argue that in the *US – Wheat Gluten* and *US – Line Pipe* disputes, the Appellate Body held that in excluding NAFTA

[2592] United States' first written submission, para.407.
[2593] China's second written submission, para. 188.
[2594] China's second written submission, para. 189.
[2595] United States' first written submission, para. 533.
[2596] United States' first written submission, para. 534.
[2597] United States' written reply to Panel question No. 32 at the second substantive meeting.

countries from a safeguard measure, the United States must offer a "reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources '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'."[2598]

7.1063 According to the European Communities, China and Norway, since excluded imports may be causing injury, the existence of a genuine and substantial causal link between non-excluded imports and serious injury can only be determined if the injury caused by excluded imports is not attributed to non-excluded imports.[2599] They argue that this requires two steps. First, it must be determined whether excluded imports are causing injury. If it is found that such excluded imports are causing injury then any such injury must not be attributed to non-excluded imports. The European Communities argues that irrespective of when or how a decision is taken to exclude certain imports, a determination must be made showing that the conditions for the application of a safeguard measure are met with respect to non-excluded imports.[2600]

7.1064 Japan, Korea, China, Norway and Brazil argue that increased imports coming from sources that are eventually excluded from the safeguard measure must be treated as an "other" factor in the causation/non-attribution analysis. Norway argues that this requires that they be excluded "up front", and not even considered for "increased imports".[2601] More specifically, Japan and Brazil argue that imports are a causal factor with respect to the issue of serious injury because they compete with the domestic like product. It would undermine the causation analysis required by the Agreement on Safeguards if a competent authority could render some portion of those imports meaningless simply by excluding certain sources from a measure. Korea believes that under Article 2.2 of the Agreement on Safeguards, imports which are not subject to a safeguard measure, cannot be used to satisfy the conditions contained in Article 2.2 and elaborated in Article 4.2 of the Agreement on Safeguards. Brazil submits that it is not enough that the competent authority separates and distinguishes all of the other causal factors other than the subject and excluded imports. If the competent authority does not separate and distinguish the effect of imports from excluded sources, it is potentially sanctioning a measure against subject imports for which there may not be a genuine and substantial causal link to serious injury.[2602] Further, China argues that if a certain portion of imports is not subject to a safeguard measure, then such imports must logically be "other factors"; they do not fall in any "third" category, or a "black hole" of causation.[2603]

7.1065 The European Communities argues that parallelism requires that all the conditions for the application of a safeguard measure must exist with respect to the imports to which the measure is

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[2598] For instance, European Communities' first written submission, para. 488 et seq.; Japan's written reply to Panel question No. 82 at the first substantive meeting; China's second written submission paras. 191-193; Norway's written reply to Panel question No. 82 at the first substantive meeting; New Zealand's written reply to Panel question no. 82 at the first substantive meeting; Brazil's second written submission, para. 102; Brazil's written reply to Panel question No. 82 at the first substantive meeting.

[2599] European Communities' written reply to Panel question No. 82 at the first substantive meeting; China's second written submission, paras. 195-196; Norway's written reply to Panel question No. 82 at the first substantive meeting.

[2600] European Communities' written reply to Panel question No. 82 at the first substantive meeting; Norway's written reply to Panel question No. 82 at the first substantive meeting.

[2601] Norway's second written submission, para. 182.

[2602] Japan's written reply to Panel question No. 82 at the first substantive meeting; Korea's written reply to Panel question No. 82 at the first substantive meeting; China's second written submission, paras. 197 and 198; Brazil's second written submission, para. 103; Brazil's written reply to Panel question No. 82 at the first substantive meeting.

[2603] China's second written submission, para. 198.

applied. If an investigating authority does not determine whether excluded imports are causing serious injury (as opposed to "contributing importantly" to serious injury), and does not then ensure that injury caused by such excluded imports is not attributed to the non-excluded imports, the causation analysis is automatically flawed.[2604] Similarly, New Zealand and Brazil argue that absent a reasoned and adequate explanation for an exclusion that establishes explicitly that the subject imports satisfied the conditions for the application of a safeguard measure, a violation of the parallelism requirement does result in a WTO-inconsistent causation analysis.[2605] Korea argues that if parallelism is violated, the measure is not limited to the extent necessary to remedy the serious injury caused by the increase in imports subject to the measure. For the same reason, the causation analysis in such a case is inconsistent with the requirement set out in the Agreement on Safeguards because serious injury caused by sources excluded from the measure was not treated as an "other factor" and attributed to imports covered by the measure.[2606] In contrast, Japan argues that a violation of the parallelism requirement does not automatically result in a WTO-inconsistent causation analysis. The Appellate Body has stated that parallelism requires that "the imports included in the determination made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2". Through a reasoned and adequate explanation of an exclusion that establishes explicitly that the subject imports satisfied the conditions for the application of a safeguard measure, the competent authority can effectively cure the parallelism violation.[2607]

7.1066 In response, the United States argues by way of general response that although the Appellate Body has stated that the United States must perform a parallel "causation" analysis with respect to the injury caused by non-NAFTA imports when it excludes Canada and Mexico from a safeguards remedy, it has not stated that the United States must perform a separate non-attribution analysis for these imports, either in its initial causation analysis covering all imports, or in the causation analysis performed as a part of the required "parallelism" analysis discussed in the *US – Wheat Gluten* and *US – Line Pipe* cases.[2608]

7.1067 The United States argues, as an initial point, that there is nothing in the language of the Agreement on Safeguards or the findings of the Appellate Body that indicates that the USITC must consider Canada and Mexican imports to be an other factor causing injury when performing its initial assessment of whether imports have caused serious injury to the industry. At this stage of the USITC's analysis – that is, before the USITC considers whether Mexico and Canada should be excluded from the remedy – the USITC is required by the United States statute and the Agreement on Safeguards to assess whether imports from all sources have been a substantial cause of serious injury to the domestic industry. In this regard, the United States notes that the United States statute and the Agreement on Safeguards both require the USITC to perform its general causation analysis by including "imports" – that is, all imports of the product concerned, not merely those eventually included in the measure – in its analysis. Moreover, according to the United States, the Appellate Body has not indicated in its prior findings that there is any reason for a competent authority to exclude any category of imports from its initial injury analysis. Accordingly, under the language of the statute and the Agreement, there is simply no basis for the USITC to treat these products in its initial injury analysis as though they were something other than imports.[2609]

[2604] European Communities' written reply to Panel question No. 83 at the first substantive meeting.

[2605] New Zealand's written reply to Panel question No. 83 at the first substantive meeting; Brazil's written reply to Panel question No. 83 at the first substantive meeting.

[2606] Korea's written reply to Panel question No. 83 at the first substantive meeting.

[2607] Japan's written reply to Panel question No. 83 at the first substantive meeting.

[2608] United States' first written submission, para. 452.

[2609] United States' first written submission, para. 453.

7.1068 The United States points out that the second sentence of Article 4.2(b) of the Agreement – which is the provision of the Agreement that requires a competent authority not to attribute to imports the effects of other factors – specifically states that, "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".[2610] Accordingly, the Agreement on Safeguards indicates that a non-attribution analysis is only required for factors "other than imports" that may be causing injury to the domestic industry, even when certain imports are excluded from the remedy.[2611]

7.1069 The United States argues that, similarly, there is no reason that the USITC should be required to treat these imports as a "non-import" cause of injury in the context of its "parallelism" causation analysis. The United States asserts that the Appellate Body in *US – Wheat Gluten* has found that the Agreement on Safeguards requires the United States to perform a second causation analysis that excludes Canadian and Mexican imports from its assessment of the causal link between imports and the condition of the industry, when the United States finds that Canadian and Mexican imports should be excluded from the safeguards remedy under the NAFTA exclusion. However, the requirement that the United States exclude these imports from its "parallelism analysis" in effect requires the United States to treat these imports as an "other" cause of injury and to distinguish the price and volume effects of NAFTA imports from non-NAFTA imports.[2612]

7.1070 In counter-response, Norway submits[2613] that when describing the legal rule applicable under the Agreement on Safeguards, the United States is agreeing that it has made a mistake, and that it is required after all to do a non-attribution analysis treating these imports as an "other" factor causing injury. In the words of the United States:

> "[T]he Appellate Body has found that the Safeguards Agreement requires the United States to perform a second causation analysis that excludes Canadian and Mexican imports from its assessment of the causal link between imports and the condition of the industry, when the United States finds that Canadian and Mexican imports should be excluded from the safeguards remedy under the NAFTA exclusion.[2614] However, the requirement that the United States exclude these imports from its 'parallelism analysis' in effect requires the United States to treat these imports as an 'other' cause of injury and to distinguish the price and volume effects of NAFTA imports from non-NAFTA imports."[2615]

7.1071 China submits that, as the excluded NAFTA imports are to be seen as "other factor" within the meaning of Article 4.2(b) of the Agreement on Safeguards, the United States is wrong in stating that nothing in the Agreement on Safeguards, as construed by the Appellate Body reports requires the United States to conduct a non-attribution analysis of the NAFTA imports.[2616] The European Communities argues[2617] that it is undeniable that the Appellate Body has not said, in so many words, that a competent authority must conduct a non-attribution analysis for excluded imports. However, the Appellate Body has said that in order to satisfy the requirement of parallelism:

[2610] Agreement of Safeguards, Article 4.2(b).
[2611] United States' second written submission, para. 150.
[2612] United States' first written submission, para. 454.
[2613] Norway's second written submission, para. 126.
[2614] Appellate Body Reports *US – Wheat Gluten*, para. 96; *US – Line Pipe*, para. 179 *et seq*.
[2615] United States' first written submission, para. 454. (emphasis added)
[2616] China's second written submission, paras. 198-199.
[2617] European Communities' second written submission, para. 362.

> "[I]t would be necessary for the United States to demonstrate, consistent with our ruling in *US – Wheat Gluten*, that the USITC provided a *reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources '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*.' "[2618]

7.1072 According to the European Communities, evidently, in order to ensure that non-FTA imports satisfy the conditions for the application of a safeguard measure, a Member must show that all the elements of a determination justifying the imposition of a safeguard measure are present for the non-excluded imports.[2619] The European Communities submits that this is confirmed when Article 4.2(b) of the Agreement on Safeguards is read in light of the Appellate Body's findings on parallelism. Article 4.2(b) provides that "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports". "Increased imports" in this phrase must be read as non-excluded imports, because a competent authority must find a genuine and substantial relationship of cause and effect between such non-excluded imports and serious injury. Consequently, "factors other than increased imports" must be understood as all non-import factors (e.g. increased capacity, declining demand etc.) and, if a Member decides to exclude certain imports, also those excluded imports.[2620]

7.1073 The complainants submit that the USITC did not conduct any specific evaluation of non-NAFTA imports. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports would not change its findings of injury and causation as to total imports.[2621] However, according to China and Brazil, this finding does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury. As such, it does not reflect a proper non-attribution analysis of NAFTA imports. The USITC's analysis of non-NAFTA imports, therefore, did not meet the Appellate Body's standard as set forth in *US – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry.[2622]

7.1074 The United States submits that notwithstanding the lack of an explicit requirement in the Agreement on Safeguards , however, the USITC did, in fact, properly isolate the effects of NAFTA from non-NAFTA imports in its parallelism analysis.[2623] The United States submits that the USITC appropriately discussed the nature and extent of the injurious effects of non-NAFTA imports and distinguished their effects from those of NAFTA imports. In fact, the USITC found that imports from Canada and/or Mexico did not constitute a substantial share of imports and did not contribute importantly to injury for a number of the products covered by the President's remedies. For these

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[2618] Appellate Body Report, *US – Line Pipe*, para. 188. (emphasis in the original)

[2619] European Communities' second written submission, para. 363.

[2620] European Communities' second written submission, para. 364.

[2621] See, for example, European Communities' written reply to Panel question No. 82 at the first substantive meeting; Norway's written reply to Panel question No. 82 at the first substantive meeting; Brazil's second written submission, para. 105. As noted in Brazil's first written submission, the USITC actually found in several cases that imports from NAFTA countries contributed importantly to the serious injuries of the domestic industry! For example, in the USTC's CCFRS analysis, the USITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports. USITC Report Vol. I at 66. Similarly, in its hot-rolled bar and cold-finished bar analysis, the USITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports. Ibid., at 100, 107.

[2622] China's second written submission, paras. 204 and 205; Brazil's second written submission, para. 105.

[2623] United States' second written submission, para. 151.

products, the United States submits that it is clear that the USITC concluded that Canadian and Mexican imports of these products were not a significant cause of injury to the domestic industry. Moreover, for the products for which the USITC did find that imports from Mexico and Canada would contribute importantly to injury, the USITC nonetheless performed an analysis that isolated the effects of non-NAFTA imports from those of NAFTA imports and concluded that non-NAFTA imports were still a substantial cause of serious injury to the industry in question. Having done so, the USITC clearly performed an analysis designed to identify the nature and extent of the injury caused by both NAFTA and non-NAFTA imports and to distinguish the effects of both groups of imports from one another.[2624]

7.1075 In counter-response, the European Communities and China note that surprisingly, on the one hand, the United States says that there is no obligation that the NAFTA imports be subject to a non-attribution analysis and, on the other hand, it argues that it conducted the non-attribution analysis as required under Article 4.2(b) when it segregated the Canadian and Mexican imports from the other imports whenever they were excluded from the safeguard measure, and separated and distinguished the effects of the NAFTA imports from the non-NAFTA imports.[2625]

7.1076 The European Communities notes that the USITC conducted a three-step analysis of excluded NAFTA imports pursuant to the United States statute. It determined, first, whether imports from NAFTA countries, considered individually, accounted for a substantial share of total imports and second, whether imports which accounted for a substantial share, contribute importantly to the serious injury or threat thereof (i.e. they are an important cause, but not necessarily the most important cause).[2626] Upon request from the USTR, the USITC Reported additional information concerning non-NAFTA imports in the Second Supplementary Report. In the Second Supplementary Report, the USITC "analysed" whether excluding imports from Canada and Mexico would lead to the conclusion that non-excluded imports are still a "substantial cause of serious injury to the domestic industry". This was only done for those products for which the first and second steps required under the NAFTA Implementation Act were satisfied. No additional information or analysis was provided for Israel and Jordan.[2627]

7.1077 The European Communities argues that the required analysis under Article 4.2(b) is first to establish whether the other factor (in this case the excluded imports) is a cause of injury to the domestic industry and second to ensure that the injurious effects of such other factors are not attributed to non-excluded increased imports. According to the European Communities, none of the steps of the USITC's analysis of NAFTA imports follows the analysis required under Article 4.2(b). Whether Canadian or Mexican imports were among the top five suppliers, and if so, whether they contributed "importantly" to serious injury has no relevance for the simple question of whether such imports actually caused injury. The USITC's analysis of NAFTA imports does not provide for a reasoned and adequate explanation of how the facts support a finding that there was a genuine and substantial causal relationship between non-excluded imports and serious injury. Indeed, the simple conclusion that "we [the USITC] would have reached the same result had we excluded imports from Canada and Mexico from our analysis", coupled with an analysis of *excluded* imports, was judged by the Appellate Body in *US – Line Pipe* not to be a "reasoned and adequate explanation of how the facts support the determination" that *non-excluded* imports satisfy the conditions for application of a

[2624] United States' first written submission, para. 455.

[2625] European Communities' second written submission, para. 361; China's second written submission, para. 200.

[2626] These requirements of the NAFTA Implementation Act are explained in more detail at USITC Report, Vol. I. pp. 34 and 35.

[2627] European Communities' second written submission, para. 366.

safeguard measure.[2628] The European Communities argues that the United States has, in conducting such an analysis, failed to establish whether imports from Canada, Mexico, Israel or Jordan are causing injury, has not separated and distinguished the injurious effects of such imports, and has not ensured that the injurious effects of excluded imports, together with the effects of other non-import alternative causes of injury have not been attributed to non-excluded imports.[2629]

(vii) Duty to provide a reasoned and adequate explanation in the context of the causation analysis

7.1078 China argues that it must be explicitly established, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous.[2630] China claims that the USITC failed to provide a clear and unambiguous explanation that injury caused to the domestic industry by the other factors was not attributed to imports. China submits that, indeed, a conclusion that increased imports of a particular product are an important cause and a cause no less important than any other cause of serious injury to the domestic industry in the USITC Report was only a relative comparison of the effect of increased imports as compared to the effects of other factors. China further argues that an extensive interpretation of the Commissioners' findings in the United States' submissions cannot replace the lack of an explicit, reasoned and adequate explanation of "non-attribution" and an appropriate assessment of the injurious effects of other factors in the USITC Report in relation to CCFRS[2631], tin mill products[2632], hot-rolled bar[2633], cold-finished bar[2634], rebar[2635], welded pipe[2636], FFTJ[2637], stainless steel bar[2638], stainless steel wire[2639] and stainless steel rod.[2640]

7.1079 The European Communities also relies upon Appellate Body jurisprudence to argue that the last sentence of Article 4.2(b) obliges a competent authority, in separating and distinguishing the injurious effects of the increased imports from the injurious effects of other factors, to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as to explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports. The European Communities argues that this explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms. In the European Communities' view, only after making this analysis can the competent authorities determine the existence of a genuine and substantial causal link.[2641]

7.1080 In response, the United States argues that, for each of steel product covered by a remedy, the USITC established explicitly, in a well-reasoned and detailed manner, that it did not attribute injury caused by non-import factors to increased imports. Consistent with the conclusions of the Appellate Body, the USITC appropriately identified and distinguished the effects of imports from those of other

[2628] Appellate Body Report, *US – Line Pipe*, para. 195.
[2629] European Communities' second written submission, para. 367.
[2630] China's first written submission, para. 352.
[2631] China's second written submission, paras. 225 and 226.
[2632] China's second written submission, paras. 285 and 287.
[2633] China's second written submission, para. 231.
[2634] China's second written submission, para. 236.
[2635] China's second written submission, para. 244.
[2636] China's second written submission, paras. 249 and 251.
[2637] China's second written submission, paras. 254 and 260.
[2638] China's second written submission, paras. 262 and 264.
[2639] China's second written submission, para. 292.
[2640] China's second written submission, paras. 266, 268 and 270.
[2641] European Communities' first written submission, para. 444.

factors when performing its causation analysis. By doing so, it ensured that it did not attribute the injurious effects of those factors to imports when finding that there was a "genuine and substantial" causal link between increased imports and the serious injury being suffered by the industry. Moreover, its conclusions with respect to the nature and extent of injury attributable to these causes are supported by ample record evidence.[2642]

(b) Measure-specific argumentation

(i) *CCFRS*

Factors considered by the USITC

Declining domestic demand

7.1081 New Zealand and other complainants argue that declining demand, not imports, was a significant cause of the alleged injury to the domestic industry.[2643]

7.1082 China notes[2644] that, in dealing with the declining demand in the United States market, the USITC found that:

> "We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period."[2645]

7.1083 Brazil notes that the USITC reached the conclusion that demand did not matter.[2646] Similarly, Japan and New Zealand argue that the USITC simply dismissed the decline in demand as a limited, end-of-the-period phenomenon.[2647] New Zealand questions why such data should be discounted.New Zealand points out that the USITC also rejected the relevance of a decline in demand because "[i]njury was shown well before the latter portion of 2000, when demand began to decrease, and injury was first shown in 1998, when demand was increasing (and when imports surged)". According to New Zealand, while this may support an argument that decreased demand was not the sole cause of injury for the entire period and in respect of all CCFRS, it does not establish that it was never a cause at all. Further, New Zealand argues that serious injury did not in fact occur in 1998.[2648]

7.1084 New Zealand and China argue that, while the USITC dismissed decline in demand on the basis that the industry was injured before the demand started to decline, it acknowledged that the decline in demand contributed to the injury. Nevertheless, New Zealand argues that a review of the available data shows the USITC analysis of decreased demand to be simplistic, cursory and flawed.[2649]

7.1085 China argues that the USITC Report did not establish that decline in demand was not attributed to injury caused by increase in imports. According to China, it is limited only to description

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[2642] United States' first written submission, para. 426.
[2643] New Zealand's first written submission, para. 4.144.
[2644] China's second written submission, para. 207.
[2645] USITC Report, p. 63.
[2646] Brazil's first written submission, para. 182.
[2647] Japan's first written submission, para. 256; New Zealand's first written submission, para. 4.142.
[2648] New Zealand's first written submission, para. 4.142.
[2649] New Zealand's first written submission, para. 4.145.

of demand developments, noting that the demand was higher in 1999 than in 1996, dropping in late 2000.[2650]

7.1086 Japan and Brazil argue that the USITC failed to separate and distinguish the injury to the domestic industry attributed to declining demand from the entire injury experienced by the domestic industry.[2651] Japan argues that the evidence is both compelling and measurable and shows that declining domestic demand is a more important cause of the domestic industry's injury than imports. In Japan's view, had the USITC separated and distinguished these alternative causes, it could not have concluded that increased imports caused any serious injury.[2652]

7.1087 Brazil argues that the evidence shows that operating margins correlated strongly with demand – falling when demand falls – and did not correlate at all with import levels.[2653] According to Japan and Brazil, even as imports fell, and even as the domestic firms captured more and more of the market, industry performance deteriorated.[2654] Brazil submits that the most logical conclusion is that total demand decreased too rapidly.[2655] Japan and Brazil argue that the same basic pattern found in the aggregated data applies to all the individual finished CCFRS products.[2656] Similarly, China and New Zealand argue that the United States ignored the correlation between demand declines and declining operating performance and it made no attempt to distinguish the effects of this factor from the injury caused by the imports.[2657]

7.1088 In addition, in the view of Japan and Brazil, the USITC ignored the fact that when demand for CCFRS products declined, imports declined even more sharply, suggesting that at least some purchasers of domestic steel were buying less steel, not switching to imports, thus impacting negatively on the industry's financial performance.[2658] According to Japan and Brazil, had the USITC properly distinguished this factor, it would have realized this fundamental point. They submit that, instead, the USITC misconstrued the relationships among demand shifts, changes in imports, and changes in domestic industry operating performance, claiming demand was but an end of period event that had no bearing on the issue of injury.[2659]

7.1089 According to Korea, the USITC determined that demand declined significantly at the end of the period, and that the declining demand "contributed to the industry's continued deterioration at the end of the period". [2660] Korea argues that, at the same time, very significant new (low-cost) capacity had recently come on-stream. Korea argues that the industry, faced with greater United States capacity, cut prices to maintain volumes in response to a shrinking market.[2661] Korea further argues that imports also declined significantly during this period so that domestic industry market share increased from 90.2% to 93.1% of the market over the 18-month period.[2662] Korea submits that since

[2650] China's second written submission, para. 209.
[2651] Japan's first written submission, para. 256; Brazil's first written submission, para. 180.
[2652] Japan's first written submission, para. 255.
[2653] Brazil's first written submission, para. 180.
[2654] Japan's first written submission, para. 258; Brazil's first written submission, para. 182.
[2655] Brazil's first written submission, para. 182.
[2656] Japan's first written submission, para. 259; Brazil's first written submission, para. 183.
[2657] China's second written submission, para. 209; New Zealand's first written submission, para. 4.144.
[2658] Japan's first written submission, para. 256; Brazil's first written submission, para. 180.
[2659] Japan's first written submission, para. 257; Brazil's first written submission, para. 180.
[2660] Korea's first written submission, para. 134.
[2661] Korea's first written submission, para. 132.
[2662] Korea's first written submission, para. 133.

demand declines clearly affected the industry's performance, the USITC should have identified and isolated those effects.[2663]

7.1090 China and New Zealand also argue that the USITC wrongly dismissed this factor entirely as a cause of injury and as a consequence failed to consider the nature and extent of that injury, as distinguished from the injury attributed to imports. It did so by means of a short generalised discussion which focused narrowly and exclusively on one part of the period of investigation, and failed to analyse the available data fully and properly. [2664]

7.1091 Brazil asks what makes the USITC's treatment of declining demand, found invalid by the Appellate Body in *US – Line Pipe*, any different from the USITC's "analysis" of declining demand in this case? Brazil submits that the USITC in this case begins with an assumption that serious injury was already being caused by imports, noting that "the domestic industry showed signs of injury . . . well before the latter portion of 2000, when demand began to drop off" and that "the period of increased demand was also when imports surged".[2665] It then concludes:

> "We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not a cause of injury found here, contributed to the industry's continued deterioration at the end of the period. Indeed, the losses experienced by the industry in 1999 and 2000 as a result of import left the industry in a much weakened position to face the slowdown in demand."

7.1092 Brazil argues that the only distinction that it sees is that the USITC was at least prepared to admit that declining demand in the *US – Line Pipe* dispute was a causal factor, just that it was not as important as increased imports.[2666] Brazil submits that in this case, the USITC takes the more novel approach of injecting an assumption about increased imports into the analysis before it even considers declining demand, so as to render declining demand a non-issue. Yet, implicit in the USITC's discussion is the fact that declining demand did play a role in injury, whether it was only an aggravating role, or a contributing role. The problem is there is no way to really tell based on the USITC's discussion.[2667]

7.1093 In response, the United States argues that the complainants' contention that the USITC improperly discounted demand declines as a significant source of injury to the industry is factually wrong. According to the United States, the record clearly showed that the industry's operating income levels did not fluctuate with demand. Although the industry's operating income margins did increase between 1996 and 1997 at the same time as a growth in demand, its operating margins declined in each of 1998, 1999 and 2000, even though demand grew in each of these years. The United States submits that the only distinction, in fact, between 1997 and the three subsequent years is a simple one: there was a substantially higher volume of imports in the markets in these years than in 1997 levels and these imports were priced at substantially lower levels than in 1997.[2668]

[2663] Korea's first written submission, para. 134.
[2664] China's first written submission, para. 359; New Zealand's first written submission, para. 4.143.
[2665] USITC Report, Vol. I. at 63.
[2666] Appellate Body Report, *US – Line Pipe*, para. 207 (citing *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 (December 1999) at I-28).
[2667] Brazil's second written submission, para. 79.
[2668] United States' first written submission, para. 487.

7.1094 In counter-response, Japan argues[2669] that the United States analysis is based on incorrect data. Japan submits that United States and the USITC rely on figures that merely add together shipments of each type of CCFRS, ignoring the fact that these figures reflect double and triple counting of tons of steel as they go through the various stages of production – an ironic ploy, given that the mills' vertical integration was the reason for conjoining these products into a single like product. A more proper measure of apparent domestic consumption – imports of each distinct finished CCFRS like product plus domestic commercial shipments of those products – shows the clear drop in demand as early as 1999:

Table 4: Change In Apparent Domestic Consumption: 1996-2000[2670]

Year	Apparent Domestic Consumption	Change
1996	75.8	–
1997	78.1	+2.3
1998	84.1	+6.0
1999	82.4	-1.7
2000	83.1	+0.7

7.1095 According to Japan, after strong growth in 1997 and 1998, demand fell noticeably in 1999 and remained low in 2000 – the very period when the domestic industry operating profits began to fall.[2671]

7.1096 Japan argues[2672] that, in fact, during 2000, there were sharp changes in demand, as illustrated below:

Table 5: Change In Apparent Domestic Consumption: Interim Periods 2000-2001[2673]

Year	Apparent Domestic Consumption	Change
1H 2000	45.0	
2H 2000	38.1	-6.9
1H 2001	36.7	-1.4

7.1097 According to Japan, the USITC analysis is also too static. The United States argues that demand in 2000 was higher than in 1996.[2674] This statement may be true, but it is largely irrelevant. In most markets, demand increases over time. The issue for understanding the competitive dynamics is not a mechanical comparison of 2000 to 1996, but an analysis of the trends from year to year within

[2669] Japan's second written submission, para. 128.

[2670] Sum of total domestic commercial shipments reported in USITC Report Vol. II at Tables FLAT-12, 13, 14, 15 and 17 plus, total imports reported in Tables FLAT- 3, 4, 5, 6, 7 and 9 (Exhibit CC-6.) The addition of the five flat-rolled products is provided in Japan First Submission ANNEX B. Tin mill and GOES are excluded from this analysis. Note the figures here differ from those provided in Japan's first written submission (para. 257) because there exports were not excluded. The United States industry did not export commercially significant quantities, therefore the difference is immaterial.

[2671] According to Japan, the USITC makes another mistake: to consider only aggregate CCFRS demand is to ignore a key difference in trends between finished and semi-finished CCFRS. Increasing imports of semi-finished steel at the end of the period mask the decline in demand for finished steel.

[2672] Japan's second written submission, para. 129.

[2673] USITC Report Vol. II at Tables FLAT-12, 13, 14, 15 and 17 plus, total imports reported in Tables FLAT- 3, 4, 5, 6, 7 and 9 (Exhibit CC-6), See also, Japan's first written submission, Annex B.

[2674] United States' first written submission, para. 485.

the overall period of investigation, and, if available, the trends within a year. Japan submits that it is ludicrous for the United States to try to ignore the collapse in demand in the second half of 2000, and the role that collapse had on prices and the condition of the domestic industry.[2675]

7.1098 According to Japan, the United States tries to dismiss the correlation between declining demand and declining operating performance.[2676] If one considers the trends in apparent domestic consumption and imports from 1999 to 2001, the relative importance of the two factors is obvious. From 1999 to 2001, as imports retreated from the market and as the domestic industry captured more and more of the market, operating performance declined. Thus, the decline in domestic industry operating performance correlates with declining demand, not with increased levels of imports. In any event, no effort at all was made to separate and distinguish the effects of demand from imports.[2677]

7.1099 In response, the United States notes that, in its analysis, the USITC explicitly recognized that demand for CCFRS had declined substantially during the last three quarters of the period of investigation. It specifically noted that this demand decline occurred only very late in the period, beginning with the fourth quarter of 2000 and lasting through the first two quarters of 2001. It correctly noted, however, that demand had increased consistently during each of the five years before interim 2001, and that the industry had been experiencing serious injury because of imports since at least 1998, even though demand was still rising in that year. Moreover, the USITC found that, as a result of import competition, the industry's condition continued to deteriorate in 1999 and 2000, even though demand continued to rise during these years. As a result, the USITC properly concluded that the demand declines in interim 2001 had only exacerbated the industry's level of serious injury during that period, and had not been the cause of injury during prior periods. It is clear then that the USITC properly discounted these declines in demand as a significant cause of injury during the period.[2678]

7.1100 In counter-response, New Zealand questions how can a factor "exacerbate" injury – or "contribute to" injury, to use the USITC's language, but not be a cause?[2679] New Zealand also submits that the data compiled by the USITC itself shows a very strong coincidence, in 2000-2001, between the decrease in demand of 14.9%, and the deterioration in operating margins from –1.4% to –11.5%. During the same period, absolute import volumes decreased by 40% (over 30% down on 1996) and import market share decreased by 2.9%.[2680] According to New Zealand, the United States does not rebut these figures because it cannot.[2681] New Zealand submits further that there was no serious injury in 1998 contrary to the USITC's and United States oft repeated claims – here as elsewhere the USITC ignored its own figures, which showed the domestic industry producing certain flat steel returning a healthy profit margin of 4% in 1998.[2682]

Domestic capacity increases

7.1101 New Zealand notes that the USITC acknowledged that increase in domestic capacity explains "in significant part" the decline in the rate of domestic capacity utilization over the period of investigation[2683], which it had earlier found to be an indicator of serious injury, and identified a

[2675] Japan's second written submission, para. 130.
[2676] United States' second written submission, para. 487.
[2677] Japan's second written submission, para. 131.
[2678] United States' first written submission, para. 485.
[2679] New Zealand's second written submission, para. 3.118.
[2680] New Zealand's second written submission, para. 3.119.
[2681] New Zealand's second written submission, para. 3.120.
[2682] New Zealand's second written submission, para. 3.121.
[2683] USITC Report Vol. I, p. 63.

reduction in capacity as necessary for the industry's improvement.[2684] It also noted the arguments of respondents that the presence of new capacity, combined with the failure of the industry to retire older, less efficient capacity, put tremendous pressure on the domestic industry to cut costs in order to generate sales to fill the new capacity, and agreed that "there is a significant incentive to maximize the use of steelmaking assets". "Increased capacity" the USITC concluded, "while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports".[2685] [2686]

7.1102 The European Communities, Japan, Korea, China and Brazil argue that the USITC acknowledged that domestic capacity increases caused injury.[2687] However, Japan, Korea and Brazil argue that the USITC made no effort to try to determine how much of the injury should be attributed to the capacity increases.[2688] More particularly, New Zealand argues that the USITC made no serious attempt to assess the nature and extent of the injury which it acknowledged increased capacity caused.[2689]

7.1103 China reiterates that the Agreement on Safeguards as interpreted by the Appellate Body in *US – Line Pipe* case requires the investigating authority to identify the nature and extent of the alternative factors.[2690] China submits[2691] that in order to identify the extent of an effect, it is necessary to evaluate its size, amount, volume. China argues that the USITC evaluated the effects qualitatively by comparing the "importance" of those factors, but refrained from providing such a "quantitative" evaluation:

> "[B]y finding that capacity increases had some effect on domestic pricing but imports had a far more substantial effect, the USITC appropriately made a qualitative finding on the general level of injury that should be attributed to each factor."

7.1104 According to China, as the USITC failed to evaluate the capacity increase in an adequate way, it was not able to establish that the effects of this factor were not attributed to the imports.[2692]

7.1105 In China's view, the impact of capacity increase on the situation of the domestic industry was under-rated. In this regard, China refers to the following chart, comparing net increases in capacity over demand and imports between 1996 and 2000.[2693]

[2684] Ibid., para. 358, footnote 22.

[2685] USITC Report Vol. I, p 64.

[2686] New Zealand's second written submission, paras. 3.122 and 3.123..

[2687] Japan's first written submission, para. 262; Korea's first written submission, para. 125; China's first written submission, paras. 359 and 361; Brazil's first written submission, para. 186; European Communities' first written submission, para. 468.

[2688] Japan's first written submission, para. 262; Korea's first written submission, para. 125; Brazil's first written submission, para. 186.

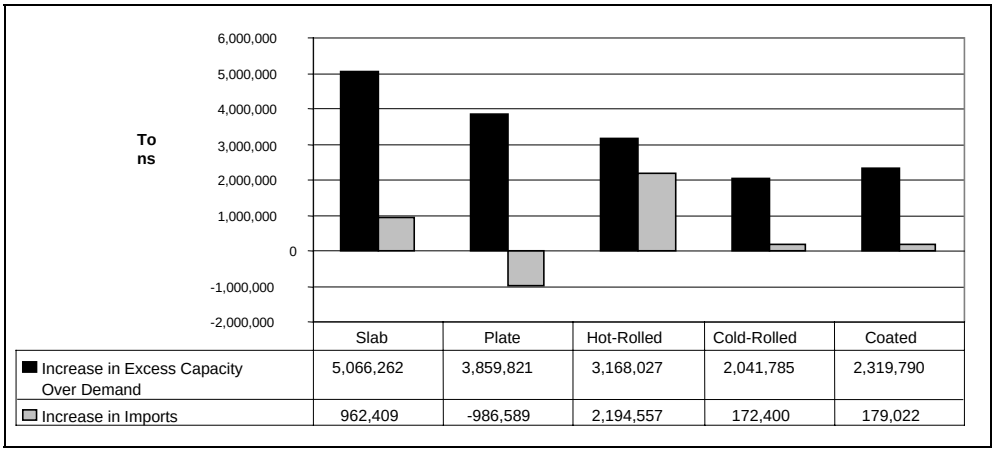
[2689] New Zealand's first written submission, para. 4.155; New Zealand's second written submission, para. 3.123.

[2690] China's second written submission, paras. 210 and 211.

[2691] China's second written submission, para. 212.

[2692] China's second written submission, para. 213.

[2693] Brazil's first oral statement, Annex-Figure 3, referred to in China's second written submission, para. 214; Brazil's first written submission, Figure 22; Japan's first written submission, para. 266.



	Slab	Plate	Hot-Rolled	Cold-Rolled	Coated
Increase in Excess Capacity Over Demand	5,066,262	3,859,821	3,168,027	2,041,785	2,319,790
Increase in Imports	962,409	-986,589	2,194,557	172,400	179,022

7.1106 On the basis of the foregoing, China argues that as to the alleged negative influence of imports on the pricing dynamics, given the capacity increase and dominant market share of the domestic companies, it is clear that these companies would set the market prices and imports would react to these prices.[2694]

7.1107 Japan and Brazil argue that had the USITC engaged in a more careful analysis, it would have found that domestic capacity increases prompted the domestic industry to lead prices downward.[2695] Japan and Brazil submit that the domestic share of the total CCFRS steel market grew from 70% in 1998 to 75% in 1999 and 2000 and then to 81.5% in 2001. This gain in domestic share resulted from aggressive domestic pricing. In 2000 and 2001, when industry operating income declined significantly, the combination of excess domestic capacity and declining demand meant that domestic firms were desperately competing for cash flow, all the time with more and more capacity to fill.[2696] New Zealand argues that imports lost substantial market share after 1998 and particularly sharply in the period most recently preceding the USITC's investigation. During the same period, domestic prices decreased more sharply than import prices and, in some cases, undercut import prices by a substantial margin.[2697] Japan argues that, ironically, the less imported steel in the market, the more domestic prices fell. The only way to explain this phenomenon is that competition among domestic mills fuelled by growing excess capacity drove down the prices. In Japan's view, it is difficult to see how declining import volumes, rather than increasing capacity and domestic shipments, could somehow cause declines in prices and operating performance.[2698]

7.1108 Korea argues that United States' producers captured virtually all of the increase in consumption, maintained a market share of over 90%, and still suffered from significant overcapacity. Korea further argues that not coincidentally, domestic prices fell and the industry experienced losses. In 2000, the year of the highest production during the period, the industry maintained 34 million tons of excess capacity as it produced 199.9 million tons of CCFRS with a capacity of 234.6 million tons. Korea submits that these numbers are staggering and place the 2.5 million ton increase in CCFRS imports over the entire period into proper perspective.[2699]

[2694] China's second written submission, para. 215.
[2695] Japan's first written submission, para. 263; Brazil's first written submission, para. 187.
[2696] Japan's first written submission, para. 264; Brazil's first written submission, para. 187.
[2697] New Zealand's first written submission, para. 4.152.
[2698] Japan's first written submission, para. 265.
[2699] Korea's first written submission, para. 126.

7.1109 In response, the United States argues that the record indicated that increased imports, not domestic capacity increases, were primarily causing the price declines in the latter part of the period of investigation. In its analysis of this issue, the USITC discussed the nature and impact of these capacity increases on domestic pricing behavior, noting that the industry had added capacity during the period of investigation, and concluded that the capacity additions had outstripped increases in demand during the same period. Although it found that these increases in capacity were generally justified because there had been consistent demand increases in the market, it also recognized that this increased capacity provided the industry with "a significant incentive to maximize the use of steel making assets," which would have an "effect [on] producers' pricing behavior."[2700]

7.1110 However, the United States argues, the USITC also examined the ample record data on pricing to assess the nature and scope of the price effects of both imports and this increased capacity in the market. The record data on pricing – both the price comparison data and the data on average unit values – showed that imports consistently undersold the domestic industry (including minimill producers) throughout the period of investigation[2701], that the large surge of lower-priced imports in 1998 had caused a significant drop in prices in that year, and that imports continued to lead prices down, or keep them suppressed, by consistent underselling through 1999 and 2000. Moreover, even though minimills had added the large bulk of this additional capacity and this additional lower-cost capacity had some effect on prices, the USITC also correctly found that imports of hot-rolled merchandise had consistently undersold the merchandise sold by minimills during the period from 1998 and 2000. Thus, the United States asserts, the USITC properly found that it was increased imports, not capacity increases, that were primarily causing the price declines that occurred during the period from 1998 to 2000.[2702]

7.1111 In response, the United States argues that the complainants ignore the fact that the record clearly showed, as the USITC found, that imports led prices down and kept them suppressed during the period from 1998 through 2000, not the domestic industry. Moreover, although the industry did manage to regain some of its lost market share in 1999 and 2000 by actively following downward import prices in those years, the record did not show that the industry utilized its increasing capacity to wrest market share from imports that was held by imports at the beginning of the period. In other words, by following import prices downward in 1998, 1999 and 2000, the industry was only able to regain some of its market share losses, but it was not able to increase its market share over the level it held in 1996.[2703]

7.1112 In counter-response, New Zealand argues that the United States forgets that it is increased imports, not merely cheaper imports, which must cause serious injury. New Zealand submits that as has been established, from 1999 onwards, imports were in sharp decline. New Zealand argues that the United States ignores data from 2001, by which time imports were down over 30% on 1996 figures, there was a 15.1% increase in domestic capacity on 1996 figures, contrasting with an 8.3% decrease in consumption on 1996 figures.[2704]

7.1113 Japan, New Zealand and Brazil also argue that the USITC refused to discuss the fact that the growth in excess domestic capacity dwarfed the modest increases in imports.[2705] Brazil notes that the

[2700] United States' first written submission, para. 491.
[2701] USITC Report, p. 63-64 and Tables FLAT-66 to FLAT-71.
[2702] United States' first written submission, para. 492-93.
[2703] United States' first written submission, para. 499.
[2704] New Zealand's second written submission, para. 3.126.
[2705] Japan's first written submission, para. 266; New Zealand's first written submission, para. 4.153; Brazil's first written submission, para. 189.

USITC acknowledged that it "is true, as alleged by respondents, that capacity increases did exceed the increases in domestic consumption". However, according to Brazil, the USITC never related that excess capacity to changes in import levels or the shrinking market, as if domestic mills cutting prices and trying to maintain volume in a shrinking market was beyond reasonable consideration.[2706] Japan and New Zealand argue that with respect to all five CCFRS products, the excess capacity exceeded the modest change in imports over the period. For four out of five products, the excess capacity dwarfs the modest change in imports.[2707] With so much excess capacity chasing a shrinking total market, Japan argues that it is no wonder that domestic mills were cutting prices and trying to maintain volume. In Japan's view, it makes no sense to blame the modest and declining level of imports for this problem.[2708]

7.1114 In response, the United States submits that the complainants' argument is premised on an "apples" to "oranges" comparison of factors that have differing price effect characteristics. More specifically, instead of comparing the domestic industry's capacity increases during the period to the foreign industry's capacity increases, the complainants simply compared the industry's capacity increases to increases in import shipments. As a theoretical matter, the distinction is critical, because actual shipments of merchandise, whether domestic or import, have a more direct effect on pricing behavior in the market than capacity increases in that shipments reflect actual pricing and sales competition in the market place. The United States submits that, in essence, while the availability of capacity might have some impact on pricing behavior in a market place, the actual price effects of increased capacity are only directly and substantially transmitted to the market when that capacity is used to produce and ship merchandise.[2709]

7.1115 The United States argues that, accordingly, the complainants should have compared the domestic industry's capacity increases to the foreign industry's capacity increases during the period of investigation. If they had, they would have recognized that the foreign industry's capacity increase during the period of investigation was substantially larger than the domestic industry's capacity increases during this period.[2710] More specifically, foreign production capacity grew by 44 million tons during the period from 1996 to 2000, while the domestic industry's production capacity grew by 32.2 million tons. In other words, during a period in which demand in the Asian and other markets was significantly affected by the Asian financial crisis and the continuing deterioration of the steel markets in the former Soviet Union, foreign steel producers increased their aggregate capacity levels by an amount that was 37 percent larger than the domestic industry's capacity increases. The United States argues that, moreover, if complainants had also compared the increase in import shipments during the period with the increase in the industry's shipments between 1996 and 1998, they would have recognized that the import increase during this period was 2.6 million tons, or 60%, larger than the increase in domestic shipments during the same period. Given the substantial increase in import volumes in 1998 and the significant reduction in their pricing levels, it should again not be surprising that the USITC found that increasing import shipments at lower prices had a more substantial impact on pricing levels in the market than did domestic capacity increases and domestic shipments.[2711]

[2706] Brazil's first written submission, para. 190.
[2707] Japan's first written submission, para. 267; New Zealand's first written submission, para. 4.154.
[2708] Japan's first written submission, para. 267.
[2709] United States' first written submission, para. 496.
[2710] United States' first written submission, para. 497.
[2711] United States' first written submission, para. 498.

7.1116 According to Japan, as a matter of economic theory, it is incorrect to argue that capacity only matters when it is turned into actual shipments.[2712] [2713] Japan submits that one needs to consider capacity in light of barriers to entry facing that capacity. Domestic capacity has no barriers; domestic shipments can easily enter the market. Import capacity has intrinsic disadvantages, due to the lead times and uncertainty. Japan argues that, in this case, uncertainty increased dramatically because of the numerous anti-dumping and countervailing investigations that chased imports from the market.[2714]

7.1117 According to Japan, the United States tries to shift the focus to the role of foreign capacity.[2715] Japan argues that this argument is fundamentally misleading, since so little of foreign capacity goes to the United States market. The United States argues that 44 million tons of new foreign capacity is more important than 32.2 million tons of domestic capacity. Yet over the five-year period of investigation, virtually all United States capacity was dedicated to the United States' market[2716], as reflected in the USITC's export statistics, while less than 4% of foreign capacity went to the United States' market.[2717] Japan submits that, by any reasonable measure, domestic capacity mattered much more than foreign capacity, but the USITC did not even try to isolate its effects.[2718]

7.1118 Japan submits that the United States also tries to shift the focus away from domestic capacity by focusing on shipment levels.[2719] This argument disingenuously concentrates only on 1998, which is fundamentally misleading. In 1999 and 2000 – the years when domestic industry performance deteriorated – import shipments were down, but domestic shipments were up and domestic capacity was up. In 1999 and 2000, import share of the market was stable at about 10.5% in both years, a level consistent with 1996 and 1997.

Table 6: Change in Import and Domestic Shipments,
Domestic Operating Performance: 1997-2000[2720]

Year	Change in Import Shipments from Prior Year	Change in Domestic Shipments from Prior Year	Operating Performance in that Year
1997	902	1619	6.1
1998	6031	-111	4.0
1999	-4488	3119	-0.7
2000	77	1190	-1.4

7.1119 Japan says that in 1999 and 2000, when domestic industry operating performance declined, imports were retreating from the market, and domestic shipments were increasing. In both 1999 and 2000, increasing domestic shipments dwarfed changes in the import levels. Japan argues that it is wrong to blame declining imports and to ignore the increasing domestic capacity that was fuelling increasing domestic shipments. At the very least, the impact of domestic capacity increases should

[2712] See Joint Respondents' Posthearing Brief on Flat-Rolled Steel (1 Oct. 2001) (filed by the Law Firm of Willkie Farr & Gallagher) (responding to Commissioner Hillman's question how capacity, as opposed to actual shipments, can affect price.) at 93 (Exhibit CC-55).
[2713] Japan's second written submission, para. 139.
[2714] Japan's second written submission, para. 140.
[2715] United States' first written submission, para. 497.
[2716] USITC Report, Vol. II, at Tables FLAT-16-21.
[2717] Ibid., at Tables FLAT-30, 33, 36, 39 and 43.
[2718] Japan's second written submission, para. 141.
[2719] United States' first written submission, para. 498.
[2720] Japan's second written submission, para. 142, citing USITC Report, Vol. II, at Tables FLAT-12-17 and FLAT- 20-25, and Japan's first written submission, ANNEX B.

have been separated and distinguished from imports to test the USITC's theories and ensure that their effect was not mistakenly attributed to imports.[2721]

7.1120 New Zealand also argues that the United States does not seek to challenge the factual observation that excess domestic capacity (i.e. the extent to which capacity exceeded demand, not merely "capacity increases") was over six times greater than the modest increase in imports measured over the period 1996-2000.[2722] The United States does not acknowledge the implications of this fact in terms of the relative effect on price of increased domestic capacity as opposed to imports. Instead, the United States responds weakly that the proper comparison is between foreign capacity increases (not actual imports) and domestic capacity increases.[2723] [2724] According to New Zealand, this has to be wrong on two counts. First, Article 4.2(b) requires the establishment of the causal link between increased imports and serious injury to the domestic industry, as distinguished and separated from other factors causing injury to that industry (such as greatly increased excess domestic capacity). Second, a reference to a mere increase in foreign capacity is also economically meaningless absent any consideration of the extent to which this exceeds demand and influences the level of imports into the United States market.[2725]

7.1121 Japan and Brazil also note that the USITC also pointed to low capacity utilization rates as evidence of injury caused by imports. Brazil and Japan make reference in this regard to the Appellate Body decision in *US – Wheat Gluten*, where the Appellate Body specifically discussed the need to carefully consider increases in capacity and decreases in capacity utilization. However, according to Japan and Brazil, the USITC did not perform the analysis set forth in *US – Wheat Gluten*, including considering the capacity utilization rate, if capacity had remained stable over the period rather than increasing. Japan and Brazil argue that had it performed the analysis, perhaps it would not have rushed to its conclusion.[2726]

7.1122 In response, the United States argues that the USITC did assess whether capacity increases had caused the industry's capacity utilization declines. The USITC recognized that the industry's production capacity had increased by 15.9% from 1996 to 2000 and that the industry's capacity had increased at a rate that was higher than the increase in demand during that same period, given that consumption had grown by 7.8%. It also correctly recognized that the industry's production levels, while growing, had not kept pace with the increases in the industry's capacity levels. Moreover, after considering the relationship of these two trends, the USITC correctly found that imports were not a significant cause of declines in the industry's capacity utilization rates. Instead, it found that these capacity utilization declines were due "in significant part" to the increase in industry capacity over the period.[2727] The United States also argues that, because the USITC did not ascribe any declines in the industry's capacity utilization rates to imports, the Appellate Body's holding in *US - Wheat Gluten* is inapposite to the USITC's CCFRS analysis. As the Appellate Body noted in *Wheat Gluten*, the USITC explicitly found that declines in the industry's capacity utilization rates were the direct result of the increase in imports.[2728] Here, the USITC has held the opposite.[2729]

[2721] Japan's second written submission, para. 142.
[2722] New Zealand's second written submission, para 3.127.
[2723] United States' first written submission, para 496.
[2724] New Zealand's second written submission, para. 3.127.
[2725] New Zealand's second written submission, para. 3.128.
[2726] Japan's first written submission, para. 267; Brazil's first written submission, para. 191.
[2727] United States' first written submission, paras. 489-90.
[2728] Appellate Body Report, *US – Wheat Gluten*, paras. 82-84.
[2729] United States' first written submission, para. 490, fn. 619.

7.1123 Japan and Brazil submit that in 1996, before any alleged import surges, the domestic industry had utilization rates between 80% and 90%. The USITC found the domestic industry to have reasonable operating profits at those operating rates.[2730] Japan and Brazil argue that but for the massive increases in new domestic capacity, the industry could have been operating at full capacity and more profitably in 2000. According to Japan and Brazil, the USITC did not even contemplate this analysis.[2731]

7.1124 In response, the United States submits that the above argument is misplaced in two significant respects. First, it ignores the fact, recognized by the USITC, that an industry can be expected to increase its capacity in response to consistent growth in demand in a market, as occurred in the CCFRS market during 1996 through 2000. Second, and more importantly, they ignore the fact that, even if the industry had not increased its capacity levels, imports would still have surged into the market in 1998 at low-prices and led prices downward through the remainder of the period. Thus, even if these domestic capacity increases had not occurred, the record shows that imports would still have caused the substantial price declines seen in the market during the period from 1998 through 2000. In this regard, the record shows, for example, that the AUV of imports fell by 10.1% during this period, with all of this decline being represented by lower prices in 1998, 1999 and 2000.[2732]

7.1125 Korea notes that the United States says that the USITC "distinguished and separated the price declines attributable to imports from the price declines attributable to capacity increases".[2733] Korea states that it agrees that this is what the USITC should have done but it is not what the USITC did. As the United States explicitly admits, the USITC actually did not focus on separating out the effects attributable to each factor at all and, in fact, merely found that these capacity increases were substantial and therefore "were likely" to have "some" effect on prices but that imports were "far more significant" than capacity increases.[2734]

7.1126 Korea and New Zealand submit that the USITC failed to establish explicitly, through a reasoned and adequate explanation, that injury caused by this factor was not attributed to increased imports.[2735] More particularly, Korea argues that the USITC never explained how it determined that it was imports, not excess domestic capacity, that led prices down. Since the US industry was suffering from low capacity utilization and the relative price of imports continued to rise into the latter part of the period of investigation, it was "plausible" that the domestic industry led prices down in order to increase the market share. Irrespective of all these facts, Korea argues that the USITC did not provide a reasoned and adequate explanation for its conclusive statement that imports, not excess domestic capacity, led prices downward.[2736] Similarly, China argues that, while the USITC concluded by stating that this factor likely played a role in the price declines that helped cause the injury, it did not explain how it played this role, nor at which moment it played this role. Moreover, according to China, the USITC did not explain to what extent this factor played a role on the overall situation of the industry.[2737]

[2730] Japan's first written submission, para. 268; Brazil's first written submission, para. 191.
[2731] Japan's first written submission, para. 268; Brazil's first written submission, para. 192.
[2732] United States' first written submission, para. 500.
[2733] United States' first written submission, para. 494.
[2734] United States' first written submission, para. 494.
[2735] Korea's first written submission, para. 128; New Zealand's first written submission, paras. 4.146 and 4.155.
[2736] Korea's first written submission, para. 128.
[2737] China's first written submission, para. 367.

7.1127 Korea submits that a more precise consideration of time periods, exact effects, and the means by which prices were affected, are obvious additional analytical tools that could have been employed.[2738] Korea submits that such an analytical approach would have revealed what the USITC ignored. The obvious effect of capacity increases on producer performance was to stimulate production and increase sales in order to maximize the efficient use of capacity. In a capital-intensive industry like the steel industry, capacity utilization rates are key. It is self-evident that excess capacity would cause producers to lower prices to sell that additional production to maintain efficient utilization.[2739]

7.1128 Brazil asks what makes the USITC conjecture on capacity that the Appellate Body found invalid in *US – Wheat Gluten*[2740] any different from the USITC's "analysis" in this case regarding capacity. In light of substantial domestic capacity increases in excess of demand, the USITC recognized "there is a significant incentive to maximize the use of steelmaking assets, which can affect producers' pricing behavior".[2741] [2742] Brazil submits that, nonetheless, it offers only a conclusory statement that:

> "[I]f increased domestic capacity were in fact the source of the injury to the domestic industry, we would have expected to see the domestic industry lead prices downward, and wrest market share from imports. Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury equal to or greater than the injury caused by increased imports."[2743]

7.1129 Brazil questions wherethe USITC actually separates and distinguishes causes in this statement; where the reasoned and adequate explanation to support the conclusion is; and where the USITC's actual analysis of the injurious effects of increased excess capacity on the industry are. Because imports are a more important cause of injury than capacity increases, Brazil further questions whether the USITC actually found that there was a genuine and substantial causal link between increased imports and serious injury.[2744]

Intra-industry competition

7.1130 New Zealand notes that cheap and rapidly increasing minimill production, which the United States concedes accounted for a third of total CCFRS production in the United States[2745] and was "pertinent" to the issue of causation[2746], was a critical factor in the decline of domestic prices and operating margins.[2747] [2748]

[2738] Korea's second written submission, para. 164.
[2739] Korea's second written submission, para. 165.
[2740] Appellate Body Report, *US – Wheat Gluten*, paras. 90-92.
[2741] USITC Report, Vol. I, at 63.
[2742] Brazil's second written submission, para. 77.
[2743] USITC Report, Vol.1, at 64.
[2744] Brazil's second written submission, para. 77.
[2745] United States first written submission, para 353, footnote 381.
[2746] Ibid., para 353.
[2747] New Zealand's first written submission, para 4.158.
[2748] New Zealand's second written submission, para. 3.136.

7.1131 The European Communities and New Zealand further note[2749] that the USITC acknowledged the injurious effect of intra-industry competition – "the addition of a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did" – but then, after noting, without explanation, that "imports, rather than minimills, typically led prices downward", the USITC recited its standard mantra:

> "[W]e find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry … equal to or greater than the injury caused by increased imports."[2750]

7.1132 China and New Zealand argue that by stating that intra-industry competition was not "primarily" responsible for serious injury to the industry, the USITC recognized that minimills were nevertheless responsible, although in a less significant way.[2751]

7.1133 Japan argues that in relation to intra-industry competition, it is clear that the USITC decision does not satisfy the non-attribution requirement of Article 4.2(b). In particular, Japan argues that the evidence is both compelling and measurable and shows that each intra-industry competition is a more important cause of the domestic industry's injury than imports. In Japan's view, had the USITC separated and distinguished these alternative causes, it could not have concluded that increased imports caused any serious injury.[2752] Similarly, New Zealand submits that while the USITC acknowledged that minimill competition had an injurious effect on the domestic industry, it did not explain what these effects were, as distinguished and separated from the serious injury caused by increased imports.[2753]

7.1134 Japan and Brazil argue that dramatically expanding capacity and shipments by certain segments of the domestic industry had given rise to deleterious competition among domestic producers.[2754] In this regard, Japan and Brazil argue that intra-industry competition in the CCFRS market was driven by changes in production technology. The emergence of minimills with dramatically lower cost structures placed less efficient integrated mills on their heels.[2755] Japan and Korea argue that with an extremely competitive cost structure, minimills could charge lower prices and yet still earn attractive operating profits. Weaker integrated mills, using the more traditional blast furnace technology, decided they had to sell CCFRS steel to generate cash flow regardless of the price. Japan submits that competing largely with minimills in the commodity segment of the market, the integrated firms had little choice but to compete with minimills that had much lower costs.[2756]

7.1135 Confronted with tremendous evidence on this account, Japan and Brazil argue that the USITC made no effort to separate and distinguish this alternative cause.[2757] Japan, Korea and Brazil argue that the USITC recognized the competitive advantage of minimills but failed to fully consider the effects on the rest of the industry because they were not "primarily" responsible for the injury. More specifically, Japan and Brazil state that the USITC noted that minimills "did typically enjoy cost advantages over integrated producers", and that "a greater volume of lower-cost capacity would be

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[2749] New Zealand's second written submission, para. 3.135; European Communities' first written submission, para 468.
[2750] USITC Report Vol I, p. 65.
[2751] China's first written submission, paras. 359 and 363.
[2752] Japan's first written submission, para. 255.
[2753] New Zealand's second written submission, para. 3.136.
[2754] Japan's first written submission, para. 269; Brazil's first written submission, para. 192.
[2755] Japan's first written submission, para. 270; Brazil's first written submission, para. 193.
[2756] Japan's first written submission, para. 270; Korea's first written submission, para. 136.
[2757] Japan's first written submission, para. 269; Brazil's first written submission, para. 192.

expected to have an effect on prices, and we find that it did". It then dismissed the factor by pointing to a quick and flawed examination of hot-rolled prices; import prices apparently were lower than minimill prices. This attempt to dismiss the role of intra-industry competition fails on several counts.[2758]

7.1136 Japan, Korea and Brazil submit that if the USITC had properly considered this factor, it would have found that mini-mills had low-cost structures that allowed them to price below other domestic producers, yet remain profitable.[2759] Korea also argues that while the USITC acknowledged that minimills maintain a cost advantage over integrated producers, it dismissed the significance of this fact by observing that that cost advantage existed throughout the period, that is, before and after injury.[2760]

7.1137 New Zealand argues that nowhere in the USITC Report does the USITC segregate the production and pricing data of minimills and integrated producers so that it can assess the effects of minimill production on the industry as a whole. Nor does the USITC consider the obvious competitive disadvantage suffered by integrated mills as a result of legacy and other costs far higher than those borne by minimills.[2761]

7.1138 In response, the United States notes that USITC thoroughly discussed the nature and extent of minimill competition on domestic pricing for CCFRS. In particular, the USITC correctly recognized that the record data showed that minimills "did typically enjoy cost advantages over integrated producers," noting that these advantages were due to minimill's lower raw materials costs and the different product mixes of the two categories of producer. As a result of these cost advantages, the USITC found that it was reasonable to expect that the addition of a greater volume of lower cost capacity would have some indirect effect on prices. Based on its assessment of the record, therefore, it concluded that the addition of this lower-cost capacity had some effect on domestic pricing during the period of investigation.[2762]

7.1139 Moreover, the United States submits that the USITC did not simply assume that the pricing decisions of minimill operators did not cause the substantial price declines that hit the CCFRS market between 1998 and interim 2001. The USITC appropriately examined the ample record evidence that was available on the nature of price competition between minimills, imports and integrated producers.[2763] As the USITC noted in its discussion of the competitive effects of minimills, the data indicated that, even though minimills were lower-cost producers than integrated producers, imports, not minimills, were the price leaders in the market place and led prices downward throughout the

[2758] Japan's first written submission, para. 271; Korea's first writen submission, para. 135; Brazil's first written submission, para. 194.

[2759] Japan's first written submission, para. 271; Korea's first written submission, para. 135; Brazil's first written submission, para. 193.

[2760] Korea's first written submission, para. 136.

[2761] New Zealand's first written submission, para. 4.160.

[2762] United States' first written submission, para. 507.

[2763] In this regard, the United States notes that, during its investigation, the USITC prepared a series of specific charts breaking out the financial and production operations for minimill and integrated producers, separately, and a series of quarterly price comparison charts showing underselling/overselling patterns between minimills, imports and integrated producers. See, e.g., INV-Y-215, pp. 3-11 (US-38); See also Minimill Trade Data (US-60). While some of this material may not be released because it is confidential, the USITC did, in fact, prepare such data and examine it, as can be seen in US-38. Accordingly, New Zealand's assertion that the USITC did not segregate data for these producers in its Report is highly misleading. New Zealand's first written submission, para. 4.160.

period of investigation.[2764] Indeed, as the USITC pointed out in its analysis, the price comparison data showed that imports consistently undersold minimill producers throughout the entire period of investigation on its sales of hot-rolled merchandise, which accounted for the bulk of minimill shipments during the period.[2765] Moreover, the record showed that imports undersold minimills consistently on plate and cold-rolled as well during the period as well.[2766] Given this record evidence, the USITC properly concluded that it was not "low-cost" minimills, but imports, that led prices in the CCFRS market down so consistently during the period from 1998 to 2001.[2767] Thus, although the USITC reasonably concluded that minimills had played some role in price declines in the market, it also correctly found that it was increased imports, not the operations of minimills, that were the primary cause of the price declines that occurred during the period from 1998 to 2000.[2768]

7.1140 Further, the United States argues that although it was true that the USITC recognized in its analysis that "minimill producers may have been in a better position to withstand low-priced import competition than other domestic producers" due to their cost advantages, the record does not show that minimills were able to maintain a healthy profit margin throughout the period of investigation in the face of lower prices. The United States submits that, instead, the unit operating income for minimills declined from a profit of approximately US$28 per ton in 1997 to a loss of approximately US$4 per ton in 1998, when imports surged in the market. Moreover, even though minimills were able to improve their operating income to approximately US$7 and US$16 per ton in 1999 and 2000, respectively, the returns obtained by minimills in these two years remained significantly below the strong level obtained by minimills in 1997, that is, before the import surge occurred. Further, minimills' operating income declined to a loss again in interim 2001, as prices fell even further in the market. In other words, despite the complainant's arguments to the contrary, the record shows not that minimills were able to continue earning strong profits throughout the period of investigation, even as prices fell, but that minimills experienced the same operating income declines as integrated producers as a result of the surge of low-priced imports that occurred in 1998.[2769]

7.1141 China notes[2770] that concerning the intra-industry competition and increased imports, the USITC stated in its report that:

> "[I]ndeed, the only way in which the USITC could have more specifically identified the distinct amount of pricing effects caused by these factors would have been to place a quantitative value on the effects caused by each. However, as we have previously noted, the test of the Agreement on Safeguards does not require a

[2764] USITC Report, p. 65.

[2765] In this regard, the United States notes that it was entirely reasonable for the Commission to rely on its price comparison data for two hot-rolled products when assessing whether imports consistently undersold the merchandise sold by minimills. In this regard, the record indicated that hot-rolled steel accounted for the large majority of minimill producers' commercial shipments. Compare, Table FLAT-1 (Minimill Trade Data for Carbon Flat-rolled Steel) with Table G03-1 (Table for Minimill Hot-rolled Steel Trade Date) (US-60). Accordingly, Brazil's assertion that the USITC improperly relied on this data to support its analysis is simply misplaced. Brazil's first written submission, para. 197.

[2766] The United States notes that although the quarterly pricing comparisons are confidential, the record shows that imports undersold minimills on their sales of plate, hot-rolled and cold-rolled steel in the large majority of possible price comparisons during the period, with imports underselling minimills in 64% of possible comparisons (70 of 110 comparisons), at margins ranging up to 30.6%. Ibid. Imports undersold minimills in 76% of possible comparisons (50 of 66) involving plate and hot-rolled merchandise. Ibid.

[2767] USITC Report, p. 65.

[2768] USITC Report, p. 65; United States' first written submission, para. 508.

[2769] United States' first written submission, para. 513.

[2770] China's second written submission, para. 217.

> quantitative valuation of the effects attributable to imports or no-imports factors, respectively, nor has the Appellate Body or any panels construed the Agreement on Safeguards to do so."

7.1142 China argues that the USITC did not perform a quantitative evaluation of the effects of competition between efficient, low cost minimill production and the integrated producers despite the fact that the Agreement on Safeguards as interpreted by the Appellate Body in *US – Line Pipe* case requires the investigating authority to identify the nature and extent of the alternative factors.[2771] China argues that the USITC found that the intra-industry competition between minimills and integrated producers resulted in lowered sales for domestic products and subsequent price cuts. China submits that, obviously, the intra-industry competition had negative effects on the industry, which should have been evaluated.[2772]

7.1143 China points to[2773] the following data on minimill shipments and imports of CCFRS products:[2774]

Table 7: Flat-Rolled Imports

Thousands of tons	1996	1997	1998	1999	2000	Interim 2000	Interim 2001
Minimills shipments	17,951	27,206	31,197	34,516	37,838	17,845	19,322
Imports	18,372	19,274	25,305	20,816	20,893	11,483	6,930

7.1144 China argues that the evidence at hand demonstrates that the intra-industry competition played a certain role in the developments of prices in the market.[2775] More particularly, New Zealand argues that data available to the USITC shows intra-industry competition to be a critical factor in the decline of domestic prices and operating margins.[2776] According to New Zealand, by 2001 minimill production of raw steel had reached 47.5% of total United States production. However, in New Zealand's view, not only did the increase in domestic capacity (which was largely from minimill production) far outstrip demand, but the cheap and efficient nature of this increased capacity accentuated its price-lowering effect. New Zealand submits that minimill production comprised a rapidly growing supply of steel at a time when the USITC itself acknowledged domestic prices were falling. New Zealand argues that the USITC erroneously ascribed this fall in prices to imports, ignoring the fact that it was the growing domestic supply of steel that exerted downward pressure on prices.[2777] The European Communities states that there is no attempt to distinguish and separate the effect of downward pressure resulting from intra-industry competition from the downward pressure allegedly caused by increased imports. The European Communities submits that, therefore, there was no explicit establishment and no clear, unambiguous and straightforward explanation of how the effects of the other factors are not attributed to increased imports.[2778]

[2771] Appellate Body Report, *US – Line Pipe*, para. 215
[2772] China's second written submission, para. 219.
[2773] China's second written submission, para. 220.
[2774] USITC Report Vol. II, table FLAT-1, FLAT-3
[2775] China's second written submission, para. 221.
[2776] New Zealand's first written submission, para. 4.158.
[2777] New Zealand's first written submission, para. 4.159.
[2778] European Communities' first written submission, para. 468.

7.1145 Japan and Brazil argue that the USITC ignored evidence that as minimill pricing fell, minimills still had stronger financial performance. Minimills increased their shipments of all CCFRS and decreased their average unit sales values.[2779] Japan argues that, remarkably, as minimill volumes increased and prices fell, their profits still increased. According to Japan, the contrast between minimill and non-minimill operating results is dramatic. Minimills did much better in 1999 and 2000 precisely when the other mills began to experience financial difficulties.[2780]

7.1146 Japan and Brazil argue that although the USITC decision applied to all CCFRS products, the USITC analysis cites only an isolated example for a single product, hot-rolled steel. Minimills also make and sell plate, cold-rolled, and even some coated steel. The USITC extrapolates to these other products without any factual basis.[2781] Japan and Brazil also argue, that the USITC ignored substantial evidence to the contrary. The USITC never evaluated the role of minimill competition in different segments of the CCFRS industry, or addressed arguments that minimill pricing was in fact leading integrated mill pricing.[2782]

7.1147 Brazil argues further that the USITC acknowledged that minimills producing CCFRS accounted for most of the increase of capacity in the United States steel industry during the 1990s. Brazil further argues that there was not just a "greater" volume of lower-cost capacity entering market, it was an enormous volume. More importantly, the evidence revealed that minimills were not simply locked into capacity expansion resulting from investment made prior to 1998. Rather, minimills were still investing in capacity expansion during 1998, 1999 and 2000, when the USITC found the industry situation to be drastically deteriorating.[2783]

7.1148 In this regard, Korea notes that between 1996 and 2000, the domestic industry's CCFRS capacity increased by 32 million tons. Most of the increase of capacity in the United States' steel industry during the 1990s was accounted for by the minimills utilizing thin-slab technology. According to Korea, the small increase in imports of 2.5 million tons pales in comparison to the huge increase in the low-cost minimill capacity. Still, the USITC brushed aside the impact of minimills' competition with the unsubstantiated conclusive statement that imports "led" prices down.[2784] Korea argues that even if it were true that the imports, not minimills, led prices down, the volume of low-cost capacity did have an effect on prices, as the USITC admits. Thus, the USITC had an obligation to identify, distinguish and separate the injury arising from low-cost minimill supplies.[2785]

7.1149 Korea adds[2786] that over the period 1996 through 2000, minimill CCFRS capacity increased by 19.9 million tons, with an additional 1.48 million tons added in interim 2001 vis-à-vis interim 2000.[2787] More to the point, 8.12 million tons of that mini-mill capacity was added between 1998 through June 2001[2788], the period during which the United States industry was allegedly being injured by imports. During this same period of 1998 – 2001, however, imports were declining. Thus, at the

[2779] Japan's first written submission, para. 274; Brazil's first written submission, para. 197.
[2780] Japan's first written submission, para. 274.
[2781] Japan's first written submission, para. 272; Brazil's first written submission, para. 195.
[2782] Japan's first written submission, para. 273; Brazil's first written submission, para. 196.
[2783] Brazil's first written submission, para. 199.
[2784] Korea's first written submission, para. 137.
[2785] Korea's first written submission, para. 138.
[2786] Korea's second written submission, para. 169.
[2787] United States' first written submission, Minimill Trade Data, Table FLAT-1 (Exhibit US 60).
[2788] United States' first written submission, Minimill Trade Data, Table FLAT-1 (Exhibit US 60).

beginning of the period, mini-mill CCFRS capacity was less than imports. By the end of the period, minimill CCFRS capacity was approximately three times imports.[2789]

Table 8: Comparison of Minimill Capacity to Flat-Rolled Imports (in thousands of tons)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills	17,951	27,206	31,197	34,516	37,838	17,845	19,322
Imports	18,372	19,274	25,305	20,816	20,893	11,483	6,930

Sources: Minimill Capacity from Table FLAT-1 (Exhibit United States 60); Import Data from USITC Memorandum No. INV-Y-209, Table FLAT-ALT7 (Exhibit CC-90).

7.1150 The United States submits that this argument is flawed in several respects. First, the argument fails because it is based on an "apples" to "oranges" comparison of non-comparable factors. In particular, complainants' mistakenly compare the capacity increases of minimill producers to import shipments during the period, when the more appropriate comparison is to compare the minimills' capacity increases to capacity increases of foreign producers. If the complainants had performed this more appropriate comparison, they would have recognized that the foreign industry's capacity increases during the period of investigation were substantially larger than the capacity increases undertaken by minimills during this period. Given this substantial difference in the capacity increases of the two sets of producers, it should not be surprising that the USITC concluded that imports were a more significant cause of price declines in the market than minimills.[2790]

7.1151 The United States argues that, in this same vein, the record shows that there was a substantially larger volume of imports shipped into the market than there was of merchandise shipped by minimills. In particular, the volume of imports shipped into the US market ranged between 18.3 million and 25.3 million tons on annual basis during the period from 1996 to 2000. By way of comparison, the total volume of all carbon flat-rolled shipments (including GOES and tin mill steel) made by minimill producers into the commercial market never exceeded more than 11.9 million tons on an annual basis.[2791] Further, the United States argues that the record evidence established that imports routinely and consistently undersold domestic and minimill merchandise throughout the period of investigation, including the years 1998, 1999, and 2000. Accordingly, the record clearly confirms that the USITC was correct when it found that imports had a more substantial impact on market pricing than minimills during the period from 1998 to 2000.[2792]

7.1152 Korea argues[2793] that a comparison of minimill shipments with both shipments by integrated producers and imports demonstrates how the failure to analyse growth in the minimill sector masks the events in the United States market affecting United States producers. Overall United States shipments of CCFRS steel showed an increase of 13.3 million tons between 1996-2000. However, the data presented by the United States shows that virtually all of that growth was accounted for by

[2789] The United States argues (United States' first written submission, para. 497) that domestic industry capacity should be compared to foreign capacity, not to imports. But, clearly, since at least 99% of United States industry capacity is directed to the United States market (See USITC Memorandum INV-Y-209, Table FLAT-ALT-7 (Exhibit CC-90)), while roughly a maximum of 3% of foreign capacity is shipped to the United States market (USITC Report, Vol. II, Table FLAT-27 at FLAT-30 (Exhibit CC-6)), the proper comparison is clearly between United States capacity and imports.

[2790] United States' first written submission, para. 511.

[2791] Table FLAT-1 (US-60).

[2792] United States' first written submission, para. 512.

[2793] Korea's second written submission, para. 170.

minimills alone: shipments by integrated producers increased by only 1.1 million tons between 1996 -2000 while minimill shipments increased by 12.2 million tons. Domestic shipments by integrated producers in the interim period – when the greatest losses occurred – fell by 13.5 million tons (from 91.2 million tons to 77.7 million tons). In contrast, mini-mill shipments increased by 588 thousand tons. In 1996, minimill shipments accounted for 8.5% of United States shipments. By 2001, minimill shipments had doubled their share of United States shipments.

Table 9: United States Shipments of Flat-Rolled Steel by Minimills, Integrated Mills, and Total (in thousands of tons)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills	15,749	19,549	21,874	26,040	27,306	14,778	15,366
Integrated*	169,058	168,898	167,269	170,573	170,163	91,221	77,689
Total	184,807	188,447	189,143	196,613	198,069	105,999	93,055
Minimills as a percentage of total United States shipments	8.5%	10.4%	11.6%	13.2%	14.1%	13.9%	16.5%

*Integrated is the difference between Total and Mini-Mill.
Sources: Mini-Mill Capacity from Table FLAT-1 (Exhibit United States 60); Total United States Shipments from USITC Memorandum No. INV-Y-209, Table FLAT-ALT7 (Exhibit CC-90).

7.1153 Korea submits that in comparison to the impact of minimills, especially in the key period of 1998-2001 (when imports are alleged to have caused injury), imports had a diminished role in the market. Comparing the increase in minimill shipments to the increase in imports, it is clear that the overall growth in minimill shipments over the period dwarfed the growth in imports (12.2 million tons to 2.6 million tons). It is also clear that while mini-mill shipments grew by 6 million tons during the period in which the United States "industry was allegedly injured by imports", (1998-2000) imports were falling by 4.4 million tons through 2000 and fell by an additional 4.6 million tons in the interim period. Thus, at the beginning of the period of investigation imports were greater than minimill shipments. By the end of the period, minimill shipments were over twice as large as imports.[2794]

[2794] Korea's second written submission, para. 171.

Table 10: Comparison of Minimill United States Shipments to Imports of Flat-Rolled (in thousands of tons)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills	15,749	19,549	21,874	26,040	27,906	14,778	15,366
Imports	18,372	19,274	25,305	20,816	20,893	11,483	6,930
Minimills and import shipments	34,121	38,823	47,179	46,856	48,799	26,261	22,296
Minimills as a percentage of minimill and import shipments	46.2%	50.4%	46.4%	55.6%	57.2%	56.3%	68.9%

Sources: Minimill Shipments from Table FLAT-1 (Exhibit United States 60); Imports from USITC Memorandum No. INV-Y-209, Table FLAT-ALT7 (Exhibit CC-90).

7.1154 Korea submits that the impressive growth of minimill shipments both in relation to integrated producers and in relation to imports throughout the period – and especially in the period between 1998-2001 – raises serious doubts about the claim that imports "led prices down" during the 1998-2001 period.[2795] [2796] According to Korea[2797], these doubts are confirmed by examining the difference in per unit costs of minimills and integrated producers. A comparison of these unit costs shows that in 1996, unit costs of mini-mills were US$26/ton lower than those of integrated producers in 1996, a figure which grew to US$70/ton in 2000 before reaching a stunning US$100/ton in interim 2001. This competitive advantage manifested itself in the market share gains described below.

Table 11: Comparison of Minimills and Integrated Cost of Goods Sold for Hot Rolled ($/ton)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills	$311.21	301.77	293.67	250.23	257.24	266.91	232.61
Integrated	$337.26	333.64	324.46	300.07	326.84	315.70	332.18
Minimills below integrated	$26.05	31.87	30.79	49.84	69.60	48.79	99.58

Source: Public Versions of Supplementary Material Cited in Views of Commissioners in Investigation No. TA-201-73, *Steel*, Memorandum No. INV-Y-215 (1 May 2002) ("USITC Memorandum No. INV-Y-215"), Tables STL20H3I.WK4 (Flat: Hot-Rolled Integrated) and STL20H3M.WK4 (Flat: Hot-Rolled Minimill) (Korea Exhibit 10, "K-10").

7.1155 Korea further argues that not coincidentally, the cost advantage was used by minimills to lower prices and gain market share at the expense of both integrated producers and imports. Moreover, even when integrated producers were consistently selling hot-rolled steel at higher *prices* than minimills, those prices of integrated producers were below their Cost of Goods Sold in 2000 and

[2795] United States' first written submission, para. 509.
[2796] Korea's second written submission, para. 172.
[2797] Korea's second written submission, para. 173.

2001. In contrast, minimill prices were always above their Cost of Goods Sold throughout the period of investigation.[2798]

Table 12: Unit Selling Price of Hot-Rolled/Comparison of Minimill and Integrated Prices (unit: US$/ton)

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimills prices	$321.20	$328.62	$296.32	$271.12	$283.66	$316.81	$233.51
Integrated prices	$353.24	$365.16	$350.00	$308.23	$320.14	$332.97	$269.07
Minimills below integrated	$32.04	$36.54	$53.68	$37.11	$36.48	$16.16	$35.56

Source: USITC Memorandum No. INV-Y-215, Tables STL20H3I.WK4 (Flat: Hot-Rolled Integrated) and STL20H3M.WK4 (Flat: Hot-Rolled Mini-Mill) (Exhibit K-10).

7.1156 According to Korea[2799], a comparison of the difference in profitability between mini-mills and integrated producers reveals that: between 1999-2001, the only period in which mini-mills had a negative operating profit was in interim 2001, when imports had declined to their absolute low point in terms of both absolute and relative levels. Moreover, this was the period (first half of 2001) when the negative effect of a major demand downturn was felt as the USITC and the United States admit.[2800] In fact, the United States uses 1996 as the base profit in its numerical analysis due to the similarity of demand in 1996 and the first half of 2001. Mini-mills also lost money in 1996.[2801]

Table 13: Comparison of Mini-Mill and Integrated Mill Operating Profitability and Imports as a Percentage of United States Production

	1996	1997	1998	1999	2000	Jan-June 2000	Jan-June 2001
Minimill operating profitability	-1.5%	4.1%	-3.4%	2.8%	4.9%	11.7%	-4.1%
Integrated mill operating profitability	-0.7%	4.1%	1.6%	-10.4%	-8.1%	-0.1%	-30.1%
Imports relative to all flat-rolled production	10.0%	10.2%	13.2%	10.6%	10.5%	10.8%	7.4%

Sources: USITC Memorandum No. INV-Y-215, Tables STL20H3I.WK4 (Flat: Hot-Rolled Integrated) and STL20H3M.WK4 (Flat: Hot-Rolled Mini-Mill) (Exhibit K-10); *Korea first written submission*, para. 84, Chart 3.

7.1157 According to Korea, a proper analysis of the role of minimills calls into serious question the USITC's causation analysis that declining imports "led prices down" when it was mini-mills alone that gained market share between 1998 through interim 2001. More importantly, an analysis of the minimill part of the industry shows that an analysis of integrated and minimills together masks the relative movements in domestic industry indicators and the role of imports in the market. The USITC

[2798] Korea's second written submission, para. 174.
[2799] Korea's second written submission, para. 175.
[2800] United States' first written submission, para. 1094.
[2801] United States' first written submission, para 1094.

failed to properly identify and separate these significant effects from intra-industry competition and instead, attributed them to imports.[2802]

7.1158 Further, New Zealand argues that although the USITC acknowledged that minimill production had an effect on prices and that it contributed in some part to the alleged injury, it failed to assess the full impact of intra-industry competition or provide a reasoned and adequate explanation of the relationship of injury caused by this factor to any injury allegedly caused by imports.[2803] China and New Zealand argue that the USITC failed to identify, and explain, the nature and extent of the injurious effects of intra-industry competition as distinguished from the alleged injurious effects of increased imports, and to establish explicitly through a reasoned and adequate explanation, that injury caused by this factor has not been attributed to increased imports.[2804]

7.1159 Brazil asks what makes the USITC's simplistic explanation that: "…the loss of Wool Act payment hurt lamb growers and feeders and caused some to withdraw from the industry", found invalid by the Appellate Body in *US – Lamb*[2805], any different from the USITC's "analysis" in this case regarding intra-industry competition. Acknowledging the greater volume of lower-cost minimill capacity in the market, and finding that this lower-cost capacity did have an effect on prices, the USITC offers yet another conclusory statement:

> "[W]e find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports."[2806]

7.1160 Again, Brazil questions where the USITC actually separates and distinguishes causes in this statement; where the reasoned and adequate explanation to support the conclusion are; and where the USITC's actual analysis of the injurious effects of increased excess capacity on the industry is. Because imports are a more important cause of injury than capacity increases, Brazil further questions whether the USITC actually found that there was a genuine and substantial causal link between increased imports and serious injury.[2807]

7.1161 Finally, the United States cautions the Panel not to rely on Korea's comparisons of the volumes of minimill and import shipments. According to the United States, these comparisons are misleading because they compare double-counted minimill shipments (and capacity and production) data to import shipment data that is not double-counted.[2808] The minimill shipment numbers used by Korea all double-count shipments of slab, hot-rolled carbon steel, and cold-rolled steel that were internally consumed by minimills in the production of downstream CCFRS products. For example, the record indicates that, of the 27.9 million tons of CCFRS shipped by minimills overall in 2000, 16.043 million tons (or more than 57%) was internally transferred for the production of downstream products, the vast majority of which consisted of plate, hot-rolled and cold-rolled carbon flat steel.[2809] In other words, if double-counting of internal transfers is eliminated, the actual tonnage of CCFRS shipped by the minimills is overstated in Korea's charts by at least a factor of two. By way of contrast, the import shipment data used in Korea's charts do not double-count import shipments because, when these shipments are imported and used to produce downstream merchandise, they are

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[2802] Korea's second written submission, para. 176.
[2803] New Zealand's first written submission, para. 4.161.
[2804] China's first written submission, para. 369; New Zealand's first written submission, para. 4.156.
[2805] Appellate Body Report, *US – Lamb*, paras. 185 and 186.
[2806] USITC Report Vol. I at 65.
[2807] Brazil's second written submission, para. 77.
[2808] These comparisons are contained in Korea's second written submission, paras. 169-176
[2809] See Minimill Trade Data, p. 1 (Exhibit US-60).

then considered domestic production and shipments. The United States submits that, in other words, Korea's analysis relies on comparisons of overstated volumes of minimill shipments against import shipment data that are not overstated. In order to properly compare minimill shipment volumes against import volumes, Korea should have compared commercial shipments by minimills against import shipments (as the United States did in its first written submission) because these numbers do not double-count the internal transfers of CCFRS products made by minimills. When the Panel does so, it will recognize that there was a substantially smaller volume of shipments of CCFRS for minimills than for imports during each year of the period of investigation, thus making clear that imports were more likely to have a serious and adverse impact on domestic pricing during the period than minimills.[2810]

7.1162 In counter-response, Korea notes that in the second substantive meeting the United States conceded that the mini-mill data cited by Korea in its first written submission is accurate. It limited its objections to whether it was proper to compare import volumes to mini-mill shipments that included both commercial and internal shipments (the so-called "double count"). As Korea noted in its response, the mini-mill shipments reported by Korea in paragraphs 170 and 171 are stated on the same basis that those shipments were included in the total US shipments in USITC Memorandum No. INV-Y-209, Table FLAT-ALT-7.[2811] It is apparent that imports are being compared to total US shipments reported in Table FLAT-ALT-7, so it is equally apparent that imports are properly compared to the mini-mill component of that figure.[2812]

7.1163 In counter-response, New Zealand notes that the United States seeks to retrospectively justify the USITC's conclusions by relying on evidence that was deleted from its report, in particular price information that allegedly suggested imports were underselling minimill production[2813] and that import volumes exceeded minimill production.[2814] This data can form no part of the record for the purposes of this case. The United States had to demonstrate non-attribution "explicitly, through a reasoned and adequate explanation" *before* applying the safeguard measure. As New Zealand has pointed out, the data does not appear anywhere in the USITC Report and it is too late to try to justify the USITC finding now, by reference to data not included in the USITC Report.[2815]

7.1164 Also in counter-response, Japan argues that the USITC ignored evidence that Nucor, a domestic minimill, was the price leader for hot-rolled and cold rolled steel products, two of the most important categories of CCFRS steel.[2816] Thisblind eye says Japan, is quite surprising, since the

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[2810] United States' written reply to Panel question No. 40 at the second substantive meeting.

[2811] Korea's second written submission, paras. 170-171; Table FLAT-1 (US Exhibit 60), and Public Versions of Supplemental Material Cited in Views of Commissioners in Investigation No. TA-201-73, Steel, Memorandum No. INV-Y-209 (1 May 2002) ("USITC Memorandum No. INV-Y-209") (Exhibit CC-90).

[2812] Korea also points out that, as noted at the Second Substantive Meeting, any "double counting" issue is the direct result of the overly broad definition of the flat-rolled like product. No Respondent at the ITC endorsed the "flatrolled" like product. Respondents clearly argued that slab, hot-rolled, cold-rolled, corrosion-resistant, and plate constituted five separate like products.

[2813] United States' first written submission, paras. 508, 473-474, relying on Table Flat-1 in the USITC Report Vol. II at Flat-4, which has been blanked out.

[2814] Ibid., para. 512, relying on Table Flat-1 in the USITC Report, Vol. II at Flat-4, which has been blanked out.

[2815] New Zealand's second written submission, para. 3.137.

[2816] Joint Respondents' Post Hearing Brief on Flat-Rolled Steel (1 Oct. 2001) (filed by the Law Firm Willkie Farr & Gallagher) at 94 (Exhibit CC-53) (At the USITC's hearings in the recent AD investigation of hot-rolled steel, Nucor's CEO testified, "If our order book is weak in the present quarter, we will lower our prices to increase orders. What happened in 2000? A period of very strong demand for hot-rolled. By the end of the first quarter and through the year, our order book for hot-rolled was falling. We responded by reducing

USITC had explicitly relied on this evidence in other recent trade proceedings involving cold rolled steel.[2817] [2818]

7.1165 Japan also submits[2819] that the USITC ignored data showing that minimills gained market share with lower prices, particularly in 2000 and 2001:

Table 14: Minimill / Import / Integrated Market Shares[2820]

Period	Import Share	Minimill Share	Integrated Share
1H00	26.7%	21.8%	51.5%
2H00	22.2%	25.9%	51.9%
1H01	13.1%	31.4%	55.5%

7.1166 According to Japan, not surprisingly, given that in 2001 most import sources were shut out of the market by anti-dumping and countervailing duties orders, minimills were disproportionately the beneficiaries, gaining twice as much market share as integrated firms.

7.1167 Japan submits that the United States again tries to shift the focus to foreign capacity.[2821] Japan reiterates that this comparison of crude aggregate capacity is incorrect. Since virtually all United States capacity stays in the United States market, minimill capacity remains almost exclusively in the United States market. Moreover, the USITC knows that minimills historically have priced to fill their mills, and try to maintain high rates of capacity utilization.[2822] With such a business model, new minimill capacity is much more likely to affect domestic price levels than foreign capacity.[2823]

7.1168 Japan also submits that the United States also tries to shift the focus to aggregate shipment levels.[2824] However, in doing so, the United States fails to acknowledge that minimills produce predominately plate, hot-rolled, and cold rolled steel, and produce only limited galvanized steel and no slab.[2825] The United States also considers only the level of shipments, not the trends over time.

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our prices." Ibid., citing *Certain Hot -Rolled Steel from Argentina and South Africa,* USITC Pub. 3446, Inv. Nos. 701-TA-404 (Final) and 731-TA-898 and 905 (Final) (Aug. 2001), Transcript at 57-58 (statement of Mr. DiMicco). He also stated, "Based on our previous experience, we believe as a low-cost producer worldwide its certainly better to run at high capacity utilization with low prices than at low capacity utilization with low prices.").

[2817] See Exhibit CC-34, *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-8324, 836, and 838 (Final) USITC Pub. 3283 (Mar. 2000) at 22-23.

[2818] Japan's second written submission, para. 145.

[2819] Japan's second written submission, para. 146.

[2820] United States' first written submission, Exhibit US-60.

[2821] United States' first written submission, para. 511.

[2822] Joint Respondents' Prehearing Brief on Cold Rolled Steel (11 Sept. 2001) (filed by the Law Firm of Willkie Farr & Gallagher) (discussing how the United States domestic industry has consistently created and fully utilized its production facilities as evidenced by increasing shipments throughout the period) at 20-23 (Exhibit CC-53).

[2823] Japan's second written submission, para. 147.

[2824] United States' first written submission, para. 512.

[2825] USITC Report at 65 ("Hot rolled steel is the primary commercial product for minimills.").

From 1999 to 2001, when the domestic industry began to experience problems, import shipments were falling and minimill shipments were increasing.[2826]

Legacy costs

7.1169 Korea argues that there is no question that legacy costs were a significant factor explaining the poor condition of the industry. Korea, China, New Zealand and Brazil argue that the USITC acknowledged that legacy costs were causing injury to the domestic industry at the same time as imports.[2827]

7.1170 Korea and Brazil assert that, without question, the USITC appreciated the severity of the legacy cost situation. Even with import relief, the USITC admitted that the future viability and health of the industry could only be ensured by addressing these costs.[2828] New Zealand further notes that the USITC found that the funding of legacy costs is a "vexing problem for the domestic industry"; that these costs "have prevented needed consolidation within the domestic industry"; pointed to "[t]he difficulties in meeting these obligations"; described them as a "longstanding problem"; and concluded they "may have left certain members of the domestic industry less able to compete with low-priced imports".[2829]

7.1171 However, according to Korea and Brazil, the USITC then rejected the importance of legacy costs claiming that "respondents have offered no reason why the industry's longstanding problems would cause no injury in 1996 or 1997 but then begin to depress prices and strangle revenue in 1998-2000". Brazil argues that this statement defies the record and ignores the dramatic distinctions between different segments of the industry on this issue.[2830] Korea argues clearly, legacy costs continued to significantly impact the health of the industry and legacy costs were the reason that the integrated sector performed more poorly than the minimill sector of the industry. Therefore, according to Korea, the USITC should have identified, distinguished, and separated those injurious effects of legacy costs, which they so clearly understood, before concluding that there was a substantial relationship between imports and the serious injury to the industry.[2831]

7.1172 Brazil argues that the USITC's cursory examination and explanation of the legacy cost issue did not match what the USITC clearly saw as a significant problem for the industry. According to Brazil, implicit in its statements was the reality that legacy costs were affecting the domestic industry at the same time as imports. However, Brazil argues that the USITC did not ensure that it was not imputing to imports injury caused by this other admittedly important factor and that, therefore, the USITC's analysis was not sufficient to meet the standard of Article 4.2(b).[2832]

7.1173 In response, the United States notes that in its analysis, the USITC acknowledged that the legacy costs had been, and continued to be, a long term obstacle to the prospects of consolidation in the industry.[2833] It noted, however, the issue of the industry's legacy costs had predated the period of investigation and that these costs had not prevented the industry from earning a reasonable rate of

[2826] Japan's second written submission, para. 148.
[2827] Korea's second written submission, para. 177; China's first written submission, paras. 359 and 362; New Zealand's first written submission, para. 4.163; Brazil's first written submission, para. 204.
[2828] Korea's first written submission, para. 129; Brazil's first written submission, para. 207.
[2829] New Zealand's second written submission, para. 3.130.
[2830] Korea's second written submission, para. 177; Brazil's first written submission, para. 204.
[2831] Korea's first written submission, para. 131.
[2832] Brazil's first written submission, para. 207.
[2833] USITC Report, p. 64. Indeed, the USITC's factual report sets forth a lengthy discussion of the impact these costs have had on the industry's condition. USITC Report, p. OVERVIEW-31-35.

return in 1996 and 1997, before the surge of imports in 1998.[2834] Moreover, although the USITC explicitly recognized that the burden of legacy costs varied between producers and had left certain producers more vulnerable to injury from imports, it found that there was no record evidence linking legacy costs to the price declines that caused serious injury to the industry during the latter part of the period of investigation.[2835] Accordingly, the USITC reasonably discounted these costs as an other factor causing injury to the industry during the period of investigation.[2836]

7.1174 In counter-response, New Zealand argues[2837] that despite the fact that the USITC clearly appreciated the severity of the legacy cost situation, the USITC still managed to conclude, against the weight of its own reasoning and the evidence, that legacy costs,

> "[A]re not responsible for the low prices that have injured the industry. We therefore find that legacy costs are not a source of injury to the domestic industry equal to or greater than increased imports."[2838]

7.1175 New Zealand argues that there is an obvious *non-sequitur* here – why was the USITC only prepared to take legacy costs seriously if they depressed domestic prices, having just listed a range of other negative impacts? [2839]

7.1176 The United States argues further that the USITC's finding that legacy costs had not contributed to the declines in the industry's condition during the period is fully supported by the record evidence. In this regard, the USITC prepared an analysis of the financial impact these costs had on the financial results of the industry in its Report.[2840] That analysis shows not only that legacy costs did not contribute to the declines in the industry's financial condition during the period from 1996 to 2000 but that the change in these "costs" actually benefitted the industry with respect to its operating results during this period.[2841] In this regard, that analysis shows that the aggregate net period cost for steel producers who had either defined benefit or defined contribution plans actually declined over the period; more specifically, the aggregate net periodic cost of the post-employment pension and non-pension benefits for both defined benefit and defined contribution employers fell by US$447 million during the period from 1996 to 2000.[2842] Since these are the costs that are reflected in the operating results of the industry[2843], the industry's "legacy costs" did not increase the industry's costs over the period, as complainants suggest; instead, the industry's legacy "costs" actually reduced

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[2834] USITC Report, p. 64.
[2835] USITC Report, p. 64.
[2836] United States' first written submission, para. 503.
[2837] New Zealand's second written submission, para. 3.130.
[2838] USITC Report Vol. 1, p 64.
[2839] New Zealand's second written submission, para. 3.131.
[2840] USITC Report, Table OVERVIEW-9.
[2841] USITC Report, Table OVERVIEW-9.
[2842] USITC Report, Table OVERVIEW-9. In this regard, the aggregate net periodic cost for these firms for legacy costs consistently declined during the period, from 1.123 billion dollars in 1996 to 834 million dollars in 1998 to 676 million dollars in 2000. Ibid. The aggregate net periodic cost of these expenses is calculated by adding the net periodic costs (or benefits) of post-employment pension and non-pension benefits for defined benefit plan employers to the net pension plan expense and other post-employment benefits for defined contribution plan employers. Ibid. These are the amounts recognized in a company's operating income statements. Ibid.
[2843] It is important to note that the items marked "amounts recognized in financial statements" in Table OVERVIEW-9 reflect liability or asset amounts that are included in a company's balance sheet, not its statements of operating results. USITC Report, pp. 33 and 35.

the industry's aggregate COGS over the period, thus increasing the industry's operating income levels somewhat during the period of investigation.[2844]

7.1177 The United States argues that the USITC was therefore correct when it found that the industry's legacy costs had not contributed to the serious injury being experienced by the industry during the period of investigation. Although the complainants correctly note that the USITC recognized that legacy costs represented a "vexing problem" for the industry, they ignore the fact that the USITC clearly stated that the legacy cost issue was a problem predating the period of investigation that would hinder the industry's future efforts to adjust, but did not contribute significantly to the pricing or cost issues that caused the industry's injury during the period of investigation.[2845]

7.1178 In counter-response, New Zealand submits that the USITC Report actually concluded the opposite. It conceded a range of injurious effects caused by legacy costs, but then sidelined them. As a result, it made no attempt whatsoever to assess their nature and extent and their injurious effect as separated and distinguished from increased imports.[2846]

7.1179 Brazil argues that despite the fact that the USITC notes that "the issue of legacy costs varies tremendously among domestic producers", no effort was made by the USITC to distinguish between producers with massive legacy cost burdens and producers with no such burdens. In the CCFRS industry, it would have discovered that the distinction falls along the type of technology used to produce steel. Integrated mills shoulder an overwhelmingly disproportionate share of the legacy costs within the industry. Yet, according to Brazil, the USITC's analysis was oblivious to the distinction, including what it meant for the integrated industry as massive increases in minimill capacity were being ramped up well into 2000.[2847] In this regard, New Zealand argues that the fact that "the burden of legacy costs varies tremendously among domestic producers" is not a reason to dismiss legacy costs as a cause of injury. In fact, according to New Zealand, it confirms the conclusion already reached that this simply served to intensify the already severe effects on integrated mills of domestic intra-industry competition.[2848]

7.1180 In New Zealand's view, the fact that the problem of legacy costs may have predated the period of investigation and did not comprise a new issue for the industry, is irrelevant if, as they did, those costs continued to erode competitiveness and profit during that period. New Zealand submits that in terms of Article 4.2(b), they "are causing injury to the domestic industry at the same time [as increased imports]". New Zealand also argues that the fact that certain parts of the industry were able to operate profitably at one point in the period of investigation is also, by itself, irrelevant: The question is whether legacy costs nevertheless caused injury, at this or at other points.[2849] New Zealand submits that clearly, the fact that legacy costs have been present for some time is irrelevant so long as legacy costs are still "causing injury to the domestic industry at the same time as [increased imports]", in terms of Article 4.2(b). [2850] [2851]

7.1181 New Zealand notes costs of between US$30 and US$65 per ton of steel produced by integrated mills existed, totalling across the industry between US$1.7 and US$3.6 billion. In terms of current costs, integrated producers surveyed by the USITC had to cover US$742 million in post

[2844] United States' first written submission, para. 504.
[2845] United States' first written submission, para. 505.
[2846] New Zealand's second written submission, para. 3.133.
[2847] Brazil's first written submission, para. 206.
[2848] New Zealand's first written submission, para. 4.167.
[2849] New Zealand's first written submission, para. 4.166.
[2850] New Zealand's first written submission, para 4.166.
[2851] New Zealand's second written submission, para. 3.134.

employment benefits in 2000. Further, during the same year, the benefit obligations of steel producers surveyed by the USITC exceeded fund assets by US$6.6 billion.[2852]

7.1182 Korea notes[2853] that the United States now cites tables in the Staff Report and data to suggest that the short-term portion of legacy costs, which, says Korea, were enormous, declined somewhat during the period.[2854] Korea submits that whether or not they declined, the absolute weight of such legacy costs on the performance of the integrated producers in the industry is undeniable[2855] and was reaffirmed by the USITC in its remedy recommendation to the President. As Commissioner Okun observed:

> "[W]hile the Commission did not find these alternative causes [pension costs, healthcare costs, environmental clean-up costs, and certain labor-related issues] to be a more important cause of injury...than imports, *this does* not mean that these issues should not be addressed as part of a remedy that will facilitate positive adjustment to import competition by lowering costs and allowing the industry to restructure."[2856]

7.1183 China and New Zealand argue that the USITC's analysis of legacy costs fails to identify and explain the nature and extent of the injurious effects of legacy costs as distinguished from the alleged injurious effects of increased imports, and to establish explicitly through a reasoned and adequate explanation, that injury caused by this factor is not attributed to increased imports.[2857] In particular, China argues that the USITC failed to explain why legacy costs were a problem, how this problem impacted on the situation of the industry, how legacy costs had prevented needed consolidation and the result that this had on the industry.[2858]

Buyer consolidation

7.1184 China argues that the USITC acknowledged buyer consolidation as a cause of injury.[2859] China further argues that the USITC failed to explain the nature and extent of that impact. According to China, it is not enough to merely state that a factor cannot, on its own, explain a substantial decline in prices. Rather, the requirements of the Agreement on Safeguards dictate that the injurious effects of all factors be identified.[2860]

7.1185 In defence, the United States argues the USITC addressed the argument made by foreign respondents that buyer consolidation had impacted the bargaining power and profits of the industry.[2861] After recognizing that there had been some consolidation of buying operations by automotive manufacturers and other steel purchasing sectors, the USITC discounted this factor as a cause of injury, noting that it had been on-going for a number of years and that it pre-dated 1998, the

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[2852] New Zealand's first written submission, paras. 4.164-4.165; New Zealand's second written submission, para. 3.133.

[2853] Korea's second written submission, para. 179.

[2854] United States' first written submission, para. 504.

[2855] The Chairman of Bethlehem Steel specifically testified as to the magnitude of these costs, as Commissioner Okun noted: "We now have 13,000 active workers trying to support 74,000 dependent families which is over a hundred thousand actual people that small work base is trying to support." USITC Report, Vol. I, p. 442, n. 70 (Exhibit CC-6).

[2856] USITC Report, Vol. I, p. 442, n. 69 (emphasis added) (Exhibit CC-6).

[2857] China's first written submission, para. 368; New Zealand's first written submission, para. 4.162.

[2858] China's first written submission, para. 368.

[2859] China's first written submission, paras. 359 and 364.

[2860] China's first written submission, para. 370.

[2861] USITC Report, p. 65.

year of the import surge.[2862] Moreover, it stated that it found no evidence indicating that this consolidation had an impact on domestic pricing or that it had been a cause of serious injury to the industry.[2863]

7.1186 The United States argues that given that China has not offered any substance to support its arguments, it is clear that the USITC's findings in this regard are reasonable and that the USITC properly discounted the argument that purchaser consolidation was a source of injury to the industry.[2864]

7.1187 China argues that purchaser consolidations are an on-going process covering the whole period of investigation. As they are able to reduce the bargaining power and the profit margins of domestic producers, the USITC should have distinguished these effects from the impact of imports and nourish its findings with 'substance'. China submits that the USITC failed to do so.[2865]

Poor management

7.1188 China notes that the respondents argued before the USITC that bad corporate decisions increased companies' debt load and were responsible for poor financial performance and bankruptcies. According to China, the USITC, in response, merely stated that since the financial position of the industry "weakened after imports surged", it resulted from injury caused by increased imports and, thus, poor financial decisions cannot be a cause of injury, especially since increased debt load cannot explain the price declines. China argues that this is not an answer. When the USITC states that a factor is not a cause because another factor is the cause, it does not give the reasons why the former is not a cause. In China's view no explanation whatsoever was provided.[2866]

7.1189 In response, the United States notes that the USITC addressed the argument made by importers and foreign producers that bad management decisions, such as the industry's capital investment decisions, had caused injury to the industry.[2867] The USITC found this argument "unpersuasive", noting that the increased debt load and other management decisions of the industry did not explain the decline in prices that occurred during the period.[2868] Moreover, the USITC stated that the record showed that substantial declines in the industry's performance first began in 1998, when imports surged into the market and began driving prices downward.[2869] It noted that these imports prevented the industry from maintaining or achieving high levels of profitability and that the industry's degree of debt was a result of that import competition, rather than being a cause of injury.[2870] In sum, the USITC properly identified the nature and extent of the injury caused by this other factor, found that there was no evidence that bad management decisions caused injury to the industry, and reasonably dismissed this alleged "injury" factor as a possible source of injury.[2871]

[2862] USITC Report, p. 65.
[2863] USITC Report, p. 65.
[2864] United States' first written submission, para. 517.
[2865] China's second written submission, para. 222.
[2866] China's first written submission, para. 375.
[2867] USITC Report, p. 64.
[2868] Ibid.
[2869] Ibid.
[2870] Ibid.
[2871] United States' first written submission, paras. 515-517.

7.1190 The United States argues that given that China has not offered any substance to support its arguments, it is clear that the USITC's findings in this regard are reasonable and that the USITC properly discounted the argument that poor management was a source of injury to the industry.[2872]

NAFTA imports

7.1191 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic certain flat steel industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[2873]

7.1192 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.[2874]

7.1193 In this regard, the European Communities notes that the USITC concluded that imports from Mexico accounted for a substantial share of total imports and "contributed importantly" to injury. The European Communities notes that the President later decided to exclude imports from Mexico from the scope of the measure.[2875] China notes that Canada and Mexico belonged to the five top suppliers of CCFRS products during the period of investigation. The rate of increase in imports from Mexico was higher than the rate of increase in total imports, and the AUV for imports of the product concerned from Mexico were consistently below average unit value of imports from other sources[2876]-able to undersell United States producers.[2877]

7.1194 In light of the foregoing, the European Communities, China New Zealand and Brazil submit that, clearly, the NAFTA imports that were excluded from the measure were an "other" factor for the purposes of non-attribution. However, the United States failed to analyse this factor and to establish explicitly that its effects were not attributed to non-NAFTA imports.[2878] More particularly, the European Communities argues that despite finding that Canada was one of the top five importers and that Mexican imports contributed importantly to the serious injury suffered by the domestic industry, the USITC did not undertake a non-attribution analysis for the injurious effects of these excluded imports.

[2872] United States' first written submission, paras. 515-516.
[2873] China's first written submission, para. 380.
[2874] China's first written submission, para. 383.
[2875] European Communities' first written submission, para. 469.
[2876] USITC Report, Vol. I, p.66.
[2877] China's second written submission, para. 224.
[2878] European Communities' second written submission, para. 376; China's second written submission, para. 224; New Zealand's written reply to Panel question No. 82 at the first substantive meeting; Brazil's first written submission, para. 230;

7.1195 The United States simply insists that it is not required to undertake such an analysis. For the United States' response, see paragraph 7.1066 *et seq*. [2879]

7.1196 Brazil argues that the USITC's treatment of injury and causation was perfunctory and inadequate with regard to NAFTA imports. The USITC only noted that "…we would have reached the same result had we excluded imports from Canada from our injury analysis." Yet, according to Brazil, the general discussion of causation and the role of alternative causes by the USITC never once mentioned the role of non-NAFTA imports as distinguished from all imports. Brazil argues that no attempt at factual analysis for non-NAFTA imports was ever attempted.[2880] Brazil argues that the USITC's response to the USTR with regard to NAFTA imports was no better than its original analysis. In Brazil's view, there was no factual analysis and only the simple statement that "the same considerations that led us to conclude that increased imports of CCFRS are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of CCFRS from all sources other than Canada and Mexico."[2881]

7.1197 Relying upon the Appellate Body decisions in *US – Wheat Gluten* and *US – Line Pipe*, Brazil argues that a cursory USITC analysis of non-NAFTA imports does not meet the parallelism requirement under the Agreement on Safeguards. In the instant case, Brazil argues that the USITC did not conduct any specific evaluation of non-NAFTA imports as required by parallelism. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports would not change its findings of injury and causation as to total imports. Brazil submits that in doing do, it repeated the very same mistakes previously highlighted by the Appellate Body.[2882] Brazil argues that the USITC's unsupported conclusion that it "would have reached the same result" in justifying the exclusion NAFTA countries from the recommended measure was the very same language the Appellate Body found to fail the parallelism requirement in *US – Line Pipe*. Brazil asserts that the statement does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury.[2883]

7.1198 Brazil further argues that the USITC failed to fulfil its obligation to provide a "reasoned and adequate explanation that establishes explicitly" that imports alone caused serious injury to the domestic industry because it failed to establish that non-NAFTA imports alone caused serious injury; its conclusions about the causal link between non-NAFTA imports and serious injury were vague and merely implied or suggested why non-NAFTA imports alone caused serious injury. The USITC's analysis therefore did not satisfy the parallelism requirement.[2884]

Existing anti-dumping and countervailing duty proceedings and orders

7.1199 Korea and Brazil note that the USITC admitted that anti-dumping and countervailing duties orders "to some extent staunched the flow of imports after 1998".[2885] However, Korea argues that the USITC failed to properly consider the effect of anti-dumping and countervailing duties, which substantially limited import volumes and repaired injury caused by unfairly traded imports. The vast

[2879] European Communities' second written submission, para. 376.
[2880] Brazil's first written submission, para. 230.
[2881] Brazil's first written submission, para. 230.
[2882] Brazil's first written submission, para. 231.
[2883] Brazil's first written submission, para. 232.
[2884] Brazil's first written submission, para. 233.
[2885] Korea's first written submission, para. 139; Brazil's first written submission, para. 208.

majority of imports which had increased in the 1997-1998 period were hot-rolled products which were subject to significant restrictions in the form of anti-dumping and countervailing duties.[2886]

7.1200 Brazil argues that, in fact, overall, imports were down significantly from 1998 levels, and flat in 1999 and 2000. Individual imports subject to anti-dumping and countervailing duties orders and investigations were down sharply. For finished CCFRS products, the trend was also down sharply. According to Brazil, only slab imports increased, driven by the domestic industry's own demand for that product.[2887]

7.1201 Korea argues that the scope of the injury caused by unfairly traded imports and repaired by the anti-dumping and countervailing duties orders should have been separately identified and separated. Such an analysis, if performed, would have shown that the injury remaining was that caused by the other factors discussed above.[2888]

7.1202 In response, the United States argues that, as a legal matter, there is no provision in the Agreement on Safeguards that requires a competent authority to exclude imports subject to anti-dumping or countervailing duty orders from its calculus of assessing the contribution of imports to injury. On the contrary, the basic provisions of the Agreement on Safeguards require a competent authority to assess serious injury and causation by examining whether "imports" – that is, all imports, not only "fairly traded" imports – have caused serious injury to the domestic industry producing the like or directly competitive article. Indeed, unless a particular exception in the Agreement applies, the remedy imposed must apply to all imports of the product concerned "irrespective of its source", without regard to whether some imports are subject to anti-dumping or countervailing duty orders. The Agreement does not suggest that a competent authority should treat imports subject to anti-dumping or countervailing duty orders as though they were a "non-import" injury factor.[2889]

7.1203 The United States also submits that the premise of Brazil's and Korea's argument is that the imposition of anti-dumping or countervailing duties on imports from a particular country eliminates all of the injurious effects these imports have had, or could have, on an industry. Under the AD and SCM Agreements, an investigating authority may impose duties on imports if dumped or subsidized imports are causing "material" injury to a domestic industry producing the like product. As the Appellate Body has stated, the "material" injury standard contained in these Agreements requires a lower amount of injury than does the "serious injury" standard of the Agreement on Safeguards. Thus, an investigating authority need only determine in an anti-dumping or countervailing duty investigation whether there is the requisite amount of injury – i.e., "material" injury – needed to satisfy the requirements of the AD and SCM Agreements; the authority has no need to assess whether the industry is suffering a higher – i.e., "serious" – level of injury than the "material" level required under the AD and SCM Agreements.[2890] Accordingly, although anti-dumping duties and countervailing duties are remedial duties intended to offset the level of subsidies or the amount of "dumping" found for imports from a country and, by doing so, to remedy the "material" injury caused by these dumped or subsidized imports, they do not, and indeed may not, offset all of the injury that an industry can suffer as a result of those imports. Indeed, oftentimes, the orders do not offset all of the material injury caused by unfairly traded imports even after their imposition. In other words, even with the imposition of duties to offset these "unfair" trade practices, imports subject to anti-dumping

[2886] Korea's first written submission, para. 139.
[2887] Brazil's first written submission, para. 209.
[2888] Korea's first written submission, para. 140.
[2889] United States' first written submission, para. 524.
[2890] United States' first written submission, para. 525.

an countervailing duty orders can still cause additional injury to the industry that would qualify as serious injury under the Agreement on Safeguards .[2891]

7.1204 The United States argues that indeed, the record did not show that the orders imposed on CCFRS products during the period of investigation had eliminated the injurious effects of these imports. The United States submits that, as the USITC correctly noted in its decision, although imposition of orders on hot-rolled carbon steel and plate stemmed the flow of these imports to some extent, the record data showed that reasonably substantial volumes of imports from the countries covered by the orders still continued to enter the United States, as did much more substantial volumes of imports from countries not covered by the orders. For example, despite the fact that anti-dumping duty orders were imposed on carbon steel plate imports from China, Russia and the Ukraine in October 1997, China, Russia and the Ukraine remained the third, fourth and ninth largest exporters of plate to the United States in the year 2000.[2892] Moreover, even with the imposition of anti-dumping duty orders on hot-rolled steel from Russia, Japan, and Brazil, prices for hot-rolled steel continued to be depressed in the market after imposition of the orders. Although anti-dumping orders were imposed on these imports in June and July 1999, the USITC correctly noted, the "corrosive effects" of these low-priced imports still continued to impact the industry's pricing levels, as evidenced by the fact that the pricing levels for hot-rolled did not come close to recovering to their 1997 levels, even after imposition of the orders. On the contrary, after imposition of these orders, the record indicated that hot-rolled prices continued declining through the end of June 2001, after a small initial boost in the first two quarters of 2000.[2893]

7.1205 In counter-response, Korea argues that the United States mischaracterizes Korea's argument regarding the required non-attribution analysis with respect to unfair trade practices remedied by anti-dumping and countervailing duties orders.[2894] Korea is not maintaining that the imposition of these duties on imports automatically eliminated "all of the injurious effects". Rather, Korea's position is that the United States had to examine the extent to which the orders and duties had eliminated some or all of the injurious effects of imports. Clearly, the orders could have remedied the injury caused by unfairly traded imports entirely or to some extent.[2895] According to Korea, the USITC did not investigate this and merely concluded that "the orders had not fully eliminated the injurious effects".[2896] In Korea's view, this "analysis" does not establish the extent of injury caused by those unfairly traded imports and accordingly remedied by such orders, if any, and therefore, the United States has not complied with its obligations under Article 4.2(b) of the Agreement on Safeguards.[2897]

7.1206 Korea submits, however, that the United States failed to examine the anti-dumping and countervailing duties orders and its remedial effects on the injury caused by unfairly traded imports to the industry concerned in the current case. [2898]

[2891] United States' first written submission, para. 526.
[2892] United States' first written submission, para. 528.
[2893] United States' first written submission, para. 529.
[2894] United States first written submission, para. 525.
[2895] Korea's second written submission, para. 182.
[2896] United States' first written submission, para. 528. It is interesting that the United States suggests that imports of plate continued to enter at injurious levels when imports of plate had declined so low as the result of anti-dumping and countervailing duties orders that even the domestic industry conceded that imports of plate were not causing injury to plate producers. See Korea's first written submission, para. 88 and footnote 131.
[2897] Korea's second written submission, para. 183.
[2898] Korea's second written submission, para. 184.

Economic analyses submitted to the USITC

7.1207 For a broader discussion on this issue see paragraph 7.997 *et seq*. In addition, Japan and Brazil argue that instead of attempting to separate and distinguish alternative causes as required by the Agreement, the USITC held steadfast to rudimentary (and often wrong) trends analysis as the sole means of assessing the effect of alternative causes on the performance of the domestic industry. The USITC had at its disposal econometric studies containing evidence of the relative role of different causes, which demonstrated qualitatively and quantitatively that several of these causes were dramatically more important than imports and that one could separate and distinguish the various economic factors. However, the USITC dismissed these studies that had been prepared by respondents with respect to the three most important CCFRS products – hot-rolled steel, cold-rolled steel, and corrosion resistant steel.[2899]

7.1208 Japan and Brazil argue that the USITC ignored these studies, although they were a prominent part of the respondents' written briefs and oral presentations at the hearing. In the final decision, the USITC made little mention of them, relegating a reference to them to a footnote and, thus, provided scant recognition of what could have been the most relevant evidence for meeting the obligation to separate and distinguish the role of alternative causes.[2900]

7.1209 Japan and Brazil further argue that the USITC also seems to have ignored its own staff assessment of the studies. In a memo requested by Commissioner Bragg, USITC staff reported that both the respondents' and the petitioners' econometric studies demonstrated that the imports of cold-rolled steel and corrosion resistant steel had no discernible impact on domestic price levels. The only point of disagreement was with respect to hot-rolled steel. Brazil and Japan argue that this consensus evidence by all of the economists that cold-rolled and corrosion resistant imports had no effect on domestic price levels was simply ignored by the USITC.[2901]

7.1210 Japan and Brazil also argue that whereas the studies provided product-specific data, the USITC seemed content to discard the more specific evidence in light of its single like product that combined all CCFRS products. Brazil and Japan submit that the USITC did have to consider specific product pricing evidence as it was impossible to generate prices for "CCFRS steel". However, Brazil argues that when it came to considering product-specific economic studies which led to conclusions it did not like, the USITC "placed little weight" on them, opting instead to rely on aggregate information for its super generic – like product.[2902]

7.1211 In response, the United States argues that the USITC properly dismissed the conclusions in the econometric study and those in a similar study submitted by the domestic industry because both studies had "serious" methodological limitations. The two studies in question both purported to be comprehensive economic studies establishing the extent to which imports impacted pricing in the CCFRS market. Not surprisingly, the study submitted by the domestic industry purported to show that "imports were the most important determinant of the decline in domestic hot- and cold-rolled steel products", while the study submitted by foreign respondents purported to show that imports were

[2899] Japan's first written submission, para. 276; Brazil's first written submission, para. 212.
[2900] Japan's first written submission, para. 278; Brazil's first written submission, para. 213.
[2901] Japan's first written submission, para. 280; Brazil's first written submission, para. 214.
[2902] Japan's first written submission, para. 279; Brazil's first written submission, para. 215.

not a particularly important factor in price declines for hot-rolled, cold-rolled and galvanized (i.e., corrosion-resistant) steel.[2903]

7.1212 The United States submits that, as can be seen from the staff memorandum analysing the studies, the USITC's economic staff found that the economic "models" in both studies contained substantial analytical flaws. The USITC staff found that the domestic industry's study was flawed because it assumed, without laying an evidentiary foundation, that integrated producers would make changes in their production patterns due to changes in profitability levels. Moreover, the staff noted that the domestic industry's study failed to make the necessary distinctions between factors reflecting demand variations and variations in domestic and foreign competition in the market. As a result, the staff concluded, the domestic study simply did not provide sufficient statistical evidence of its conclusions, that is, that the "effect of import competition was significantly greater than the effect of other factors". In other words, the USITC staff found that the author of the study had not proved his thesis.[2904]

7.1213 According to the United States, the USITC staff found that the study submitted by the foreign respondents had serious methodological flaws as well. Its most significant flaw, they noted, was that the study was not actually a "formal" economic model but simply reflected an "informal" argument that "'massive' increases in domestic capacity, primarily by low-cost mills, [had] driven down prices". The staff noted, the study's "main argument[,] that domestic competition was the biggest source of domestic price decline[,] is only weakly supported by the empirical results". In their final word on the matter, the USITC economic staff stated that the author of the study "did not provide evidence that the effect of import prices and volumes was significantly less than the other factors". In other words, the USITC staff found that the author of this study had not provided support for his basic argument.[2905] In sum, the USITC reasonably chose to discount these studies because the USITC and staff both found the two studies to be deeply flawed.[2906]

7.1214 In counter-response, Japan argues that the Panel should read the main body of the USITC staff memorandum, not just the summary conclusions to which the United States tries to direct attention. The main body makes clear two keys points. First, the criticism of how the interested parties' study modeled intra-industry competition applies only to that factor – not to the other factors that were studied. Thus, the USITC's own staff economists implicitly embraced the findings about the relative roles of demand and imports, changing raw material prices and imports, and domestic capacity and imports. Even if one were to discount interested parties' arguments about minimill competition, the other factors overwhelmingly matter more than imports in explaining price declines. There is simply no basis in the body of the memorandum to support the overbroad conclusion that the interested parties' studies should be rejected.[2907] Japan submits that, the USITC staff memorandum notes that the domestic industry study and the interested parties' study reached essentially identical conclusions on cold rolled steel and galvanized steel. Both studies found that imports of those two key CCFRS products had no meaningful effect on price levels.[2908] In Japan's view, the USITC ignored this finding because it substantially undercut its decision to bundle various CCFRS products into one like product. Having decided on such an over-broad like product grouping, the USITC

[2903] United States' first written submission, para. 519; United States' second written submission, para. 132.
[2904] United States' first written submission, para. 520.
[2905] United States' first written submission, para. 521.
[2906] United States' first written submission, para. 522.
[2907] Japan's second written submission, para. 153.
[2908] USITC Staff Memorandum (EC-Y-042) to Commissioner Bragg, Inv. No. TA-201-73 Steel (22 October 2001) (Exhibit CC-10).

proceeded to ignore any inconvenient evidence about the individual steel products that made up that grouping. In the end, a single Commissioner requested an analysis from a staff economist to justify ignoring the studies.[2909] The resulting perfunctory memorandum contained a conclusion that only loosely connected to the discussion in the main body of the memorandum. The Commission then largely ignored the studies, rather than giving them the careful attention they deserved.[2910]

7.1215 The United States responds by noting that the models submitted by both the respondent and domestic parties during the steel investigation did not indicate that imports of carbon flat-rolled merchandise had a minimal impact on domestic cold-rolled and corrosion-resistant prices during the period of investigation. As Brazil should be aware, the econometric model provided by the domestic steel industry to the USITC was intended to show that imports of carbon flat-rolled steel "were the most important factor for determining the price of flat steel products" in the US market. In addition to claiming that imports of plate and hot-rolled steel had important price effects on the domestic price of plate and hot-rolled steel products, the model also showed that imports of cold-rolled steel had important "own price" effects on domestic cold-rolled prices in the US market, while the price of all carbon flat-rolled imports had important price effects on the price of galvanized (corrosion-resistant) products. Further, as the economic consultant for the domestic industry testified during the hearing, the domestic industry's model also showed that demand and the price of factor inputs had only a "secondary impact" on domestic prices, while capacity utilization was not statistically significant and had a small effect on domestic prices.[2911]

7.1216 The United States also submits that the foreign respondents' economic model did not quantify the overall level of injury caused by imports. As both Japan and Brazil concede[2912], the model only purported to estimate the effects of imports on domestic prices, which is only one of several factors that should be considered by a competent authority under the Agreement on Safeguards. The model did not "quantify" the effects of imports and other injury factors on the industry's production, shipment, or sales revenue levels, its productivity and employment levels, its capacity utilization rates, its profitability levels, or its capital investment levels.[2913] In other words, neither Japan nor Brazil has come close to describing a model that addresses all of the factors set forth in the Agreement on Safeguards.

7.1217 The United States notes that although Japan and Brazil explicitly concede that the Agreement on Safeguards does not require the use of econometric models, Japan and Brazil assert that a competent authority must, in fact, use an econometric analysis in its analysis if such an analysis is submitted by a party to the investigation and the data is available.[2914] The Agreement on Safeguards simply does not contain language suggesting that parties have a right to dictate the analytical methodology that should be used by a competent authority in its causation analysis, nor have Japan and Brazil pointed to any such language in the Agreement.[2915] While parties are clearly free to suggest possible analytical approaches during the course of an investigation, the Agreement does not require the competent authority to respond to these suggestions by conducting a full-blown causation analysis to account for every methodology offered by the parties. Moreover, as long as the United States complies with its obligation to adequately and clearly explain why there is a "genuine and

[2909] Ibid.

[2910] Japan's second written submission, para. 154.

[2911] United States' written reply to Panel question No. 38 at the second substantive meeting.

[2912] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's written reply to Panel question No. 85 at the first substantive meeting.

[2913] United States' second written submission, para. 133.

[2914] Japan's written reply to Panel question No. 85 at the first substantive meeting; Brazil's written reply to Panel question No. 85 at the first substantive meeting.

[2915] See Agreement on Safeguards, Article 3.1.

substantial" causal link between imports and the serious injury being suffered by the industry, there is nothing in the Agreement that suggests that United States must "test" its conclusions by performing a series of economic modelling exercises.[2916]

Failure to provide a reasoned and adequate explanation

7.1218 The European Communities, Japan and Brazil argue that the USITC Report fails to meet the standard of "an adequate explanation" which "addresses fully the nature and complexities of the data".[2917] In particular, Brazil notes that the USITC identifies in its report six "alternate sources of injury" that were the source of exhaustive discussion during the USITC investigation. Japan and Brazil argue that the USITC failed to meet its obligation in explaining the effects of these other factors. Japan argues in particular that with respect to the USITC's explanation of how it met the non-attribution obligation, the USITC discussion is disappointingly sparse. Although there had been extensive argumentation and data on each of the alternative causes, the USITC devotes only a paragraph or two to summarily dismissing these alternative causes.[2918] The European Communities, Japan and New Zealand and Brazil argue that what little explanation was offered did not meet the requirement to "establish explicitly, with a reasoned and adequate explanation" that injury caused by these factors was not attributed to increased imports as most recently reiterated by the Appellate Body in *US – Line Pipe*.[2919]

7.1219 Japan argues that each of the factors discussed above was important and collectively they severed any credible connection between imports and the condition of the domestic industry. If one combines the impact of the other factors, and compares them to imports, a reasonable authority simply could not conclude that imports caused the problems.[2920] Japan further argues that the effects of these various factors are interrelated and mutually reinforcing, particularly at the end of the period of investigation, when the United States industry encountered its only significant decline in operating results.[2921] Yet, Japan argues that the USITC analysis provides no discussion of these interactions. Instead, the USITC superficially evaluated the importance of each other factor in isolation relative to increased imports, and did not either separate or distinguish the injury attributable to such other factors, thus failing to meet its obligation to address fully the complexities of the data.[2922]

7.1220 In response, the United States submits that like Japan, the United States agrees that the effects of most injury factors, including increased imports, are oftentimes "interrelated and mutually reinforcing" and are therefore difficult to disentangle. Similarly, the United States agrees that, when one of these factors intensifies its injurious effect over time, it is likely that it will also intensify the injury experienced by the industry due to the interplay of that factor with other factors causing injury, such as increased imports. In fact, it is precisely for these reasons that the United States has consistently taken the position in WTO disputes that it is not realistic as an economic matter to expect a competent authority to precisely identify and separate the injury effects of individual factors in complex and sophisticated markets, such as the steel market.[2923] Nonetheless, Japan is clearly mistaken in asserting that a competent authority must assess whether imports are a more important

[2916] United States' second written submission, para. 134.
[2917] European Communities' first written submission, para. 468; Japan's first written submission, para. 251; Brazil's first written submission, para. 160.
[2918] Japan's first written submission, para. 251; Brazil's first written submission, para. 178.
[2919] European Communities' first written submission, para. 476; Japan's first written submission, para. 251, New Zealand's first written submission, para. 4.138; Brazil's first written submission, para. 178.
[2920] Japan's first written submission, para. 282.
[2921] Japan's first written submission, para. 283.
[2922] Japan's first written submission, para. 285.
[2923] United States' first written submission, para. 532.

cause of serious injury than all other possible factors before imposing a safeguards remedy. The Agreement on Safeguards simply does not contain a requirement that a competent authority find that the injurious effects of imports are greater than the cumulated effects of all other injurious factors. In fact, the Agreement contains no language requiring a competent authority to weigh the importance of the injurious effects of increased imports against any factor, either individually or collectively, nor has Japan pointed to such a requirement in its argument. Instead, as long as there is a "genuine and substantial" causal relationship between increased imports and a significant overall impairment in the condition of the industry, and as long as the competent authority does not attribute the effects of other factors causing injury to imports, the requirements of the Agreement on Safeguards are satisfied. Indeed, even the Appellate Body has interpreted the Agreement as requiring a competent authority to "separate and distinguish" the injurious effects of individual factors causing injury from one another when performing its injury analysis. Even though this separation and distinction of individual injury factors may be "difficult", the Appellate Body has directed that it be done.[2924]

7.1221 The United States argues that accordingly, in its steel determination, the USITC has taken great pains to identify the nature and scope of the injury caused by both imports and other individual factors, to assess the extent of injury, if any, that each of these individual factors has caused to the industry, and to ensure that it does not attribute the effects of non-import factors to imports in its causation analysis. Indeed, even Japan appears to concede that the United States did actually "isolate" the injurious effects of each of the factors by evaluating the importance of each factor in relation to increased imports. The USITC's efforts in this regard are in full compliance with the principles outlined by the Appellate Body in *US – Wheat Gluten* and other cases, i.e., that competent authorities "separate" and "distinguish" the effects of increased imports from those of all other individual injury factors in safeguards investigations.[2925]

7.1222 The United States argues that the USITC's causation analysis with respect to CCFRS is a well-reasoned and cogent analytical discussion that takes into account the complexities of a large and sophisticated market for a raw material critical to any large economy. In its analysis, the USITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of CCFRS and the significant declines in the condition of the CCFRS industry during the latter half of the period of investigation. Moreover, the USITC analysed a number of other factors alleged to be causing injury to the industry (such as demand declines, increased domestic capacity, and intra-industry competition), identified the nature and scope of the injury caused by these factors, if any, and ensured that it did not attribute the effects of these factors to imports. The USITC's analysis is fully consistent with the requirements of the Agreement on Safeguards .[2926]

Relevance of like product analysis for CCFRS

7.1223 Japan and Brazil argue that the USITC's discussion of alternative causes illustrates the difficulties, if not the error, in finding a single super-generic like product that combined all CCFRS steel. According to Brazil and Japan, there was simply no means of analysing such an abstraction. All the pertinent data and underlying factors could only be assessed for specific products, reflecting the vastly different producers, products and markets involved. Japan and Brazil refer in particular to differences in demand[2927], excess capacity[2928], intra-industry competition.[2929] Yet, the USITC seemed

[2924] United States' first written submission, para. 533.
[2925] United States' first written submission, para. 534.
[2926] United States' first written submission, para. 536.
[2927] Japan's first written submission, para. 288; Brazil's first written submission, para. 217.
[2928] Japan's first written submission, para. 288; Brazil's first written submission, para. 217.

to believe it could measure such indicia as total combined demand or capacity in a coherent manner that could support its causation findings.[2930] Japan and Brazil argue that these distinctions and the degree to which the USITC ignored them, demonstrate the failure of the USITC to meet the standards set by Article 4.2(b) by distinguishing and evaluating different injurious effects caused by alternative factors.[2931] Brazil and Japan also argue that by its use of an overly broad single "like" product, itself a violation of United States WTO obligations, the USITC compounded the depth of its errors by forcing itself into a flawed analytical approach to causation.[2932]

7.1224 Japan, Korea and Brazil also argue that the USITC failed to satisfy the non-attribution requirement under the second sentence of Article 4.2(b) of the Agreement on Safeguards because, amongst other things, the USITC's flawed like-product meant that the USITC violated the non-attribution requirement under Article 4.2(b), second sentence, as interpreted by the Appellate Body. Specifically, grouping "unlike" products and industries together makes it impossible to separate and distinguish causal factors, since the "other factors" affecting each like product varied in relevance and scope depending on the like product analysed.[2933]

7.1225 According to Korea, by incorrectly defining the like product, the USITC, in essence, attributed causation for all CCFRS products to increased imports of hot-rolled steel alone.[2934] The failure to properly define the like product masked the actual effects of other factors on the industry.[2935] The European Communities, Korea and Brazil also argue that **w**hen the domestic industry is improperly defined, a competent authority cannot identify any distinction in the performance of the merged industries.[2936]

7.1226 New Zealand argues that an analysis of whether increased imports have caused serious injury to a domestic industry cannot be carried out if that industry is incorrectly identified. Assessing causation in respect of the wrong domestic industry must also lead to a "legal mistake as regards causation itself" because Article 2.1 requires, as a prerequisite to applying a safeguard measure, that increased imports have caused serious injury "to the domestic industry that produces like … products".[2937] The European Communities, Korea and Brazil argue that, likewise, when distinct like products are improperly merged, it is impossible to determine the causal importance of the individual like products on the industry producing the merged products.[2938] Korea elaborates that by improperly defining the like product, the causation analysis cannot properly assess the weight and significance to be given to a particular "other factor" of injury since each factor may affect each actual like product differently.[2939] The European Communities submits that improperly combining like products and

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[2929] Japan's first written submission, para. 289; Brazil's first written submission, para. 218.
[2930] Japan's first written submission, para. 286; Brazil's first written submission, para. 216.
[2931] Japan's first written submission, para. 290; Brazil's first written submission, para. 219.
[2932] Japan's first written submission, para. 291; Brazil's first written submission, para. 219.
[2933] Japan's written reply to Panel question No. 80 (a) at the first substantive meeting; Korea's first written submission, para. 122; Korea's second written submission, para. 131; Brazil's written reply to Panel question No. 80 (a) at the first substantive meeting.
[2934] Korea's first written submission, para. 104.
[2935] Korea's second written submission, para. 131.
[2936] European Communities' written reply to Panel question No. 80 at the first substantive meeting; Korea's written reply to Panel question No. 80 at the first substantive meeting; Brazil's written reply to Panel question No. 80 at the first substantive meeting.
[2937] New Zealand's written reply to Panel question No. 80 at the first substantive meeting.
[2938] European Communities' written reply to Panel question No. 80 at the first substantive meeting; Korea's written reply to Panel question No. 80(a) at the first substantive meeting; Brazil's written reply to Panel question No. 80 at the first substantive meeting.
[2939] Korea's written reply to Panel question No. 80(a) at the first substantive meeting.

domestic industries creates the possibility that increased imports which are not causing serious injury to the industry producing the like product may be found to have caused serious injury to another industry which has been artificially included in the definition of industry.[2940] [2941]

(ii) Tin mill products

Decision-making

7.1227 China and Norway note that the only commissioner who voted in the affirmative concerning tin mill, and who defined tin mill as a separate like product, is Commissioner Miller. Consequently, it is the determination of Commissioner Miller which becomes relevant to examine, for she is the only Commissioner to have made a separate determination for a product on which the President imposed a separate safeguard measure.[2942] China argues that as the other two Commissioners, Bragg and Devaney, developed their analysis on a different like product' definition, their findings do not represent a correct basis for the examination of the tin mill products. If the basis of the findings is erroneous, it is logical that the result of the analysis cannot lead to a correct determination.[2943] Similarly, the European Communities argues that it cannot see how the findings of the two Commissioners who found increased imports, serious injury and causation for CCFRS as a whole can purport to provide a reasoned and adequate explanation of a causal link between increased imports and serious injury for a product which they never disaggregated from the whole. While the United States may wish to rely on these determinations, they cannot be regarded under the Agreement on Safeguards as even purporting to provide a reasoned and adequate explanation sufficient to demonstrate the causal link required by Article 2.1 and Article 4.2 of the Agreement on Safeguards. Thus, it is only Commissioner Miller's analysis which can purport to provide such a reasoned and adequate explanation and thus only her analysis which requires examination.[2944]

7.1228 The United States notes that several complainants mistakenly assert in their briefs that the President relied solely on Commissioner Miller's causation findings for tin mill products when determining to impose a safeguard remedy on tin mill steel. Three Commissioners found that tin mill steel was causing serious injury to the domestic tin mill industry: Commissioners Miller, Bragg and Devaney. Commissioner Miller found tin mill steel to be a separate like product and made an affirmative injury finding for that product, while Commissioners Bragg and Devaney found tin mill steel to be part of the same like product as other CCFRS and made an affirmative determination for that like product.[2945] Under the United States statute, the President cannot decide to treat an affirmative finding of one Commissioner as a basis for imposing a remedy, as the complainants allege. Instead, under the United States statute, the President may only impose a remedy if at least one-half of the Commissioners then in office make an affirmative finding of injury and causation. In this case, the President was only able to impose a remedy on tin mill products because three of the six sitting Commissioners had found that tin mill steel, whether or not treated as a separate like product, had caused serious injury to a domestic industry. In fact, in his official announcement of the imposition of these remedies, the President specifically stated that he considered the "determinations of the groups of Commissioners voting in the affirmative with regard to" tin mill products to be the determination of the USITC. In other words, the President specifically and clearly identified the

[2940] European Communities' written reply to Panel question No. 80 at the first substantive meeting.
[2941] Brazil's written reply to Panel question No. 80 at the first substantive meeting.
[2942] China's first written submission, para. 509; China's second written submission, para. 272; Norway's first written submission, para. 315.
[2943] China's second written submission, para. 274.
[2944] European Communities' second written submission, para. 379.
[2945] United States' first written submission, para. 538.

affirmative determinations of Commissioners Miller, Bragg and Devaney as the decision of the Commission for tin mill steel. Accordingly, even though complainants argue otherwise, the President's remedy finding does not indicate that he adopted the like product decision or injury finding of Commissioner Miller as his own.[2946]

7.1229 On the basis of the foregoing, the United States asserts that it is incorrect both legally and factually for the complainants to assert that the President adopted the injury and causation findings of Commissioner Miller as the sole grounds for his findings. Nonetheless, because the complainants focus their arguments concerning tin mill products almost entirely on Commissioner Miller's causation analysis for tin mill, the United States also focuses its discussion on Commissioner Miller's analysis as well.[2947] However, the United States does note that complainants have not seriously challenged the affirmative findings of Commissioners Bragg and Devaney with respect to tin mill products and other CCFRS products. Accordingly, the complainants have failed to make a prima facie case showing that Commissioners Bragg and Devaney's analysis with respect to these products violated the causation requirements of the Agreement on Safeguards. The Panel should therefore should find that the causation analysis of these Commissioners has not been placed at issue by complainants in this proceeding and should find that the determinations of these Commissioners are proper under the Agreement.[2948]

7.1230 Further, the United States argues that the complainants' argument ignores the fact that there was, in actuality, a substantial degree of agreement between Commissioner Miller and the other three Commissioners with respect to the basic legal issues in the case. In this regard, Commissioner Miller agreed with and joined the findings of the three other Commissioners that tin mill steel was the appropriate like product, that there had been increased imports of tin mill steel during the period of investigation, and that the industry had suffered serious injury during the period of investigation. Moreover, Commissioner Miller also identified similar conditions of competition as governing the manner in which imports and domestic merchandise competed in the market and even identified the same other factors that might be causing injury to the industry in her analysis. While she disagreed with respect to whether imports were a substantial cause of the serious injury being suffered by the industry, there was, nonetheless, a substantial agreement on the basic issues driving the case.[2949] The United States argues, further, that the simple fact that three Commissioners disagreed with Commissioner Miller no more makes her decision unreasonable than does Commissioner Miller's disagreement with those three Commissioners make their decision unreasonable. To put it another way, Commissioner Miller and the three other Commissioners all analysed a complex record, thoroughly discussed the record evidence relating to causation, and issued a decision that is cogent and reasonable. The issue for this Panel, therefore, is whether Commissioner Miller performed an adequate and thorough analysis of the record and established that there was a genuine and substantial causal relationship between increased imports and the declines in the industry's condition.[2950]

7.1231 In counter-response, Korea notes that according to the United States, the USITC relied on the affirmative determinations of Commissioners Bragg and Devaney as well as Miller's.[2951] Nonetheless, the United States only analyses the causation analysis of Commissioner Miller alone and fails to explain how the affirmative determinations of Commissioners Bragg and Devaney support causation

[2946] United States' first written submission, para. 539.
[2947] United States' first written submission, para. 540.
[2948] United States' first written submission, para. 541.
[2949] United States' first written submission, para. 569.
[2950] United States' first written submission, para. 570.
[2951] United States' first written submission, paras. 538-541.

with respect to tin mill products.[2952] Korea submits that, in fact, the failure by the United States to explain how the affirmative determinations of Commissioners Bragg and Devaney support an affirmative finding of causation with respect to tin mill products is exactly the point. The United States cannot explain it because those Commissioners did not perform that analysis. In the absence of such analysis of increased imports of tin mill or an analysis of the causes of injury to the domestic producers of tin mill products alone, these Commissioners cannot show any coincidence of trends nor causation.[2953]

Factors considered by the USITC

Declining demand

7.1232 The European Communities points out that Commissioner Miller noted that declining demand "may account in part for the fact that the industry was already in a weakened state in 1996".[2954] The other Commissioners who examined tin mill products as a separate product concluded that "the decline in consumption of tin mill products is an important cause of the injury suffered by the industry" which, together with purchaser consolidation and the fact that a substantial proportion of imported products were not available domestically, was such as to lead to the conclusion that "increased imports is not a cause that is greater than any other cause".[2955] The European Communities, China and Norway argue that it is quite clear that Commissioner Miller and the other Commissioners considered that declines in demand were a cause of the serious injury throughout the period of investigation. That the financial performance of the domestic industry worsened when demand increased does not mean that demand declines are not a cause of the industry's injury.[2956]

7.1233 The European Communities, Japan and Brazil submit that Commissioner Miller's conclusion that "declining demand is not a cause of serious injury to the domestic industry that is equal to or greater than increased imports" does not, as the Appellate Body has held in the past, purport to separate and distinguish the injurious effects of other factors from imports, and ensure that such effects are not attributed to increased imports.[2957] The United States cannot dress up this failure.[2958] Further, China and Norway argue that there is no information on the role that this factor played and to what extent it was responsible for the serious injury to the industry, although three other commissioners stated that "the evidence demonstrates that the decline in the consumption of tin mill products is an important cause of the injury suffered by the industry".[2959]

7.1234 According to Japan and Brazil, the other three Commissioners, finding a separate like product, found declining demand to be an important alternative cause.[2960] In contrast, according to Japan, Korea and Brazil, Commissioner Miller asserted that demand recovered in 1999, but ignored the fact that the increase was modest, only 5%, and short-lived.[2961] In 2000, demand fell lower than

[2952] Korea's second written submission, para. 150.
[2953] Korea's second written submission, para. 151.
[2954] USITC Report, Vol. I, p. 309.
[2955] USITC Report, Vol. I, p. 76-77.
[2956] European Communities' second written submission, para. 381; China's first written submission, para. 513; Norway's first written submission, para. 321.
[2957] USITC Report, Vol. I, p. 309.
[2958] European Communities' second written submission, para. 381; Japan's first written submission, para. 297; Brazil's first written submission, para. 261.
[2959] China's first written submission, para. 516; Norway's first written submission, para. 324.
[2960] Japan's first written submission, para. 297; Brazil's first written submission, para. 261.
[2961] Japan's first written submission, para. 297; Korea's first written submission, para. 145; Brazil's first written submission, para. 261.

1998, and in 2001 demand was at record lows for the period. Japan and Brazil assert that such a narrow focus on a single year simply cannot satisfy the demands of Article 4.2(b) for a careful review of the entire period.[2962]

7.1235 The United States argues that Commissioner Miller thoroughly discussed the nature and the extent of the injury that was attributable to demand declines during the period. She noted that demand had been declining generally in the tin mill market and that it had declined overall during the period. She correctly noted, however, that the industry lost significant market share and suffered its heaviest losses of the period in 1999, despite the fact that demand increased considerably in that year. In other words, as she found, demand declines could not possibly have contributed to the serious declines in the condition of the industry that occurred during 1999, when demand was, in fact, increasing.[2963] By performing an analysis that assessed whether imports caused injury to the industry during a period of increasing demand, she was able to distinguish the effects of the demand declines later in the period from those attributable to imports in 1999. As a result, Commissioner Miller was able to ensure that it did not attribute the injury caused by these later demand declines to imports.[2964]

7.1236 The United States also argues that Commissioner Miller recognized that there was not a correlation between changes in demand and changes in the industry's prices and operating margins during the period of investigation itself. Although Commissioner Miller recognized that the long-term decline in demand might have caused the industry to be in a weakened state prior to the period, she also correctly noted that demand changes did not appear to correlate directly to changes in the industry's condition. For example, in 1999, when demand increased to the same levels seen in 1996 and 1997 (the beginning of the period), the industry's unit prices and operating income margins dropped dramatically. As Commissioner Miller reasonably noted, if changes in demand had been a cause of deterioration in the industry's condition during the period of investigation, the domestic industry should have experienced some recovery in 1999 when demand increased considerably. However, the industry's condition did not improve. Instead, due to the massive surge of imports in that year, the industry lost significant market share and experienced its heaviest losses of the entire period of investigation.[2965]

7.1237 China further argues that given that Commissioner Miller identified decline in demand as an alternative source of the injury, decline in demands as an 'other' injurious factor should have been subjected to a non-attribution analysis.[2966] China submits that for the purpose of the non-attribution analysis, the competent authority is required to identify and separate the effect of the 'other' factor. Instead Commissioner Miller analysed imports only. According to China, moreover, she disregarded the part of the period of investigation when demands were declining and instead, analysed the increased imports in the absence of the "other" factor, i.e. when demands were increasing.[2967] China argues that this seems to be a very weak argumentation and questions how one could perform identification of nature and extent of a factor if the subject of the identification is not present.[2968] China submits that it is evident that the United States failed to rebut China's argument. According to China, the injurious effects of this 'other' factor were not properly assessed and it was not established

[2962] Japan's first written submission, para. 297; Brazil's first written submission, para. 261.
[2963] USITC Report, p. 309.
[2964] United States' first written submission, para. 558.
[2965] United States' first written submission, para. 557.
[2966] China's second written submission, para. 277.
[2967] China's second written submission, para. 279.
[2968] China's second written submission, para. 280.

in a clear and unambiguous way that the effects of the demand decline were not attributed to increased imports.[2969]

Purchaser consolidation

7.1238 China states that it believes that Commissioner Miller acknowledged that purchaser consolidation was causing injury.[2970] In particular, China and Norway argue that Commissioner Miller's conclusions regarding purchaser consolidation indicate that she believed that purchaser consolidation was a cause of serious injury, although this factor was not chiefly responsible for the injury.[2971] Similarly, the European Communities notes that Commissioner Miller found that imports were "chiefly responsible" for the decline in industry performance in 1999, without separating and distinguishing the injurious effect of purchaser consolidation, which, must be presumed to be partly responsible for some of the injury suffered.[2972] China and Norway argue that Commissioner Miller did not give any information on the role of purchaser consolidation.[2973] The European Communities argues that there is nothing in the USITC Report which explains why such purchaser consolidation would not, as the United States claims, have any effect in 1999.[2974] The mere assertion that it may have taken place before 1999 does not prove this fact, nor does it prove that purchaser consolidation was not having continuing effects in 1999.[2975]

7.1239 In response, the United States notes that Commissioner Miller also examined whether purchaser consolidation was an "other" factor that had a negative effect on the tin mill industry during the period of investigation.[2976] In her analysis of this issue, she explained, in a reasoned and thorough manner, the nature and extent of the injurious effects of purchaser consolidation during the period. After performing her analysis, she reasonably concluded that purchaser consolidation was not a factor that contributed significantly to the decline in the industry's condition during the period of investigation. According to the United States, in her analysis, Commissioner Miller discussed the nature and extent of purchaser consolidation in detail.[2977] She first noted that the number of large tin mill purchasers declined from 49 in 1990 to 26 in 2000, with four to six manufacturers accounting for 75-80% of all consumption in 2000.[2978] She also recognized that this consolidation had enhanced the negotiating power of purchasers in the tin mill market during this period.[2979] However, she also correctly noted that most of this consolidation occurred prior to the period of investigation, and found therefore that purchaser consolidation was not a significant factor in the declines in the condition of the industry during 1999, 2000, and 2001.[2980] In this regard, she found that price competition in the market was fiercest in 1999 when imports made their largest surge into the market, which showed that imports, not purchaser consolidation, were "chiefly responsible" for industry declines in 1999 and thereafter. Given her analysis of this issue, the United States argues that it is clear that Commissioner Miller thoroughly and adequately discussed the nature and extent of the injury caused by purchaser

[2969] China's second written submission, para. 281.
[2970] China's first written submission, para. 512.
[2971] China's first written submission, para. 514; Norway's first written submission, para. 322.
[2972] USITC Report, Vol. I, p. 309.
[2973] China's first written submission, para. 516; Norway's first written submission, para. 322.
[2974] United States' first written submission, paras. 560-562.
[2975] European Communities' second written submission, para. 382.
[2976] USITC Report, p. 309.
[2977] USITC Report, p. 307.
[2978] USITC Report, p. 307.
[2979] USITC Report, p. 307.
[2980] USITC Report, p. 309. Moreover, she added, that this consolidation process was an indication of the intense pricing competition between domestic producers and imports that existed throughout the period. USITC Report, p. 309.

consolidation. She reasonably found that purchaser consolidation had not been a significant cause of the injury the industry suffered during the latter half of the period of investigation. Commissioner Miller correctly acknowledged that the process of purchaser consolidation had generally predated the period of investigation and did not explain the massive declines in the industry's condition that occurred during 1999, 2000, and 2001. Accordingly, she correctly found that the weight of the record evidence established that imports were chiefly responsible for the declines in the industry's condition in 1999 and properly discounted purchaser consolidation as a source of injury to the industry.[2981]

7.1240 In counter-response, China notes that the data in the USITC Report indicates that the consolidation process starting in 1990 resulted in four to six manufacturers accounting for 75-80% of all consumption of tin mill products in the year 2000. China submits that this factor not only predated, but also was present during the entire period of investigation.[2982] China concludes that the Commissioner wrongly identified the nature and extent of the purchaser consolidations and failed to establish that the injurious effects of this factor were not attributed to increased imports. The United States' counter-argument that the Commissioner addressed this issue adequately has no merit.[2983]

Domestic overcapacity

7.1241 Korea asserts that Commissioner Miller suggested that overcapacity was not a problem because the industry reduced capacity between 1998-2001 (after increasing capacity between 1996-1998).[2984] However, in 1996 the industry achieved its highest capacity utilization of 78.3% – and it increased capacity over the following two years.[2985] Korea argues that in 1996, the industry had 1 million tons of excess unused capacity and in 2000, that figure had grown to 1.2 million tons.[2986] Korea argues that capacity utilization of 75% and lower simply does not support the proposition that domestic excess capacity was not a more significant problem than imports.[2987]

7.1242 In response, the United States argues that Commissioner Miller explained, in a reasoned and thorough manner, the nature and extent of the effects of "excess" capacity on the condition of the industry. After noting that the industry had "some excess capacity" during the early part of the period, she found that the domestic industry had reduced its capacity in this manner as a means of "taking steps to rationalize their production" in the face of the demand declines in the tin mill market. Having noted that the industry had reduced its capacity levels during the period, Commissioner Miller discounted this "excess" capacity as a significant source of injury to the industry. In particular, she noted that the industry's "excess" capacity levels had not led to the declines in the industry's capacity utilization rates during the latter half of the period, noting that the industry had reduced their aggregate capacity by 3.7 percent between 1996 and 2000, and reduced them even further in 2001.[2988]

Anti-dumping orders

7.1243 Korea argues that Commissioner Miller noted that an anti-dumping order was imposed on imports of tin mill products from Japan in the second half of 2000, but determined that imports from Japan continued to have a significant presence in the United States market. According to Korea, she failed to note, however, that the reason for continued importation from Japan was that the United

[2981] United States' first written submission, paras.560-562.
[2982] China's second written submission, para. 283.
[2983] China's second written submission, para. 286.
[2984] USITC Report, Vol. I, p. 309 (Exhibit CC-6).
[2985] USITC Report, Vol. II, Table FLAT-18, p. FLAT-22 (Exhibit CC-6).
[2986] USITC Report, Vol. II, Table FLAT-18, p. FLAT-22 (Exhibit CC-6).
[2987] Korea's first written submission, para. 145.
[2988] United States' first written submission, para. 564.

States industry had explicitly agreed that a number of tin mill products should be excluded from the anti-dumping order because the United States industry did not produce those products.[2989]

NAFTA imports

7.1244 China argues that Commissioner Miller's determination of the existence of a causal link between the increased imports and serious injury to the domestic tin mill industry was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, what had to be determined is in fact whether total increased imports, with the exception of imports from NAFTA-countries, have caused serious injury to the domestic industry. According to China, as a result, since the determination of causality at hand required that "increased imports" only consisted of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "another factor". Thus, in respect of Article 4.2(b) of the Agreement on Safeguards, this new determination also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[2990] China argues that such a new determination was not done concerning this product. China argues that this is especially surprising, given that it was acknowledged that "imports of tin mill products from Canada account for a substantial share of total imports and contribute importantly to the serious injury".[2991] Korea argues that since the USITC did not proceed to a new determination of causality between increased imports from non-NAFTA countries and the serious injury to the domestic industry, there was consequently a failure to assess the injury caused by imports from Mexico and Canada and a failure to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. Therefore, the investigating authority did not comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[2992]

7.1245 Norway notes that Commissioner Miller did consider imports from Canada to "contribute importantly" to the serious injury suffered by the domestic industry. However, according to Norway, she did not single out these imports and recommended that the remedy apply also to these imports, a conclusion that the President did not follow. Here again, Norway argues, there is thus no finding at all that this recognized injury has not been attributed by the President to imports from other sources.[2993]

7.1246 The European Communities argues that in failing to analyse imports from Canada, Israel, Jordan and Mexico as alternative causes of injury, the USITC also acted inconsistently with Article 4.2(b).[2994] The European Communities adds that Commissioner Miller found that Mexican imports accounted for a substantial share of imports and contributed importantly to the serious injury, but did not subject the injurious effects of these imports to a non-attribution analysis.[2995]

7.1247 For the United States' general response, see paragraph 7.1066 *et seq*.

[2989] Korea's first written submission, para. 145.
[2990] China's first written submission, para. 527.
[2991] China's first written submission, para. 528.
[2992] China's first written submission, para. 529; China's second written submission, para. 286.
[2993] Norway's first written submission, para. 325.
[2994] European Communities' first written submission, para. 480.
[2995] European Communities' second written submission, para. 385.

Factors not considered by the USITC

7.1248 The European Communities, Japan, Korea, Norway and Brazil argue that the other three Commissioners who found a separate like product also found that a large portion of purchasers testified that they imported specific products that the domestic industry simply did not make.[2996] According to Japan and Brazil, this factual finding argues strongly that imports could not be the cause of serious injury. Yet Commissioner Miller did not address this finding at all.[2997] The European Communities also argues that Commissioner Miller fails to deal with the extent to which injury was caused by the massive over-capacity in the United States industry.[2998]

7.1249 In response, the United States argues that the complainants mistakenly assert that Commissioner Miller "failed" to take into account that a "substantial portion" of imports consisted of tin mill products that were not available domestically, a fact relied on by three other Commissioners who made a negative determination for tin mill steel. In fact, Commissioner Miller did address this very issue, although in a different manner than the other Commissioners, when she found that purchasers considered imported tin mill steel and domestic merchandise to be substitutable for one another. Because the level of substitutability measures the degree to which products are considered similar to one another for pricing purposes, Commissioner Miller's finding indicates that she concluded that the "substantial" difference in product mix between imports and domestic product did not significantly affect the extent to which imports and domestic merchandise competed in the market.[2999] The United States submits that, moreover, although the other three Commissioners found the percentage of imports that were not available from the industry to be "substantial", the record showed that this percentage (although confidential) was actually substantially lower than 33% of all imported tin mill steel. As a result, while it was clearly reasonable for the three other Commissioners to consider this percentage to account for a "substantial" percentage of imports, it was just as reasonable for Commissioner Miller to consider that percentage did not significantly reduce the substitutability of the imported and domestic merchandise.[3000]

7.1250 China and Norway argue that given that the industry was already injured before imports increased in 1998 and 1999 and given that the industry did not recover once imports were declining in 2000 and interim 2001, there had to be other existing injury factors besides imports. According to China and Norway, since, without any doubt, other factors existed, Commissioner Miller had the obligation to identify them, in order to ensure that injury would not be wrongly attributed to increased imports. She did not do so.[3001]

7.1251 In response, the United States argues that Commissioner Miller performed a thorough and objective analysis of the record. She established that there was a genuine and substantial causal link between trends in the volume and market share of imports of tin mill steel and the significant declines in the condition of the tin mill industry during the last two-and-a-half years of the period of investigation. Moreover, she thoroughly assessed the nature and extent of the injury caused by other

[2996] European Communities' first written submission, para. 484; Japan's first written submission, para. 298; Korea's first written submission, para. 145; Norway's first written submission, paras. 336 and 337; Brazil's first written submission, para. 262.
[2997] Japan's first written submission, para. 298; Brazil's first written submission, para. 262, para. 484.
[2998] European Communities' first written submission, para. 484.
[2999] United States' first written submission, para. 550.
[3000] United States' first written submission, para. 551.
[3001] China's first written submission, para. 522; Norway's first written submission, para. 331.

factors in the market and ensured that she did not attribute the effects of these factors, if any, to imports.[3002]

7.1252 Moreover, the United States adds that the complainants fail to recognize that there was a substantial degree of agreement between Commissioner Miller and the other three Commissioners with respect to the basic legal issues in the case. In this regard, Commissioner Miller agreed with -- and joined – the findings of the three other Commissioners that tin mill steel was the appropriate like product, that there had been increased imports of tin mill steel during the period of investigation, and that the industry had suffered serious injury during the period of investigation. Moreover, Commissioner Miller also identified similar conditions of competition as governing the manner in which imports and domestic merchandise competed in the market and even identified the same other factors that might be causing injury to the industry in her analysis. While she disagreed with respect to whether imports were a substantial cause of the serious injury being suffered by the industry, there was, nonetheless, a substantial agreement on the basic issues driving the case. Indeed, the United States asserts, the simple fact that three Commissioners disagreed with Commissioner Miller no more makes her decision unreasonable than does Commissioner Miller's disagreement with those three Commissioners make their decision unreasonable.[3003]

7.1253 The European Communities also argues that Commissioner Miller also failed to take note of the decision of Wierton (one of the major United States producers of tin mill products) to cease production during 1999, forcing consumers of tin mill products to source their requirements from imported products.[3004] The three Commissioners who found there was no causal link between increased imports and serious injury found that this decision accounted for at least part of the increase in imports, and consequently, the poor performance of the domestic industry in 1999. Commissioner Miller failed both to discuss this situation, and to ensure that the self-inflicted injury caused by this decision was not attributed to increased imports. For these reasons, the USITC did not, and the United States cannot pretend that it did, conduct the non-attribution analysis required by the Agreement on Safeguards.[3005]

Relevance of "like product" analysis

7.1254 The European Communities, Japan and Korea and Norway note that three of the four Commissioners who considered tin mill products as a separate product found that increased imports were not a "substantial cause" of serious injury.[3006] Japan argues that of the four Commissioners who treated tin mill products as a separate and distinct like product, three specifically found that other causes were more important than imports in explaining the problems in the domestic tin mill industry.[3007] These Commissioners found that decline in consumption of tin mill products (as consumers turned to plastics), slow rationalisation of domestic capacity, increased consolidation of purchasers and the fact that a "substantial portion" of imports of tin mill products were not produced in the United States, meant that increased imports were not a "substantial cause" of serious injury.[3008]

[3002] United States' first written submission, para. 572.
[3003] United States' first written submission, paras. 569-570.
[3004] USITC Report, Vol. I, p. 76, footnote 418.
[3005] European Communities' second written submission, para. 383.
[3006] European Communities' first written submission, para. 478; Japan's first written submission, para. 293; Korea's first written submission, para. 142; Norway's first written submission, para. 317
[3007] Japan's first written submission, para. 293.
[3008] European Communities' first written submission, para. 478; Norway's first written submission, para. 317.

7.1255 Korea argues that the remaining Commissioners, Bragg and Devaney, had lumped tin mill products together in the "CCFRS" like product and found serious injury on that basis. They never even looked at other factors that were responsible for the condition of the tin mill products industry because their like product decision prevented such an analysis.[3009] According to Korea, the majority of Commissioners who analysed tin mill products correctly concluded that other causes were responsible for the condition of the United States industry producing tin mill products. The other Commissioners who found serious injury, whose decisions were the basis for the safeguard measure imposed, failed to properly separate and identify the other causes of injury to the United States industry.[3010]

7.1256 The European Communities, Korea and Norway note that Commissioner Miller treated tin mill products as a separate like product and yet voted that imports of tin mill products were the substantial cause of serious injury.[3011] She considered that the domestic industry suffered its worst results in 1999, which was also the period when imports increased. Commissioner Miller accepted that decreasing demand may "account in part" for the weakened state of the industry. However, it was not a cause of serious injury "equal to or greater than increased imports". Commissioner Miller also concluded "that increased imports, not purchaser consolidation (which existed throughout the period examined), were chiefly responsible for the industry's serious decline in 1999" and that purchaser consolidation was not a cause of injury "equal to or greater than increased imports". According to the European Communities, it is unclear whether the Commissioner also considered excess capacity to have caused serious injury. The Commissioner simply states that domestic over-capacity was not a cause of injury "equal to or greater than" increased imports. The European Communities asserts that it isnevertheless clear that the Commissioner also considered imports from Canada to "contribute importantly" to the serious injury suffered by the domestic industry.[3012]

Failure to provide reasoned and adequate explanation

7.1257 China and Norway state that they believe that the injurious effects of the other factors that have caused the injury at the same time as the increased imports have not been properly assessed. Thus, it is impossible to determine whether the injurious effects of these factors were properly separated from the injurious effects of the increased imports.[3013] They argue that, as a result, it was not established explicitly, with a reasoned and adequate explanation, that injury caused by other factors was not attributed to increased imports. This conclusion would also remain the same, should the Panel not agree with China that Commissioner Miller acknowledged that other factors are causing injury to the domestic industry at the same time as increased imports.[3014] They further argue that, indeed, if the investigating authority believes that an alleged factor is not causing injury, it must, likewise, explicitly, clearly and unambiguously, state that such a factor is not causing injury and explain the reasons why. The explanation must be straightforward. To proceed otherwise would not ensure that alleged factors have been examined closely enough to establish that they are not contributing to the injury. As a result, there would be no guarantee that injury caused by other factors has not been wrongfully attributed to increased imports.[3015]

[3009] Korea's first written submission, para. 146.
[3010] Korea's first written submission, para. 147.
[3011] European Communities' first written submission, para. 479; Korea's first written submission, para. 144; Norway's first written submission, para. 318
[3012] European Communities' first written submission, para. 479.
[3013] China's first written submission, para. 517; Norway's first written submission, para. 326.
[3014] China's first written submission, para. 518; Norway's first written submission, para. 327.
[3015] China's first written submission, para. 519; Norway's first written submission, para. 328.

7.1258 China and Norway also argue that when Commissioner Miller placed emphasis on the substantial cause methodology, she failed to fulfill the requirements of Article 4.2(b) of the Agreement on Safeguards. Indeed, a conclusion to the effect that "increased imports are a substantial cause of serious injury to the domestic industry in that they are a cause which is important and not less than any other cause", is not clear, unambiguous nor straightforward, since it is not established that other factors did not cause injury and that injury caused by other factors was not attributed to increased imports. Moreover, they argue that the explanations given by the Commissioner to support this conclusion are not clear, straightforward, unambiguous; they certainly are not reasoned and adequate.[3016] They submit, in particular, Commissioner Miller should have given great consideration to the explanations of the three commissioners who made a negative finding on the "substantial cause of serious injury". Indeed, these three commissioners found that long-term continuing decline in demand, the consolidated market and the fact that a substantial portion of imports were reportedly not domestically available caused serious injury to the domestic industry. Since half of the members of the investigating authority had explicitly recognized that these factors were causing injury, Commissioner Miller had the obligation to explain, in her view, how injury caused by these factors was not attributed to imports.[3017]

7.1259 Japan similarly argues that Commissioner Miller failed to separate and distinguish alternative causes and that given that three of her colleagues read the record very differently, one might expect Commissioner Miller to elaborate at some length why she reached a different conclusion. Instead, she provided three short paragraphs. With respect to each alternative cause, she failed to meet the standard required by Article 4.2(b).[3018]

7.1260 The European Communities argues that having identified at least three alternative sources of possible serious injury, the USITC (Commissioner Miller) was under an obligation to separate out and distinguish the effects of the different factors and ensure that no such effects were attributed to serious injury allegedly caused by increased imports. The European Communities, Japan and Korea argue that this was not done, and the United States is in breach, therefore, of its obligations under Article 4.2(b).[3019]

7.1261 The United States responds by arguing that Commissioner Miller established, through a thorough and objective assessment of the record evidence, a genuine and substantial cause and effect relationship between increased imports and serious injury. Her analysis showed that there was a clear correlation between increases in the volume of increasingly low-priced imports of tin mill steel and the significant declines in the overall condition of the tin mill steel industry that occurred during the latter half of the period of investigation. She conducted a thorough and objective examination of the nature and extent of the effects of other factors and ensured that she did not attribute the effects, if any, of these factors to imports in her analysis.[3020]

[3016] China's first written submission, para. 520; Norway's first written submission, para. 329.
[3017] China's first written submission, para. 521; Norway's first written submission, para. 330.
[3018] Japan's first written submission, para. 296.
[3019] European Communities' first written submission, para. 480; Japan's first written submission, para. 296; Korea's first written submission, para. 148.
[3020] United States' first written submission, para. 537.

(iii) Hot-rolled bar

Factors considered by the USITC

Competition among domestic producers

7.1262 China argues that the USITC acknowledged that this factor was causing injury at the same time as increased imports.[3021] China further argues that concerning competition among domestic producers, the USITC did not explain the nature and extent of the loss of market shares. Nor did it explain on which domestic producers this had an impact. Moreover, although the USITC said that this factor could not provide an explanation for certain indicia of injury, it did not say how it could provide an explanation for the remaining indicia.[3022]

7.1263 In response, the United States notes that the USITC found that this factor provided no explanation for the domestic industry's serious injury. Intra-industry competition could not explain why the domestic industry overall lost market share to imports. Additionally, the pricing data available to the Commission did not indicate that Nucor was a primary source of pricing declines or that its pricing practices otherwise contributed to the industry's difficulties.[3023]

7.1264 The United States argues that China's statements to the effect that the USITC recognized that intra-industry competition was an alternative source of injury blatantly misreads the USITC's opinion. As the USITC explained, competition between domestic producers provides utterly no explanation for the industry's overall decline in market share during the period of investigation.[3024]

Inefficient producers

7.1265 The European Communities argues that with respect to the inefficient producers, the USITC arrives at a contradictory conclusion, stating first that their performance cannot explain the serious injury and then that "the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports".[3025]

7.1266 The European Communities and China argue the USITC appears to conclude that inefficient producers were a cause of the domestic industry's injury.[3026] More particularly, the European Communities submits that if the USITC concluded that they did not cause injury, it would not have to explain that this factor was not a cause which was less important than increased imports. At the very least, the USITC did not establish explicitly, first, whether this factor was causing injury, and second, as a result, how it ensured that the injurious effects of this factor were not attributed to increased imports.[3027]

7.1267 China further argues that the USITC did not explain the nature and extent of the injurious effect of this factor. All that had been said by the USITC was is that inefficient producers could not

[3021] China's first written submission, paras. 387 and 388.
[3022] China's first written submission, para. 393.
[3023] USITC Report, pp. 97-98; United States' first written submission, para. 578.
[3024] United States' first written submission, para. 579.
[3025] European Communities' second written submission, para. 387.
[3026] European Communities' second written submission, para. 388; China's first written submission, paras. 387 and 389.
[3027] European Communities' second written submission, para. 388.

be held accountable for the overall situation of the domestic industry. According to China, this is far from being sufficient.[3028]

7.1268 In response, the United States argues that the USITC also found that this factor provided no explanation for the domestic industry's serious injury. The United States producers identified as "inefficient", due to higher cost structures, did not lose market share to other, more "efficient" domestic producers during the period of investigation. Moreover, the performance trends of the so-called "inefficient" firms did not differ from more "efficient" domestic producers.[3029]

Changes in input costs

7.1269 The European Communities notes that the USITC concludes:

> "[B]ecause we cannot attribute the domestic industry's declines in operating performance in 2000 to increased in COGS, we conclude that changes in input costs cannot be as important a cause of serious injury as increased imports."[3030]

7.1270 The European Communities and China further argue the USITC appears to conclude that increases in input costs were a cause of the domestic industry's injury.[3031] More particularly, the European Communities submits that if the USITC concluded that they did not cause injury, it would not have to explain that this factors was not a cause which was less important than increased imports. At the very least, the USITC did not establish explicitly, first, whether this factor was causing injury, and second, as a result, how it ensured that the injurious effects of this factors was not attributed to increased imports.[3032]

7.1271 China argues that this factor should have received more attention from the investigating authority, since it had to have had an impact on prices. Indeed, although demand was high, capacity also remained high throughout the period of investigation and, thus, there was in no way a shortage of supply which could have prevented prices from declining. Moreover, the market for hot-rolled bar is very open and prices had to decline as costs declined, contrary to a monopoly situation in which prices would have remained high.[3033] China also notes that the USITC states that changes in input costs are in part responsible for price decline. However, according to China, there is no information on the nature and extent of that decline.[3034]

7.1272 In defence, the United States notes that the USITC found that unit raw materials costs declined throughout the period of investigation and that unit COGS decreased from 1996 to 1999 before increasing from 1999 to 2000. It observed that, generally speaking, declines in input costs cannot be a "cause" of injury in and of themselves. At most, they may be an alternative explanation for price declines. It found that the declines in input costs could not explain the much larger price declines that occurred from 1996 to 1999. Indeed, because demand increased during this period, prices should have declined less than input costs. From 1999 to 2000, unit COGS increased but prices

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[3028] China's first written submission, para. 394.
[3029] USITC Report, p. 98; United States' first written submission, para. 578.
[3030] USITC Report, Vol. I, p. 99.
[3031] European Communities' second written submission, para. 388; China's first written submission, paras. 387 and 390.
[3032] European Communities' second written submission, para. 388.
[3033] China's first written submission, para. 400.
[3034] China's first written submission, para. 395.

did not. Instead, domestic producers' attempts to increase prices during the first portion of 2000 could not be sustained because of the import surge.[3035]

7.1273 The United States argues that China's statement that the decline in costs from 1996 to 1999 "should have received more attention from the investigating authority," appears misguided. The USITC's focus was on how cost levels in 2000, not 1999, correlated with price levels in 2000. In any event, the USITC fully explained that declines in prices from 1996 to 1999 were much greater than declines in unit input costs, notwithstanding increasing demand. China appears to posit that this divergence may have been a function of increased domestic supply. This explanation, however, cannot be reconciled with the record. The domestic industry's capacity utilization in 1999 was higher than it was in 1996. If anything, tighter domestic supplies, as reflected by increasing capacity utilization, together with increasing domestic demand, should have resulted in domestic hot-rolled bar prices declining less than input costs did. There was, however, another source of increased supply in the US market that China overlooks: the imports. Because of the increased imports, the decline in prices from 1996 to 1999 was in fact greater than the decline in unit input costs.[3036]

7.1274 The European Communities submits[3037] that the USITC's dismissal of the effect of increased COGS in 2000 is not a reasoned and adequate explanation of its conclusions, supported by the facts. While raw material costs fell in 1999 and 2000, there was a substantial increase in costs associated with direct labour and other factory costs, which negated the increased income the domestic industry could have expected from the fall in raw material costs. The European Communities submits that, indeed, the USITC implicitly noted the diverging development of raw material costs and other costs where it stated:

> "[U]nit COGS declined from US$399 in 1996 to US$362 in 1999 and then increased toUS$380 in 2000; unit raw material costs declined throughout the period examined."[3038]

7.1275 The European Communities submits[3039] that the USITC thus recognized that the increase in COGS in 2000 was not caused by increases in raw material costs, but rather by increases in other costs forming part of COGS; i.e. direct labour and other factory costs. The USITC, however, never investigated further this factual situation, and slipped into a general assertion that when demand increases producers "normally need not cut their prices to reflect fully declines in COGS".[3040] This assumes, however, that domestic producers can let other costs increase and still expect to have them covered by their sales prices. In this case, other costs did increase substantially – had they not then the domestic industry would have continued to make a comfortable profit – this is illustrated in the table below.

[3035] USITC Report, p. 99; United States' first written submission, para. 578.
[3036] United States' first written submission, footnote 302.
[3037] European Communities' second written submission, para. 389.
[3038] USITC Report, Vol. I, p. 99.
[3039] European Communities' second written submission, para. 390.
[3040] USITC Report, Vol. I, p. 99.

Table 15: Hot-Rolled Bar – Unit Value of Commercial Sales and Costs (1998-2001)[3041]

	1998 (actual)	1999 (actual)	1999 (constant)	2000 (actual)	2000 (constant)	2001 (actual)	2001 (constant)
Net. Comm. Sales	431	399	399	399	399	381	381
Raw materials	169	138	138	135	135	122	122
Direct labor	55	52	52	61	***52***	61	***52***
Other factory costs	162	172	***162***	184	***162***	199	***162***
COGS Total	387	362	**352**	380	**349**	381	**336**
Gross Profit	44	37	**47**	19	**50**	0	**45**
SG&A	22	22	**22**	22	**22**	24	**24**
Operating Income (loss)	22	15	**25**	(3)	**28**	(24)	**21**

7.1276 According to the European Communities, while admitting this cost development, the USITC does not examine the reasons for it. Thus, even with prices falling between 1998 and 1999 and then remaining stable in 2000, had it not been for increased costs, the domestic industry would have continued to make a comfortable profit. Even in interim 2001, when prices fell from their 1999 levels, given continuing falls in raw material costs, had it not been for increases in other costs, the domestic industry would have had an operating income per unit comparable to the levels of 1998. Consequently, the USITC did not provide a reasoned and adequate explanation of how its conclusions were supported by the factual findings it had made.[3042]

7.1277 In response, the United States argues that the European Communities and China misread the USITC's opinion concerning the impact of changes in input costs. Because the USITC based its conclusion on serious injury principally on data concerning the domestic industry's condition during and after 2000, the most pertinent part of the USITC's discussion concerns input costs in 2000. Here, the USITC found that while unit COGS increased from US$362 in 1999 to US$380 in 2000, neither unit sales values nor prices increased during this period. The USITC specifically stated that "[i]f the domestic industry could have increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999". However, the industry could not raise its prices because of the increased imports during that year. Thus, the USITC expressly analysed the nature and effect of the change in input costs from 1999 to 2000 and demonstrated that it was not increased input costs, but the industry's inability to increase its prices to reflect those increased costs because of increased imports, that caused the industry's difficulties in 2000.[3043]

NAFTA imports

7.1278 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic hot-rolled bar industry, which is found in the USITC

[3041] European Communities' second written submission, para. 390, based on USITC Report, Vol. II, p. LONG-33, table LONG-27. In the columns marked "constant" the data for "other factory costs" and "direct labor" has been kept constant for 1999, 2000 and interim 2001. Figures which have been kept constant have been italicized, and figures which change as a result of the simulation are put in bold.

[3042] European Communities' second written submission, para. 391.

[3043] United States' first written submission, para. 580.

Report, was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3044]

7.1279 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports. In this regard, the European Communities notes that in its separate findings on NAFTA imports, the USITC concluded that the sheer volume of the Canadian increase supported its finding that imports from Canada contributed importantly to the serious injury caused by imports.[3045]

7.1280 The European Communities notes that the United States has not tried to explain how it ensured that the injurious effects of excluded imports were not attributed to non-excluded imports, despite the fact that in 2000 imports from Canada and Mexico alone accounted for 52% of all imports.[3046] [3047] The European Communities argues that the USITC failed to even consider Canadian imports as an alternative cause of injury and, thus, did not separate and distinguish the effects of Canadian imports nor did it ensure that such effects were not attributed to increased imports from non-NAFTA sources.[3048] On the basis of the foregoing, in the view of the European Communities and China, the USITC failed to comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3049]

7.1281 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1282 The European Communities argues that there are a number of factors apparent in the data before the USITC which the USITC did not examine and which would tend to bring its conclusion that imports were the cause of serious injury into doubt.[3050] In particular, the European Communities notes that the domestic industry's "interest expenses" and "other expenses" leapt between 1998 and 1999.[3051] The European Communities argues that these quite noticeable developments occurred precisely when the USITC notes operating margins and net incomes start to decline. Yet there is no explanation of these developments.[3052]

[3044] China's first written submission, para. 407.
[3045] European Communities' first written submission, para. 488.
[3046] USITC Report, Vol. II, p. LONG-9, table LONG-5.
[3047] European Communities' second written submission, para. 393.
[3048] European Communities' first written submission, paras. 489 and 491.
[3049] China's first written submission, para. 410; China's second written submission, para. 230.
[3050] European Communities' first written submission, para. 494.
[3051] European Communities' first written submission, para. 495.
[3052] European Communities' first written submission, para. 496.

7.1283 The European Communities also argues that there was a substantial drop in domestic prices between 1998 and 1999, a period in which imports decreased, and in 1999 demand fell away to 1996 levels. According to the European Communities, the decrease in domestic prices coincided with a substantial decrease in raw material costs in 1999. However, also between 1998 and 1999, there was a sharp increase in "other factory costs" which continued into 2000. Further, between 1999 and 2000 there was a sharp increase in direct labour costs (these trends continued into interim 2001). According to the European Communities, no explanation was provided in the USITC Report of the effect of these substantial changes on the financial performance of the industry.[3053]

7.1284 In response, the United States submits that the European Communities fails to recognize that the USITC's analysis of the poor financial condition of the domestic hot-rolled bar industry was based on operating income and operating margin data. Interest expenses and "other" expenses were not a component of operating income, as computed by the USITC. Instead, the USITC deducted interest expenses and "other" expenses from operating income to derive net income.[3054] It argues that, therefore, increases in interest expenses and "other" expenses could not provide any explanation for the 2000 operating losses cited by the USITC. Consequently, there was no requirement under Article 4.2 for the USITC to have engaged in a further non-attribution analysis concerning these expenses.[3055]

Failure to provide a reasoned and adequate explanation

7.1285 The European Communities and China argue that the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports.[3056] China argues that the USITC did not explain the nature of the "large extent" of the decline in operating performance in 1999 due to the decline in demand. Moreover, the USITC stated that "prices for cold finished bar have historically tracked demand conditions", but it did not explain the impact of demand on the overall situation of the industry.[3057]

7.1286 In response, the United States argues that the USITC conducted a reasoned and adequate examination of the injury purportedly caused by factors other than increased imports and ensured that any injury caused by these other factors was not attributed to imports. It notes that the USITC examined four asserted causes of injury to the domestic hot-rolled bar industry other than increased imports and concluded that the "alternative causes cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and the deteriorating operating performance leading to negative operating margins for the domestic industry in 2000". Moreover, the USITC did consider demand conditions in the market, finding that US apparent consumption of hot-rolled bar increased by 11.7 percent from 1996 to 2000, and that it increased on a year-to-year basis for every available comparison except that for 1998 to 1999. The USITC observed that apparent U.S. consumption increased from 1999 to 2000, the year that domestic industry performance reached injurious levels. Consequently, it concluded that changes in demand could not explain the industry's condition in 2000.[3058]

[3053] European Communities' first written submission, para. 497.
[3054] United States' first written submission, para. 581.
[3055] United States' first written submission, para. 582.
[3056] European Communities' first written submission, para. 498; China's first written submission, para. 401.
[3057] China's first written submission, para. 415.
[3058] United States' first written submission, para. 578.

(iv) Cold-finished bar

Factors considered by the USITC

Declines in demand

7.1287 The European Communities notes that the USITC found that: "The domestic industry acknowledges that prices for cold-finished bar have historically tracked demand conditions. Indeed, the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year".[3059] China and the European Communities argue that it is thus clear that the USITC considered that changes in demand were a cause of the serious injury.[3060] China argues that the USITC recognized that declines in domestic demand contributed to cause the injury to the domestic industry.[3061]

7.1288 China submits that the USITC firstly focused its analysis on the year 2000 – when declining demand was not an issue. Then it demonstrated that the industry was seriously injured even during this period, and that in this way the USITC fulfilled the requirements of the Article 4.2(b) of the Agreement on Safeguards.[3062] According to China, such an approach clearly misses the assessment of the nature and extent of the declines in demand. China questions how the USITC could have properly evaluated this factor by focusing on year 2000 when "decline was not an issue". In China's view, as a consequence, the non-attribution analysis of the declines in demand in the domestic market could not have been performed.[3063]

7.1289 In response, the United States argues that the USITC concluded that the domestic industry's performance in 1999, a year when import volume and market penetration declined, appeared largely attributable to declines in demand that year. The USITC emphasized, however, that US demand for cold-finished bar was higher in 2000 than it was in 1999. Nevertheless, prices were lower in 2000 than in 1999, and the per unit difference between average unit values and COGS was lower in 2000 than in any full year of the period of investigation other than 1999. Notwithstanding that 2000 was a year in which demand increased, the industry's operating margin that year was less than half the levels of 1997 and 1998.[3064] In this regard, the United States argues that the USITC ensured that it did not attribute to imports any injury due to declining demand. It did this by focusing on the domestic industry's condition during a period when declining demand was not an issue – 2000, which was not only the most recent full year of the period of investigation, but one in which United States apparent consumption increased from the level of the prior year. The USITC found that in 2000, the domestic industry suffered from depressed pricing and poor financial performance. By demonstrating that the domestic cold-finished bar industry was in a seriously injured condition even during a period where demand was increasing, the United States submits that the USITC clearly satisfied its obligation under Article 4.2(b) not to attribute to increased imports injury due to declines in demand.[3065]

[3059] European Communities' first written submission, para. 500.
[3060] European Communities' first written submission, para. 501; China's first written submission, para. 414.
[3061] China's first written submission, para. 414.
[3062] China's second written submission, para. 233.
[3063] China's second written submission, para. 234.
[3064] United States' first written submission, para. 594.
[3065] United States' first written submission, para. 596.

NAFTA imports

7.1290 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic cold-rolled bar industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3066]

7.1291 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.[3067]

7.1292 The European Communities argues that the USITC identified declining demand and imports from Canada as other sources of serious injury to the domestic industry. However, according to the European Communities, it did not attempt to separate and distinguish the effects of these other factors, and thus did not ensure that injury caused by these factors was not attributed to increased imports. The European Communities and China argue that the United States, in imposing measures, has therefore acted inconsistently with Article 4.2(b) of the Agreement on Safeguards. Moreover, the United States has not determined, through the provision of a reasoned and adequate explanation, that increased imports have caused serious injury.[3068] The European Communities further submits that the United States has not argued that it has ensured the non-attribution of the injurious effects of FTA imports. It has simply claimed that it is not required to. However, the European Communities notes that it has explained why the United States was under an obligation to undertake such a non-attribution analysis.[3069]

7.1293 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1294 The European Communities argues that the USITC did not consider in any detail the reasons for the fall in profits in 1999, other than to note that it was "to a large extent attributable to the declines in demand during that year". However, according to the European Communities, a close analysis of the data in the USITC Report suggests a major fall in the price of raw materials in 1999 which was accompanied by a substantial increase in other costs. According to the European Communities, this evolution appears to have combined with developments in demand to explain the

[3066] China's first written submission, para. 418.
[3067] China's first written submission, para. 421; China's second written submission, para. 235.
[3068] European Communities' first written submission, para. 504; China's first written submission, para. 421; China's second written submission, para. 235.
[3069] European Communities' first written submission, para. 399.

financial performance of the industry in 1999 and 2000. None of these developments are even mentioned in the USITC Report.[3070]

7.1295 In response, the United States submits that the European Communities' argument that price declines for cold-finished bar were the function of declines in unit raw material costs overlooks the fact that the USITC placed particular emphasis on the price declines that occurred between 1999 and 2000. The United States argues that, during this period, unit raw material costs increased.[3071]

7.1296 The European Communities argues that, moreover, there were a whole series of expenses which were subject to a substantial leap in 1999 and 2000 which clearly had a significant effect on the industry's financial performance.[3072] According to the European Communities, the USITC's Report does not even examine these developments, which coincide with the beginning of the serious injury allegedly suffered by the domestic industry. The European Communities states that it is quite clear that the fall in raw material prices must have had an effect on prices on the market, and that the increase in "other factory costs" must have had an effect on the profit margins which the domestic industry could expect to obtain.[3073]

7.1297 In response, the United States submits that with respect to the European Communities' argument that the declines in domestic industry performance in 1999 and 2000 appeared to be a function of increased interest and "other" expenses and depreciation, and that this fact was overlooked by the USITC, the European Communities fails to recognize that the USITC's analysis of the poor financial condition of the domestic cold-finished bar industry was based on operating income and operating margin data. Interest and "other" expenses and depreciation were not components of operating income, as computed by the USITC. Instead, the USITC deducted interest expenses and "other" expenses from operating income to derive net income. USITC then added depreciation and amortization to net income to derive cash flow.[3074] The United States argues that, accordingly, increases in interest and "other" expenses and depreciation could not provide any explanation for the poor operating performance in 2000 cited by the USITC. Consequently, there was no requirement under Article 4.2 for the USITC to have engaged in a further non-attribution analysis concerning these factors.[3075]

7.1298 In counter-response, the European Communities argues[3076] that the United States, like the USITC, ignores an important issue previously raised by the European Communities, which purports to be an alternative explanation of the changed financial performance of the industry in 1999 and 2000. The European Communities submits that this shows that but for massive changes in "other factory costs" in 1999 and 2000 the domestic cold-finished bar industry would have had a more than comfortable operating income in those years, even in the face of allegedly declining prices. This is because huge potential savings brought about by a decrease in raw material costs were nullified by huge increases in other costs. The European Communities submits that this is shown in the table below:

[3070] European Communities' first written submission, para. 509.
[3071] United States' first written submission, para. 592.
[3072] European Communities' first written submission, para. 510.
[3073] European Communities' first written submission, para. 511.
[3074] United States' first written submission, para. 597.
[3075] United States' first written submission, para. 598.
[3076] European Communities' second written submission, para. 397.

Table 16: Cold-Finished Bar – Unit Value of Commercial Sales and Costs (1998-2001)[3077]

	1998 (actual)	**1999 (actual)**	**1999 (constant)**	**2000 (actual)**	**2000 (constant)**	**2001 (actual)**	**2001 (constant)**
Net. Comm. Sales	711	667	667	668	668	671	671
Raw materials	480	347	347	368	368	364	364
Direct labor	45	51	51	54	54	58	58
Other factory costs	98	212	***98***	184	***98***	203	***98***
COGS Total	623	609	**496**	605	**520**	625	**520**
Gross Profit	88	57	**171**	63	**148**	47	**151**
SG&A	44	49	**49**	44	**44**	48	**48**
Operating Income (loss)	44	8	**122**	19	**104**	(1)	**103**

7.1299 According to the European Communities, such was the decline in raw material costs that if the industry had managed to keep "other factory costs" stable, it would have made substantial profits in 1999, 2000 and interim 2001. The European Communities submits that a competent authority, seeing such a development, should first check whether this data was correct and second examine very closely the reasons for such cost developments, in order to make sure that it did not err in attributing the injury seen in 1999 and 2000 to increased imports. Given that between 1998 and 1999 capacity utilization of the industry increased, and the volume of sales declined by only 10,000 tons, the European Communities argues that these cost developments cannot be explained by effects on the domestic industry caused by increased imports. In the absence of any discussion of this factor, the European Communities argues that the USITC cannot be considered to have provided a reasoned and adequate explanation of its determination.[3078] [3079]

(v) Rebar

Factors considered by the USITC

Domestic capacity increases

7.1300 China argues that the USITC did not address the question of whether capacity increases could have caused injury at the same time as increased imports.[3080]

7.1301 In response, the United States argues that the USITC did examine increases in domestic capacity. According to the United States, the USITC concluded that this could not be an alternative cause of injury because the 26.6% increase in domestic productive capacity from 1996 to 2000 was

[3077] European Communities' second written submission, para. 347; USITC Report, Vol. II, p. LONG-34, table LONG-28. In the columns marked "constant" the data for "other factory costs" has been kept constant. Figures which have been kept constant have been italicized, and figures which change as a result of the simulation are put in bold.

[3078] The United States misinterprets and dismisses this argument of the European Communities; See United States' first written submission, para. 592.

[3079] European Communities' second written submission, para. 398.

[3080] China's first written submission, para. 428.

much smaller than the 48.1% increase in United States apparent consumption during that period. Moreover, capacity utilization generally increased during the period of investigation.[3081]

7.1302 The United States submits that, therefore, contrary to China's argument, the USITC clearly and unambiguously stated that increased capacity was not a cause of injury. According to the United States, China does not provide any basis for the Panel to conclude that the USITC did not objectively examine the evidence concerning this factor and explain the basis for its conclusion.[3082]

Changes in input costs

7.1303 China argues that the USITC did not clearly indicate whether this factor contributed in causing injury. Moreover, according to China, the USITC failed to properly examine to what extent this factor could have had an impact on prices. The USITC merely stated that the fall in costs was not as important as the decrease in prices and that, therefore, falling costs were not responsible for falling prices. China argues that this explanation is obviously wrong. Falling costs must have had some effect on falling prices. Indeed, for prices to increase as demand increases, all other factors must remain unchanged. China asserts that this was not the case here. With increases in the United States' production and productivity, supply of rebar also increased. This had suppressed prices. Moreover, if one can assume that falling production costs do not necessarily translate into falling prices in a monopoly or oligopoly market, it would be false to assume the same thing in an open market. Competition in an open market will necessarily put pressure on prices if production costs decrease.[3083]

7.1304 The European Communities argues that because of the lack of clarity of the USITC Report on alternative causes of injury, the USITC failed to establish explicitly whether increased costs were an alternative cause of injury to the rebar industry. The European Communities argues either that the USITC had found that increased costs were an alternative source of injury or, if the USITC had not made such a finding, that the USITC had ignored and consequently failed to separate and distinguish and ensure non-attribution, of this alternative factor. [3084]

7.1305 The United States argues that the USITC examined changes in input costs in details for the period from 1998 to 2000. The USITC noted that unit COGS fell from 1998 to 1999. It stated that, in light of the large increase in demand during this period, this decline in costs should not necessarily have led to a decline in prices. However, there was a decline in unit sales values that exceeded the decline in unit input values. The USITC thus reasonably concluded that the decline in prices was not mererly a function of input cost declines. Instead, it found that the increased imports prevented domestic rebar producers from obtaining the full benefits of declining input costs in a growing market. The USITC also performed a detailed examination of changes in input costs from 1999-2000. During this period, demand increased and per unit COGS increased, yet prices declined. Consequently, the United States argues, there was no possible causal nexus during this period bewteen price declines and changes in input costs.[3085]

7.1306 The United States argues that the USITC's detailed and comprehensive examination of changes in input costs contrasts markedly with the cursory and inconsistent arguments advanced by the European Communities in its submission. In one paragraph, the European Communities asserts that the USITC should have concluded that the price decline from 1999 to 2000 was merely a function

[3081] United States' first written submission, para. 608.
[3082] United States' first written submission, para. 609.
[3083] China's first written submission, para. 429.
[3084] European Communities' second written submission, para. 402.
[3085] United States' first written submission, paras. 610-611

of decline in raw material costs.[3086] Just three paragraphs later, the European Communities states that the USITC should have concluded that the domestic rebar industry's financial problems in 2000 were due to an inability to increase prices commensurately with increases in costs such as other factory costs.[3087] What the European Communities appears to overlook is that both raw material costs and other factory costs are components of COGS. Changes in input costs from 1999 to 2000 would have either dictated an increase in prices or a decrease in prices in light of changes in other conditions of competition, such as demand. Input cost changes could not, as the European Communities seems to envision, have dictated both price increases and declines simultaneously.[3088]

7.1307 According to the United States, in marked contrast to the European Communities, the USITC used a coherent and objective approach in assessing changes in input costs. The USITC properly examined all components of COGS in determining that input costs rose from 1999 to 2000. It is not disputed that prices did not follow suit.[3089] This raises the question of why the domestic rebar industry could not recover increasing input costs, as well as the increasing selling, general, and administrative expenses cited by the European Communitites, from 1999 to 2000. As the European Communitites notes, this period was "when United States production and capacity utilization was at its highest;"[3090] moreover, demand was rising. In such a market, one would anticipate that prices would follow costs.[3091] The reason that prices for United States-produced rebar did not follow costs in 2000 is the one overlooked by the European Communities: the imports.[3092]

NAFTA imports

7.1308 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic rebar industry, which is found in the USITC Report, was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3093]

7.1309 China argues that such a new determination was not done concerning this product. This, it states, is especially surprising, given that the USITC acknowledged that imports from Canada and Mexico were causing injury by stating that "imports from Canada did not contribute importantly to the serious injury" and "imports from Mexico did not contribute importantly to the serious injury". In other words, imports from NAFTA countries contributed in causing the injury, although this contribution was not substantial.[3094] China argues that since the USITC did not proceed to a new

[3086] European Communities' first written submission, para. 521.
[3087] European Communities' first written submission, para. 524.
[3088] United States' first written submission, para. 612.
[3089] United States' first written submission, para. 617.
[3090] European Communities' first written submission, para. 524.
[3091] Indeed, when it attempts to divorce "relatively low prices" from "developments of costs" in para. 524 of its first written submission, the European Communties appears to overlook that absent price suppression or depression there normally will be a direct relationship between a company's costs and its prices.
[3092] United States' first written submission, para. 614.
[3093] China's first written submission, para. 437; China's second written submission, para. 245.
[3094] China's first written submission, para. 438.

determination of causality between increased imports from non-NAFTA countries and the serious injury to the domestic industry, it failed to assess the injury caused by imports from Mexico and Canada and it failed to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. Therefore, China argues that the USITC did not comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3095]

7.1310 Similarly, the European Communities argues that, in failing to analyse imports from Canada, Mexico, Israel and Jordan as alternative causes of injury the USITC also acted inconsistently with Article 4.2(b).[3096]

7.1311 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1312 The European Communities notes that the USITC considered that price declines in 1999, which continued into 2000 allegedly led by imports, were responsible for the poor performance of the domestic industry in 2000.[3097] According to the European Communities, it is far from clear that imports can be regarded as price setters in what the USITC admitted is a commodity market. Imports achieved their highest level of market share in 1999 with 22% of the market. According to the European Communities, it had not been demonstrated that price would be set by 22% of the market taken up by imports, rather than the 78% taken up by domestic production. The USITC's purported justification of the price leadership of imports does not survive detailed examination.[3098]

7.1313 With regard to the argument that it is "far from clear that imports can be regarded as price setters in what the USITC has admitted is a commodity market", the United States submits that this argument ignores two uncontested USITC findings. First, the USITC found that rebar was a commodity product sold on the basis of price – a proposition no party has disputed. Second, the USITC found that the imports undersold domestically produced rebar by margins over 20% since 1998.[3099] The United States further argues that in a commodity market where purchasing decisions are made on the basis of price, significant volumes of a low-priced product will drive all prices down. The increased quantities of rebar imports were priced much lower than the domestically produced product. The United States submits that, as the USITC found, to meet this competition the domestic industry was forced to cut prices to avoid losing even more market share to the imports than it actually did.[3100]

7.1314 The European Communities argues that it would appear that the price declines in 1999 and 2000 were closely linked to declines in the cost of raw materials. The declines in those two years closely followed declines in raw material prices. However, as noted, in 1999 the domestic industry continued to make a comfortable operating income while in 2000 a substantial loss was suffered. Close analysis of the data in the report shows substantial increases in both "other factory costs" and SG&A expenses.[3101] According to the European Communities, it was not the relatively low price obtaining on the United States domestic market which led the domestic industry to suffer injury, but it was the developments of costs, in particular "other factory costs" and SG&A expenses, which led to the alleged serious injury. The European Communities argues that these costs increased when

[3095] China's first written submission, para. 439.
[3096] European Communities' first written submission, para. 517.
[3097] European Communities' first written submission, para. 519.
[3098] European Communities' first written submission, para. 520.
[3099] United States' first written submission, para. 604.
[3100] United States' first written submission, para. 605.
[3101] European Communities' first written submission, para. 521.

United States production and capacity utilization was at its highest. However, the European Communities asserts that the USITC Report does not even mention these developments, nor assess their effect on the situation of the domestic industry.[3102] The European Communities argues that the USITC does not attempt to explain the striking fact that in 1996 the domestic industry made an operating loss of US$72,000, which was the year in which the domestic industry had its highest market share and was characterised by relatively high prices and a low level of imports. Demand, however, was lower in 1996 than in any other year during the investigation period. According to the European Communities, evidently, this loss could not have been caused by increased imports. This fact, which is immediately obvious is never explained. This is probably because it suggests that something other than imports is responsible for the problems of the domestic industry.[3103]

7.1315 In response, the United States argues that the USITC's detailed and comprehensive examination of changes in input costs contrasts markedly with the cursory and inconsistent arguments advanced by the European Communities in its submission. In one paragraph, the European Communities asserts that the USITC should have concluded that the price decline from 1999 to 2000 was merely a function of decline in raw material costs. Later, the European Communities states that the USITC should have concluded that the domestic rebar industry's financial problems in 2000 were due to an inability to increase prices commensurately with increases in costs such as other factory costs. What the European Communities appears to overlook is that both raw material costs and other factory costs are components of COGS. Changes in input costs from 1999 to 2000 would have either dictated an increase in prices or a decrease in prices in light of changes in other conditions of competition, such as demand. Input cost changes could not, as the European Communities seems to envision, have dictated both price increases and declines simultaneously.[3104] The United States submits that in marked contrast to the European Communities, the USITC used a coherent and objective approach in assessing changes in input costs. The USITC properly examined all components of COGS in determining that input costs rose from 1999 to 2000. It is not disputed that prices did not follow suit.[3105] This raises the question of why the domestic rebar industry could not recover increasing input costs, as well as the increasing selling, general, and administrative expenses cited by the European Communities, from 1999 to 2000. As the European Communities notes, this period was "when United States production and capacity utilization was at its highest"; moreover, demand was rising. In such a market, one would anticipate that prices would follow costs. The reason that prices for United States-produced rebar did not follow costs in 2000 is the one overlooked by the European Communities: the imports.[3106]

7.1316 In counter-response, the European Communities argues that the USITC's discussion of input costs is entirely phrased in terms of whether they caused prices to fall. According to the European Communities, the USITC recognized that declines in the COGS in 1999 could not explain the magnitude of price declines observed in that year (although such declines must have had an effect). However, the European Communities' argument was that increases in other factory costs and SG&A expenses in 2000 (which form part of COGS), the year in which operating income declined and thus serious injury was allegedly found[3107], are a more probable cause of injury than price declines caused by increased imports.[3108] Indeed, absent the increased costs, the domestic rebar industry would have

[3102] European Communities' first written submission, para. 524.
[3103] European Communities' first written submission, para, 514.
[3104] United States' first written submission, para. 612.
[3105] United States' first written submission, para. 613.
[3106] United States' first written submission, para. 614.
[3107] There was only a marginal decline in operating income in 1999, with operating income above 1996 and 1997 levels.
[3108] European Communities' first written submission, paras. 521-525.

had an operating income of US$68,368,692 rather than a loss of US$24,669,000, a respectable level given operating income in 1999 of US$74,412,000.[3109] The USITC Report contains no discussion of this increase in costs, nor of the reasons behind it. The European Communities notes that the domestic industry increased its capacity utilization and its volume of sales in 2000. Increased costs do not result from such developments. That it did not, suggests that other developments, which the USITC did not explore but which it clearly should have explored, were a more probable cause of injury than increased imports. The European Communities asserts that the United States has not addressed this issue. The European Communities argues that, consequently, the USITC's report does not provide a reasoned and adequate explanation of its findings.[3110]

Failure to provide reasoned and adequate explanation

7.1317 China argues that the USITC neither assessed injury caused by other factors nor did it clearly state that other factors were not causing injury and explained the reasons why.[3111] China argues that the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3112]

7.1318 The United States argues that the USITC conducted a reasoned and adequate examination of the injury purportedly caused by factors other than increased imports and ensured that any injury caused by these other factors was not attributed to imports. Consequently, the USITC's non-attribution analysis for rebar satisfied the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards. The USITC separated and distinguished from the serious injury caused by increased imports any injury attributable to other factors.[3113]

(vi) Welded pipe

Factors considered by the USITC

Declines in demand

7.1319 Korea argues that the USITC's failure to properly define the like products in the other welded pipe category prevented the USITC from properly considering declines in demand, an important "other factor" affecting the industry. According to Korea, the declines in demand were most pronounced for other welded pipe (excluding LDLP).[3114]

7.1320 Korea argues that the USITC's findings in the concurrent anti-dumping investigation of welded pipe are instructive. As noted there, declines in domestic industry performance at the end of the investigation period "occurred in the context of a decline in the overall economy and total

[3109] The figure of US$68,368,692 is calculated by multiplying the operating income per unit which would have been achieved if other factory costs and SG&A expenses are kept constant compared to 1999 (i.e. US$12 per unit – see Figure 43, Rebar; Evolution of costs with 1999 values held constant, European Communities' first written submission, para. 523.) by the volume of commercial sales in 2000 (i.e. 5,697,391 tons – see USITC Report, Vol. II, p. LONG-35, Table LONG-29)).

[3110] European Communities' second written submission, para. 403.

[3111] China's first written submission, para. 427.

[3112] China's first written submission, para. 430.

[3113] United States' first written submission, paras. 607 and 616.

[3114] Korea's first written submission, para. 151.

apparent domestic consumption of standard pipe".[3115] Korea argues that, consequently, the USITC concluded in that investigation that the United States welded pipe industry – during the same period of the investigation as used in the Section 201 investigation – was not materially injured or threatened with material injury by reason of imports of standard pipe from China and that industry declines were due to softening demand.[3116] In Korea's view, if there was no "material" injury arising from imports, imports could not be responsible for "serious" injury. In view of these facts, strongly suggesting that serious injury was not due to imports, the USITC should have identified, distinguished, and separated the serious injury arising from declines in demand.[3117]

7.1321 Korea also argues that, conversely, as the USITC acknowledged, demand for LDLP was increasing towards the end of the period. While the USITC agreed that "rising demand tends to ameliorate the impact of a given volume of imports", it noted that "even with a recent rise in LDLP demand, overall demand for covered welded tubular products has been relatively constant on a full year basis since 1998, as well as between interim periods. Thus, we do not consider the likely increase in demand for LDLP as eliminating the threat to serious injury". However, according to Korea, the true trends were masked by considering the two separate like products together so that demand appeared "stable".[3118]

7.1322 Korea further argues that, irrespective of the analytical flaws caused by the improper definition of like product, the USITC did not separate and distinguish the effects of this other factor affecting the United States industry's performance as required by Article 4.2 of the Agreement on Safeguards.[3119]

7.1323 In response, the United States submits that the USITC noted that several parties had argued that the welded pipe industry was not threatened with serious injury because of increasing demand in the LDLP sector of the market but rejected this argument. The USITC stated that the record evidence did, in fact, indicate that there had been a growth in demand for LDLP in the market and that the growth in demand for that product, which was expected to continue, might ameliorate the impact of these imports on the welded pipe industry. However, it also noted that LDLP only accounted for 20 to 30% of market demand for the overall welded pipe product category and that demand in the overall welded pipe market had been constant between 1998 and interim 2001, even with the substantial growth in demand for LDLP. Accordingly, the USITC reasonably rejected this factor as indicating that the industry would not continue to deteriorate or that imports would not continue to increase their presence in the market.[3120]

7.1324 The United States argues further that the USITC clearly did discuss this issue and properly considered it in the appropriate legal context, that is, in the context of how demand trends affected competition in the market for welded pipe, the relevant like product in this proceeding. The United States submits that Korea's argument is simply wrong-headed because it suggests that the USITC should have placed greater weight on demand trends for a sub-segment of the like product, LDLP, than on demand trends for the like product, all certain welded pipe. For this reason, its argument should be rejected.[3121]

[3115] Korea's first written submission, para. 151.
[3116] Korea's first written submission, para. 152.
[3117] Korea's first written submission, para. 153.
[3118] Korea's first written submission, para. 154.
[3119] Korea's first written submission, para. 155.
[3120] United States' first written submission, para. 637.
[3121] United States' first written submission, para. 638.

7.1325 In counter-response, Korea notes that the United States countered that demand in the overall welded pipe market had been constant even with the substantial growth in demand for LDLP. Korea submits that this is exactly the complainants' point. The only reason that the overall growth in demand for other welded pipe between 1998 and interim 2001 was able to remain constant was due to the substantial growth in demand for LDLP, which stabilized the declining demand for other welded pipe. Thus, the USITC failed to take into account and distinguish demand changes which affected the performance of the other welded pipe producers.[3122]

Domestic industry overcapacity

7.1326 China and Switzerland note that the USITC stated in its report that increased domestic capacity was not contributing in a more than minor way to the condition of the industry, yet it did not explain the nature and extent of this contribution.[3123] The European Communities argues that it is clear from the USITC's statements that it considered that increased capacity had some effect on the situation of the domestic industry.[3124]

7.1327 China, the European Communities and Switzerland argue that the increase in capacity was not looked at closely enough and given sufficient importance. The increase in domestic capacity over the period of investigation was 1.5 million short tons and the increase in consumption was 1.2 million short tons. The USITC states that domestic capacity did not increase much more than consumption and thus it did not have an important impact on prices. The complainants argue that this is wrong. According to the European Communities, China and Switzerland, such a significant increase in capacity must have had a greater impact on prices than the USITC recognized.[3125] The European Communities argues that it is insufficient just to compare capacity and consumption on an end-to-end basis. There is a clear trend of increasing capacity while United States' apparent consumption flattens off. The effects of increases in over-capacity would have had a more serious effect in 1999 and 2000, driving prices down, yet were not subjected to detailed examination.[3126]

7.1328 Korea further argues that the record demonstrates that domestic capacity exceeded apparent United States consumption as early as 1996 and that the evidence demonstrates that the low capacity utilization was the direct result of capacity expansion beyond even the most favorable projections of market demand.[3127] Korea argues that these capacity increases and low capacity utilization rates raised costs and intensified competition among domestic producers which, in turn, reduced prices.[3128] Korea argues that irrespective of such a clear decline in the already low capacity utilization rate and its impact on the condition of the industry, the USITC failed to consider separately the effect of excess capacity and low capacity utilization on the industry's performance at the end of the period to assure that such effects were not attributed to imports.[3129]

7.1329 In response, the United States submits that the USITC clearly did pay close attention to the record evidence concerning capacity increases and discussed in some detail whether the increases had an impact on domestic prices.[3130] The United States submits that the USITC correctly noted that

[3122] Korea's second written submission, para. 192.
[3123] China's first written submission, para. 444; Switzerland's first written submission, para. 302.
[3124] European Communities' first written submission, para. 527.
[3125] European Communities' first written submission, para. 527; China's first written submission, para. 448; Switzerland's first written submission, para. 306.
[3126] European Communities' first written submission, para. 533.
[3127] Korea's first written submission, para. 158.
[3128] Korea's first written submission, para. 159.
[3129] Korea's first written submission, para. 160.
[3130] United States' first written submission, paras. 630-632.

domestic capacity had increased during the period but also noted that this increase had tracked the growth in demand during the period of investigation to a substantial degree so that capacity increases had only a minimal impact on price levels in the market. Moreover, the USITC also correctly found that, even with this increase in capacity, the domestic industry's production levels had actually declined during the last years of the period, which showed that the industry had not been able to take advantage of its increased capacity as a result of import increases during these years.[3131] The United States concludes that since the production levels of the industry declined in 1999 and 2000, this additional capacity could have, at best, only a minimal and indirect effect on market prices during those two years. Instead, the addition of more than 360 thousand tons of import merchandise to the market on 1999 and 2000 – sold at consistently lower prices than domestic merchandise – clearly had a much more substantial and direct impact on prices during that period, as the USITC reasonably found.[3132] The United States submits that, given these facts, it is clear that the USITC examined the record evidence concerning capacity in detail and correctly rejected the argument that this increased capacity had had a significant impact on prices during the last two years of the period of investigation.[3133]

7.1330 In counter-response, China submits that with respect to domestic capacity increases, the USITC qualitatively evaluated effects of increased imports and the effects of capacity increases on the situation of the industry. As a result of this approach, in China's view, the USITC neither could provide an analysis which would properly identify the nature and extent of these factors nor could it establish explicitly that the effects were distinguished from increased imports.[3134] China submits that an extensive, and often speculative interpretation of the Commissioners' findings by the United States in its submissions cannot replace the lack of an explicit, reasoned and adequate explanation that the effects of 'other' factors were not attributed to imports, and the lack of an appropriate assessment of the injurious effects of other factors in the USITC Report.[3135]

7.1331 Also in counter-response, the European Communities argues that the mere finding that increased capacity contributed in a "minor way" does not establish, in an explicit manner, how the USITC separated and distinguished the injurious effects of increased capacity and ensured that those effects, along with the injurious effects of other factors, were not attributed to increased imports. Moreover, the European Communities reiterates that capacity increased substantially in 1999 and 2000 while consumption remained stable thus showing that an end-to-end comparison of the increase in consumption was insufficient to properly examine the interrelationship between changes in capacity and consumption.[3136] [3137]

7.1332 Korea notes that in the case of the welded pipe industry's capacity increases, the USITC ignored the fact that the industry had too much absolute capacity even at the beginning of the period. According to Korea, capacity exceeded total United States demand at the beginning of the period of investigation.[3138] Yet, the industry kept adding capacity.[3139] [3140] Korea submits that the full effects of

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[3131] United States' first written submission, para. 625.
[3132] United States' first written submission, para. 632.
[3133] United States' first written submission, para. 625.
[3134] China's second written submission, para. 248.
[3135] China's second written submission, para. 249.
[3136] European Communities' first written submission, para. 532, 533 and figure 44.
[3137] European Communities' second written submission, para. 407.
[3138] See USITC Report, Vol. II, TUBULAR-15 and Table TUBULAR-43 at TUBULAR-37 (Exhibit CC-6).
[3139] USITC Report, Vol. II, TUBULAR-15(Exhibit CC-6).
[3140] Korea's second written submission, para. 186.

that overcapacity really surfaced in its most problematic form when demand started to decline.[3141] Obviously, such overcapacity in a declining market would have led to severe declines in industry performance, even if imports had been absent from the market. Certainly, such a significant factor causing injury should have been carefully separated by the United States and the injurious effects of those factors should have been examined.[3142] Instead, the United States merely asserts that the USITC properly assessed the effect and concluded that the increased capacity levels of the industry were not responsible in more than a minor way for any declines in the industry's condition.[3143] According to Korea, such an assertion does not satisfy the non-attribution requirement under Article 4.2(b) of the Agreement on Safeguards. The nature and extent of the impact on the market caused by the increased capacity should have been separated and distinguished from the effect caused by imports.[3144]

Aberrational performance of one member of the industry

7.1333 The European Communities argues that the USITC's findings regarding the situation of the significant domestic producer suggest that factors other than imports were responsible for at least some of the decline of the company's financial performance.[3145] However, the USITC does not separate and distinguish the effects of these alternative causes, and thus does not ensure that the effects of these factors are not attributed to increased imports. The United States has, consequently, acted inconsistently with Article 4.2(b) of the Agreement on Safeguards.[3146]

7.1334 China and Switzerland argue that as regard "the events pertaining to a significant producer", the USITC merely briefly explained what the main factor for the decline in the financial performance was, but it did not give any hint concerning the role that non-import related events have played. Further, when the USITC concluded that the exclusion of this "significant" producer did not substantially alter the downward trend in industry profitability, it failed to specify the extent to which this downward trend had nevertheless been altered.[3147]

7.1335 Korea also argues that the USITC failed to properly segregate and consider the effects on the performance of the United States' industry of one very unprofitable producer whose performance declines were caused by well-documented problems entirely unrelated to other welded pipe imports.[3148] According to Korea, the USITC completely disregarded the evidence on the record that demonstrated that this company's declines were not caused by imports. Moreover, the USITC's conclusion that this company's performance was caused by the drop in unit values (which, in turn, was supposedly caused by increased imports) is equally unreliable as the USITC itself was admittedly "cautious of placing undue weight on average unit value, as it is influenced by issues of product mix".[3149]

7.1336 In response, the United States argues that although the details of the producer's problems and its operating results are confidential, the USITC clearly examined the record evidence relating to these issues and discussed the nature and extent of this producer's performance in detail.[3150] It specifically noted the arguments made on this issue by the foreign producers and rejected their assertions that the

[3141] USITC Report, Vol. I, p. 148 (Exhibit CC-6).
[3142] Korea's second written submission, para. 187.
[3143] United States' first written submission, para. 631.
[3144] Korea's second written submission, para. 188.
[3145] European Communities' first written submission, para. 527.
[3146] European Communities' first written submission, para. 528.
[3147] China's first written submission, para. 444; Switzerland's first written submission, para. 302.
[3148] Korea's first written submission, para. 161.
[3149] Korea's first written submission, para. 162.
[3150] USITC Report, p. 165.

industry's operating results had been skewed by the non-import problems of the producer.[3151] It concluded that certain costs of the company appeared to have increased but that the main reason for the decline in the industry's financial performance was the "substantial drop in the unit values of the company's sales beginning in 1999", which was due to the substantial increase in imports.[3152] Moreover, the USITC noted, the exclusion of the company from the industry data did not substantially alter the downward trends in the industry's condition in those years.[3153] By conducting this analysis, the USITC properly distinguished the effects attributable to this producer's operations from the effects of imports and found that the industry's problems were genuinely and substantially the result of increased imports.[3154] According to the United States, the complainants' assertions that the USITC did not conduct such an analysis have no foundation.[3155] [3156]

7.1337 Korea notes that once again, the United States merely asserts that the USITC did assess the extent to which the difficulties experienced by one of the domestic producers caused declines in the industry's performance. The United States concludes by simply saying that the USITC noted that the exclusion of the company from the industry data did not substantially alter the downward trends in the industry's condition in those years.[3157] This statement confirms that the USITC found that this company at issue did alter the downward trends in the industry's condition. Nonetheless, the USITC failed to analyse how and to what extent that was the case. Without such analysis, it cannot be shown that the USITC properly distinguished the effects attributable to this producer's operations from the effects of imports.[3158]

NAFTA imports

7.1338 China notes that the determination of the existence of a causal link between the increased imports and the threat of serious injury to the domestic certain tubular products industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, threatened to cause serious injury to the domestic industry. China argues that, as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3159]

[3151] USITC Report, p. 165.
[3152] USITC Report, p. 165.
[3153] USITC Report, p. 165.
[3154] In this regard, the United States notes that the complainants' argument is, in essence, an assertion that the USITC should conduct its causation assessment for only a portion of the industry producing welded pipe. As the complainants are aware, however, the USITC is required by the Agreement on Safeguards to assess whether imports are causing serious injury to the industry as a whole, not subsegments of it. Thus, even if this producer were affected to some effect by non-import factors, the USITC would nonetheless still need to include this producer in the industry and assess whether the industry as a whole were injured by imports.
[3155] European Communities' first written submission, para. 527; Korea's first written submission, para. 162; China's first written submission, para. 444; Switzerland's first written submission, para. 302.
[3156] United States' first written submission, para. 635.
[3157] United States' first written submission, para. 635.
[3158] Korea's second written submission, para. 189.
[3159] China's first written submission, para. 450. China's second written submission, para. 250.

7.1339 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.[3160]

7.1340 In this regard, the European Communities argues that a proper analysis of imports from Canada and Mexico would have been important because imports from Canada and Mexico represented, taking 2000 as an example, 45.9% of all imports. However, the European Communities submits that the USITC analysis is unclear because two Commissioners concluded that Canadian and Mexican imports "contribute importantly" to the threat of serious injury, two Commissioners concluded that Canadian and Mexican imports did not "contribute importantly" to the threat, one Commissioner found serious injury for welded products (i.e. OCTG and non-OCTG welded tubular products) and that Canadian imports "contributed importantly", while the sixth Commissioner classed the products in the same manner and found serious injury but that Canadian imports did not "contribute importantly". Since this was taken as a tie vote, the President decided that imports from Canada do not contribute importantly to the serious injury or threat thereof.[3161] The European Communities argues that, however, the mere fact that Canadian and Mexican imports were overall considered not to "contribute importantly" does not mean that they are not having an effect on the domestic industry, and should not be factored into the causal analysis which must also form part of a threat determination. In order to find that NAFTA imports did not "contribute importantly", the USITC must find that the growth rate in such imports is appreciably lower than that of other imports. Thus, a simple finding that, according to United States law, NAFTA imports did not contribute importantly does not mean that they had no effect on the domestic industry. Imports of the magnitude involved here evidently affect the domestic industry.[3162]

7.1341 The European Communities argues that a competent authority is required to assess the effect of such excluded imports on the domestic industry, to separate and distinguish those effects, and to make sure those effects are not attributed to increased imports from other sources. Consequently, China and the European Communities submit that the United States has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards. It is hardly conceivable that 45.9% of imports (again based on 2000), which, in the case of Mexican imports consistently undersold domestic products, could have no effect on a domestic industry.[3163] The European Communities further argues that a case where NAFTA imports represent 45.9% of all imports provides a very good example of why the non-attribution analysis in respect of excluded imports is necessary.[3164]

7.1342 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1343 According to the European Communities, there are a number of other factors, some of which have been ignored, which were having an effect on the domestic industry. Also, because these factors have not been properly analysed, the USITC has failed to provide a reasoned and adequate

[3160] China's first written submission, para. 454.
[3161] European Communities' first written submission, para. 529.
[3162] European Communities' second written submission, para. 410.
[3163] European Communities' first written submission, para. 530; China's first written submission, para. 454.
[3164] European Communities' second written submission, para. 410.

explanation of its findings.[3165] In particular, the European Communities argues that there were notable increases in "other factory costs" and SG&A expenses in 1999 and 2000, and of raw materials in 2000 which also must have had an effect on the domestic industry but which are not explained.[3166]

7.1344 In response, the United States submits that the European Communities' argument is not persuasive. It is true, as the European Communities contends, that the industry did experience some increase in its unit other factory costs and unit SG&A expenses between the first three years of the period of investigation and the last two years of the period. However, as can be seen from the USITC's Report, the increases in these costs were more than offset by declines in the industry's unit raw materials costs and its unit direct labour costs during this same period. As a result, the industry's overall unit costs of goods sold declined substantially between the first three years and the last two years of the period of investigation, falling from a range of US$537 to US$545 per ton during the three-year period from 1996 to 1998 to a range of US$502 to US$515 per ton in 1999 and 2000. Even with the increases in its other factory and SG&A expenses, therefore, the industry's overall costs of goods sold declined during the two years in which imports made their largest inroads into the market. The United States submits that, given this, it is clear why the USITC placed little weight on the changes in the industry's other factory and SG&A costs when assessing whether imports had caused the declines in the industry's profitability levels in the latter part of the period of investigation.[3167]

7.1345 In counter-response, the European Communities notes[3168] that, in fact, the unit values for the individual items for COGS do not add up to total COGS on which the USITC based itself. This is illustrated below:

Table 17: Welded Pipe Products – COGS Data 2000[3169]

	As recorded in USITC Report	Consistent with reported unit values
Raw materials	340	340
Direct labor	51	51
Other factory costs	106	106
Total COGS	515	**497**
Gross profit (unit)	76	**94**
SG&A expenses	51	51
Operating Income (unit)	25	**43**
Operating income (total)	118,464,000	**202,183,893**

7.1346 The European Communities submits that, thus, when correctly added up, the total COGS is US$497 per unit rather than US$515. This means that the gross profit is US$94 per unit and not US$76, and that operating income is US$43 per unit and not US$25 as is presently reported in the USITC Report. Applying this to the volume of commercial sales, operating income almost doubles, and indicates a minor fall from the 1999 level of US$246,626,000 and not the fairly substantial fall which the data used in the USITC Report suggests (operating income per unit in 1999 was US$49 as against US$43 in 2000 if the USITC Report is corrected). Thus, either the USITC Report has failed

[3165] European Communities' first written submission, para. 531.
[3166] European Communities' first written submission, para. 534.
[3167] United States' first written submission, para. 626.
[3168] European Communities' second written submission, para. 408.
[3169] European Communities' second written submission, para. 408; USITC Report, Vol. II p. TUBULAR-22, table TUBULAR 18. Figures in bold indicate differences with the data actually recorded in the USITC Report.

to show some development in costs which might have a material bearing on any causation analysis, or its data on operating income is entirely inaccurate, meaning that the findings based on operating income are not a reasoned and adequate explanation supported by the facts. The USITC's determination of the existence of a threat of serious injury is brought into question if there was only a minor fall in profits in 2000 compared to the substantial fall which the USITC alleges actually took place.[3170]

Relevance of like product analysis for welded pipe

7.1347 Korea argues that in the case of welded pipe, the USITC failed to properly consider the effect of demand trends because they simply "added together" increases for LDLP and declines for all other welded pipe and concluded that the increases did not offset the decreases since LDLP was a small part of the overall category of other welded pipe. This led to incorrect conclusions regarding causation. If the like product of LDLP had been examined then the decreases in imports in an expanding market might have led to a different conclusion regarding causation.[3171]

7.1348 For a summary of the United States' position on this issue, see paragraph 7.1324 above.

Failure to provide a reasoned and adequate explanation

7.1349 Switzerland submits that if the investigating authority believes that an alleged factor is not threatening to cause injury, it must, likewise, explicitly, clearly, and unambiguously, state that such a factor is not threatening to cause injury and explain the reasons why. The explanation must be straightforward. To proceed otherwise would not ensure that alleged factors have been examined closely enough to establish that they are not contributing to the threat of injury. As a result, there would be no guarantee that threat of injury due to other factors has not been wrongfully attributed to increased imports.[3172]

7.1350 Switzerland argues that since the injurious effects of the two factors that were threatening to cause injury at the same time as the increased imports had not been properly assessed by the USITC, it is impossible to determine whether the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3173] China and Switzerland argue that as a result, the the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China and Switzerland believe that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3174]

7.1351 The United States argues that the USITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of certain welded pipe and the significant declines in the condition of the welded pipe industry during the last years of the period of investigation and how serious injury by such imports was imminent. Moreover, it thoroughly assessed the nature and scope of the effects of other factors and ensured that it did not attribute the effects of these factors to imports.[3175] The United States also argues that, a "reasoned and adequate" explanation of the

[3170] European Communities' second written submission, para. 409.
[3171] Korea's written reply to Panel question No. 80 (a) at the first substantive meeting.
[3172] Switzerland's first written submission, para. 305.
[3173] Switzerland's first written submission, para. 303.
[3174] China's first written submission, para. 449; Switzerland's first written submission, paras. 304 and 307.
[3175] United States' first written submission, para. 639.

injurious effects of imports and non-import factors will properly take into account the manner in which the interplay of various factors (both import and non-import) have caused injury to an industry. The United States believes that the USITC's analysis of the injurious effects of imports and non-import factors identified the nature and extent of the injury attributable to all non-import factors, and therefore adequately assured that injury caused by other factors was not attributed to the imports.[3176]

(vii) FFTJ

Factors considered by the USITC

Increased capacity

7.1352 China argues that the USITC acknowledged that the increase in capacity exercised some pressure on prices.[3177]

7.1353 In response, the United States argues that it is wrong to say that USITC acknowledged capacity to be an alternative source of injury to the domestic industry. The USITC found that increased capacity could not have been a source of injury to the domestic industry, because over the period of investigation capacity increased less than United States' apparent consumption. Moreover, from 1999 to 2000, when imports had their largest annual increase in volume and market share during the period of investigation and the domestic industry ceased to operate profitably, United States capacity actually declined to its lowest level since 1996. Having found that increased capacity was not an alternative cause of the serious injury it observed, the USITC satisfied its non-attribution obligation under Article 4.2(b).[3178]

7.1354 In counter-response, China contends its understanding of the USITC's wording is that: "the increase in capacity would not be expected to place substantial pressure on domestic prices", because the capacity increased at a rate less than the increase in apparent consumption. However, according to China, the pressure is present even if it is not substantial. China argues that the capacity increase is to be seen to be an alternative source of injury and it must be subject to a causality/non-attribution analysis.[3179] In light of the foregoing, China argues that the United States' arguments are without merit. The capacity increases were to be treated as an alternative source of injury and non-attribution of this factor should have been explained clearly and unambiguously.[3180]

Purchaser consolidation

7.1355 China argues that it is possible to conclude from the USITC's comments that purchaser consolidation put pressure on domestic prices.[3181]

7.1356 In response, the United States argues that China misunderstands the USITC's discussion of purchaser consolidation. The USITC acknowledged that purchaser consolidation may have had some impact on prices of the domestic FFTJ industry could charge, because fewer purchasers would have relatively greater bargaining power vis-à-vis producers. There was no basis, however, to conclude that purchaser consolidation would reduce demand for FFTJ; to the contrary, United States apparent consumption of the product was generally stable during the latter portion of the period of

[3176] United States' written reply to Panel question No. 32 at the second substantive meeting.
[3177] China's first written submission, para. 459.
[3178] United States' first written submission, paras. 656-657.
[3179] China's second written submission, para. 256.
[3180] China's second written submission, para. 258.
[3181] China's first written submission, para. 460.

investigation. Moreover, many of the indicators of serious injury which the USITC identified were not price based. These included declines in market share, declines in shipments and sales quantities, and declines in employment. By explaining that the serious injury it observed for the FFTJ industry was different in nature and broader in scope than the relatively limited price effects that could be attributed to purchaser consolidation, the USITC satisfied its obligation not to attribute to purchaser consolidation serious injury caused by the increased imports.[3182]

7.1357 China notes in counter-response that the USITC stated that the purchaser consolidations put some pressure on the domestic prices.[3183] In light of the foregoing, China argues that the United States' arguments are without merit. Purchaser consolidation was to be treated as an alternative source of injury and non-attribution of this factor should have been explained clearly and unambiguously.[3184]

NAFTA imports

7.1358 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic FFTJ industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3185]

7.1359 The European Communities argues that while the USITC's position with respect to the alternative causes cited in the domestic investigation is unclear, its findings with respect to Canada and Mexico are unambiguous; imports from both countries caused serious injury. The European Communities asserts that Mexican and Canadian imports were not analysed by the USITC as alternative causes of injury. This was not done either in the Second Supplementary Report. Thus, the USITC did not separate and distinguish the effects of NAFTA imports, and did not make sure that such effects were not attributed to increased imports. The European Communities argues that this is all the more serious because of the importance of imports from these countries on the United States market. As a result, it is argued that the United States has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards.[3186]

7.1360 For the United States' response, see paragraph 7.1066 *et seq*.

Factors not considered by the USITC

7.1361 The European Communities argues that data which the USITC gathered is far from conclusive in proving that any serious injury has been caused by low-priced imports. Indeed, while imports may have increased overall, such increased imports appear to have had little effect on prices.

[3182] United States' first written submission, para. 658.
[3183] China's second written submission, para. 257.
[3184] China's second written submission, para. 258.
[3185] China's first written submission, para. 466; China's second written submission, para. 259.
[3186] European Communities' first written submission, para. 539.

The COGS has, however, increased significantly, as have SG&A expenses.[3187] The European Communities asserts that there is only a substantial increase in imports between 1999 and 2000. However, according to the European Communities, the fall in profitability of the domestic industry occurred between 1997 and 1998 and cannot be explained, therefore, by any sudden, recent, increase in imports. The European Communities argues that the change in profitability would appear to be more closely linked to changes in costs. However, despite the fact that the development in costs was readily apparent on the basis of a simple examination of the data collected, the USITC did not analyse this issue.[3188]

7.1362 The United States submits that the USITC explained that lower production and shipments during the period of investigation contributed to increases in unit costs.[3189] In particular, per unit increases after 1997 in other factory costs and SG&A expenses, both of which are emphasized by the European Communities, can be attributed to the fact that the industry had to spread its costs over a smaller quantity of sales.[3190]

7.1363 In counter-response, the European Communities submits that the claim by the United States that the USITC did analyse these costs, because the USITC stated that increases in per unit costs occurred as sales fell, is not borne out by the USITC Report which shows that increases in raw materials cost and other factory costs occurred between 1997 and 1998. According to the European Communities, commercial sales in 1998 were similar in volume to 1996, but higher in value, yet a comparison of costs between 1996 and 1998 shows a substantial increase, the reasons for which are never explained in the USITC Report.[3191] Thus, increases in volume cannot explain the increases in per unit costs. The USITC, despite the United States best efforts, did not therefore provide a reasoned and adequate explanation of its findings on increased costs, and thus failed to properly ensure non-attribution.[3192]

Failure to provide reasoned and adequate explanation

7.1364 The European Communities notes that the USITC used the data it had gathered on sales of Product 22, that is: "Carbon steel butt-weld pipe fitting, 6 inch nominal diameter, 90 degree elbow, long radius, standard weight, meeting ASTM A-234, grade WPB or equivalent specification …". The USITC explained, however, that for the specific products for which it had requested data in the tubular section, of which Product 22 was one, pricing data coverage tended to be very low (usually less than 5%) due to the wide heterogeneity among tubular products in all five categories. The European Communities argues that given that the USITC found that imports were "generally" higher priced than domestic products, even though imports were always higher priced, it was forced to have recourse to other data to show that imports were priced below domestic products, which must be, for a commodity product group, the determinant issue.[3193] The European Communities argues that the data for Product 22 in terms of value, demonstrates that Product 22 is not representative. On the basis of a product representing 1.2% of domestic commercial sales on the whole product category the European Communities argues that such a conclusion cannot be considered reasoned and adequate.[3194]

[3187] European Communities' first written submission, para. 548.
[3188] European Communities' first written submission, para. 550.
[3189] USITC Report, p. 176.
[3190] United States' first written submission, para. 654.
[3191] USITC Report, Vol. II, P. Tubular 24, table Tubular 20
[3192] European Communities' second written submission, para. 412.
[3193] European Communities' first written submission, para. 545.
[3194] European Communities' first written submission, para. 547.

7.1365 In response, the United States argues that by suggesting that the USITC staff chose to collect data on very low volume products, the European Communities ignores and distorts information in the USITC's report. The USITC staff did not seek pricing data on a FFTJ product that it believed would yield low data coverage, as the European Communities implies. The staff stated instead that there was no single FFTJ product on which it could obtain extensive coverage. Indeed, there was not even a combination of products that could provide the type of coverage the European Communities asserts is necessary. In a portion of the report apparently overlooked by the European Communities, the staff explained that "it is difficult to find high-volume pricing products in a heterogenous market such as the steel tubular market". The report, read in context, indicated that the FFTJ product on which the USITC obtained pricing data was a "high volume" product within the group of FFTJ products.[3195] In this regard, the United States submits that the Appellate Body has observed that no provision of the Agreement on Safegaurds specifically addresses the extent to which an investigating authority must collect data. In particular, no provision of the Agreement requires an authority to collect any specific quantum of data, or any data at all, pertaining to pricing. The USITC furthered the goal of conducting a thorough investigation, and acted in an objective manner, by collecting pricing data for a particular FFTJ product that would provide data on a high volume of sales relative to other products on which data could be collected. Such conduct cannot in any way contravene the obligations of the United States under the Agreement on Safeguards.[3196]

7.1366 In counter-response, the European Communities argues that given the importance of the examination of pricing, and the lack of other pricing data showing underselling, pricing for the specific product is evidently an important part of the USITC's finding. The United States defends itself by arguing that the USITC staff did not deliberately seek a low volume product for specific comparison.[3197] The European Communities has no reason to believe that the USITC staff would choose a product deliberately because of its lack of representativeness. However, the European Communities does consider, that if the USITC wanted to make a reasoned and adequate explanation, it might have requested data on several specific products, so that it had several sets of data on which to base its findings. The USITC did not provide a reasoned and adequate explanation of its findings.[3198]

7.1367 The United States submits that the USITC also explained the limited probative value of the average unit value data on which the European Communities apparently believes the USITC should have relied. Average unit value data may serve as a useful proxy for pricing data for some industries. However, in an industry such as the FFTJ industry that is characterized by a wide variety of products, variance between AUV is often indicative of differences in product mix (i.e., the imports are concentrated in higher-value items, while domestic production is concentrated in lower-value items) rather than differences in price. For this reason, while the USITC referred to the average unit value data for the FFTJ industry, it stated that it was cautious of placing undue weight on the data because of concerns with product mix. The USITC thus had an objective basis, which it fully explained, for relying principally on pricing data relating to an individual product, rather than on the average unit value data relating to a mix of products.[3199]

7.1368 China argues that the USITC failed to assess the injurious effects of other factors such as increased capacity and purchaser consolidation since not a word is written on the nature and extent of the injury caused by these two factors. Thus, according to China, it is impossible to determine whether

[3195] United States' first written submission, para. 650.
[3196] United States' first written submission, para. 651.
[3197] United States' first written submission, para. 650.
[3198] European Communities' second written submission, para. 414.
[3199] United States' first written submission, para. 652.

the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports. China agues, in sum, that the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3200]

7.1369 The United States argues that the USITC conducted a reasoned and adequate examination of the injury purportedly caused by these factors and ensured that any injury caused by these other factors was not attributed to imports. In particular, the USITC found that increased capacity was not an explanation for the serious injury experienced by the domestic industry. It stated that capacity increased during the period of investigation at a rate less than the increase in US apparent consumption and thus should not have placed substantial pressure on domestic prices. The USITC also acknowledged that purchaser consolidation would be expected to place some pressure on domestic prices. The USITC found, however, that demand for FFTJ was generally stable to increasing during the latter portion of its period of investigation. Moreover, the USITC did not rely solely on price effects in finding that the domestic FFTJ industry was seriously injured but also cited declines in non-price indicators, such as market share, domestic production, shipments, and employment. The USITC stated that purchaser consolidation could not explain the declines that occurred in these non-price indicators.[3201]

(viii) Stainless steel bar

Factors considered by the USITC

Downturn in demand

7.1370 China argues that the USITC acknowledged that the downturn in demand in late 2000 and interim 2001 was causing injury at the same time as increased imports. China submits that if imports had a greater impact than demand declines it was necessarily because this factor also had an impact on the declines in the industry's conditions.[3202] China argues that concerning declining demand in 2000 and interim 2001, all that the USITC explained was that there had already been changes in the industry's condition prior to 2000. It did not explain anything concerning 2000 and 2001. China argues that, clearly, this is insufficient.[3203]

7.1371 The European Communities suggests that the USITC's conclusion that decreased demand was a less important cause than imports is far from clear. In any event, it argues that the USITC does not attempt to distinguish the effect of decreased demand from the effects of imports and other factors and, thus, does not ensure that the effect of such developments was not attributed to increased imports.[3204]

7.1372 The European Communities notes[3205] that for demand declines the USITC stated no more than:

[3200] China's first written submission, para. 465.
[3201] United States' first written submission, para. 656.
[3202] China's first written submission, para. 475.
[3203] China's first written submission, para. 481
[3204] European Communities' first written submission, para. 556.
[3205] European Communities' second written submission, para. 426.

> "Although the record does show a downturn in demand for stainless bar [sic] and an increase in energy costs in late 2000 and interim 2001 there were substantial declines in the industry's production, sales and profitability levels during the years prior to 2000 and interim 2001. In particular, the industry's market share, production volumes, employment levels and profitability levels all declined during the period from 1996 to 1999 in the face of increase import volumes, despite the fact that there were only small changes overall in the amount of stainless rod consumed in the United States market and despite the fact that there is little evidence that energy costs were increasing substantially in these periods. Considering this, it is clear that imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increased, especially given the substantial increase in import quantities and market share during the last year and a half of the period."[3206]

7.1373 The European Communities and China argue that quite apart from the fact that the only increased imports which could potentially satisfy the requirements of the Agreement on Safeguards took place in 2000, and that therefore increased imports could not, even potentially, be held responsible under the Agreement on Safeguards for the injury suffered by the industry up to 2000, this statement of the USITC clearly recognizes that demand declines caused some injury.[3207] However, the USITC goes no further in its analysis, and thus does not establish explicitly, in a reasoned and adequate manner, how it has separated and distinguished such injury and ensured it was not attributed to increased imports.[3208]

7.1374 The United States argues that the USTIC properly ensured that that it did not attribute any injury caused by late period demand declines to imports. It asserts that the ITC recognised that, after growing 1996 to late 2000, demand for stainless steel bar did decline in late 2000 and interim 2001. However, the USITC correctly noted that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the years prior to 2000 and 2001, when imports had been increasing as well. Indeed, it specfically found that the industry's in ability to maintain its operating profits in the face of demand changes in late 2000 and 2001 were the "direct result of the increasing share of the market obtained by imports and their continued underselling of domestic merchandise during the period," not the result of demand declines.[3209]

7.1375 The United States asserts that the USITC closely examined the effects that were attributable to demand declines during the period. In particular, the USITC properly noted that demand declines had become evident only during the final three quarters of the period of investigation. However, it also correctly noted that these late-period demand declines could not possibly have contributed to thes serious declines in the condition of the industry during the three years prior to this period, when demand was, in fact, increasing. Moreover, given that demand actually increased, substantially on a full year basis in 2000 as well, it is clear that demand declines were not a cause of injury to the industry in that year as well. Given the foregoing, the USITC reasonably concluded that the declines

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[3206] USITC Report, Vol. I, p. 221.

[3207] United States' first written submission, paras. 709 and 712 talks of injury being "primarily caused" by imports.

[3208] European Communities' second written submission, para. 427; China's first written submission, paras. 492 and 498.

[3209] United States' first written submission para. 679

in the industry's condition that occures during interim 2001 were primarily caused by imports, even with the decline in demand in that period.[3210]

7.1376 In counter-response, the European Communities argues that the USITC recognized that demand declines had an effect on the domestic industry – by concluding that this cause is less important than increased imports, the USITC did not separate and distinguish the effects of alternative causes and increased imports.[3211]

Increases in capacity

7.1377 The European Communities argues that the USITC did not examine the effect of capacity increases greater than increases in demand on the operations of the domestic industry. According to the European Communities, it is immediately obvious that such capacity increases must have had an effect on the United States industry's performance.[3212] In particular, the European Communities argues that substantial increases in capacity were made in a period during which demand for stainless bar dropped away. According to the European Communities, price developments mirrored developments in demand and were obviously affected by developments in capacity. However, the effect of developments in demand allied to increased capacity were not assessed in the USITC Report and, thus, no effort was made to separate and distinguish the effect of these factors from the effect of imports.[3213] The European Communities argues further that the domestic industry continued to increase capacity well in excess of the rate of domestic demand during the investigation period. While the USITC did not deal with this issue, the European Communities argues that this would tend to suggest that serious injury has not been caused by imports but, rather, by developments in the domestic industry.[3214]

7.1378 In response, the United States submits that it is factually wrong to argue that the USITC failed to consider that the industry's capacity "continued to increase" well in excess of the rate of domestic demand during the period and it mischaracterizes the USITC's opinion. It is factually wrong because the industry's capacity increases did not, in fact, exceed the growth in demand during the period. More specifically, the industry's capacity levels only increased by 5.5% between 1996 and 2000. Apparent US consumption grew by 17.2% between those years. In fact, because of this differential, the industry's total capacity was slightly lower than total demand in 2000. Thus, although there were fluctuations in demand during the period, the record does not indicate that the industry's capacity increases were in excess of the growth in market demand.[3215]

7.1379 The United States argues further that the USITC clearly did discuss the industry's capacity increases during the period, noting specifically that industry capacity had grown during the period and that capacity utilization had declined. Moreover, the USITC directly addressed the relationship of these capacity increases to demand changes in the market and their impact on the condition of the industry. In particular, it found that the industry's capacity increases had not enabled the industry to take advantage of the growth in the market during the period. Given this discussion, it is unclear how the European Communities could possibly believe that the USITC ignored the relationship between the industry's capacity increases and the growth in demand. The USITC clearly considered the

[3210] United States' first written submission, para. 680.
[3211] European Communities' second written submission, para. 420.
[3212] European Communities' first written submission, para. 558.
[3213] European Communities' first written submission, para. 559.
[3214] European Communities' first written submission, para. 568.
[3215] United States' first written submission, para. 671.

growth in industry capacity in its analysis and reasonably explained why it was not a factor in the decline in market prices or in the industry's condition.[3216]

7.1380 In counter-response, the European Communities refers to the United States attempts to rebut the European Communities' arguments by comparing capacity and consumption on an end to end basis.[3217] However, since the causation analysis is essentially about identifying trends, it is insufficient to analyse this issue in such a superficial manner. Indeed, the coincidence of increases in capacity, decreases in demand, and decreases in operating income should have alerted the USITC to the possibility that capacity increases, allied with demand developments, might well have been responsible for the situation of the industry. The USITC failed to examine this issue in the detail which it clearly merited, and in so failing, did not provide a reasoned and adequate explanation of how the facts support its findings.[3218]

Increases in energy costs

7.1381 China argues that the USITC acknowledged that the increase in energy costs in late 2000 and interim 2001 was causing injury at the same time as increased imports. If imports had a greater impact than energy costs increases, it was necessarily because this factor also had an impact on the declines in the industry's conditions.[3219] China argues that concerning the increase in energy costs in 2000 and interim 2001, all that the USITC explained was that there had already been changes in the industry's condition prior to 2000. It did not explain anything concerning 2000 and 2001. China argues that, clearly, this is insufficient.[3220]

7.1382 The European Communities suggests that the USITC's conclusion that increased energy costs was a less important cause than imports is far from clear. In any event, it argues that the USITC does not attempt to distinguish the effect of increased energy prices from the effects of imports and other factors and, thus, does not ensure that the effect of such developments was not attributed to increased imports.[3221]

7.1383 The European Communities notes[3222] that for increased energy costs, the USITC stated no more than:

> "Although the record does show a downturn in demand for stainless bar [sic] and an increase in energy costs in late 2000 and interim 2001 there were substantial declines in the industry's production, sales and profitability levels during the years prior to 2000 and interim 2001. In particular, the industry's market share, production volumes, employment levels and profitability levels all declined during the period from 1996 to 1999 in the face of increase import volumes, despite the fact that there were only small changes overall in the amount of stainless rod consumed in the United States market and despite the fact that there is little evidence that energy costs were increasing substantially in these periods. Considering this, it is clear that imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increased, especially given the substantial

[3216] United States' first written submission, para. 672.
[3217] United States' first written submission, para. 671.
[3218] European Communities' second written submission, para. 421.
[3219] China's first written submission, para. 475.
[3220] China's first written submission, para. 481.
[3221] European Communities' first written submission, para. 556.
[3222] European Communities' second written submission, para. 426.

> increase in import quantities and market share during the last year and a half of the period."[3223]

7.1384 The European Communities argues that quite apart from the fact that the only increased imports which could potentially satisfy the requirements of the Agreement on Safeguards took place in 2000, and that therefore increased imports could not, even potentially, be held responsible under the Agreement on Safeguards for the injury suffered by the industry up to 2000, this statement of the USITC clearly recognizes that increased energy costs caused some injury.[3224] However, the USITC goes no further in its analysis, and thus does not establish explicitly, in a reasoned and adequate manner, how it has separated and distinguished such injury and ensured it was not attributed to increased imports.[3225]

7.1385 The United States argues in response that the USITC closely examined the effects of energy cost increases on the industry during the period of investigation. In particular, the USITC properly noted that energy cost issues had been become evident only during the final three quarters of the period of investigation.[3226] It also correctly noted that these late-period energy cost increases did not significantly contribute to the decline in the condition of the industry during the three years prior to this period, when there was no evidence of significant changes in energy costs.[3227] By performing an analysis that assessed whether imports appeared to be causing injury to the industry during a period without substantial energy cost increases, the USITC was able to distinguish the effects of these increases in the final three quarters of the period of investigation from those attributable to imports during prior periods. As a result, the USITC was able to ensure that did not attribute any injury caused by energy costs to imports. Moreover, even for the period 2000 and interim 2001, the USITC qualitatively assessed whether imports had a more substantial impact on the condition of the industry than did energy cost increases. By doing so, and by concluding that even the injury suffered by the industry in 2000 and interim 2001 was primarily caused by imports and not energy costs, the USITC appropriately assessed the extent of the injury attributable to imports even in those periods.[3228] In sum, the USITC properly separated and distinguished the effects of increases in energy costs from those of imports in its analysis, despite the complainants' arguments to the contrary.[3229]

7.1386 China notes in counter–response that the United States states that it qualitatively assessed that imports had a more substantial impact than energy cost increase. The United States claims that by doing so it appropriately assessed the extent of the injury attributable to imports.[3230] China questions how the United States was able to define the extent of the injury caused by imports by a mere comparison of two factors. China argues that the misleading interpretations in the submissions of the United States cannot prove that a proper assessment of the extent and nature of the injurious factors, and their non-attribution to the imports effects took place.[3231]

[3223] USITC Report, Vol. I, p. 221.

[3224] United States' first written submission, paras. 709 and 712 talks of injury being "primarily caused" by imports.

[3225] European Communities' second written submission, para. 427; China's first written submission, para. 492.

[3226] USITC Report, p. 221.

[3227] USITC Report, p. 221.

[3228] It bears repeating that, since demand did not decline on an overall basis in 2000, there was clearly no injurious impact of a demand decline in that year on the industry on an overall basis.

[3229] United States' first written submission, para. 711.

[3230] China's second written submission, para. 267.

[3231] China's second written submission, para. 268.

7.1387 The United States responds by arguing that the USITC considered whether energy cost increases during the last months of that period of investigation were a source of injury to the domestic industry. In its analysis, the USITC recognized that there was an increase in energy costs during late 2000 and interim 2001. However, the USITC correctly noted that there was no record evidence of specific energy cost increases in the period prior to late 2000 and 2001, and that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels as a result of increasing import volumes in the years prior to 2000 and 2001 as well. Indeed, the USITC specifically found that the industry's inability to maintain its operating profits in the face of energy cost increases in late 2000 and 2001 were the "direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period."[3232]

7.1388 The United States also argues that the USITC closely examined the effects of energy cost increases in the condition of the industry during the period of investigation. In particular, the USITC properly noted that energy cost issues had become evident only during the final three quarters of the period of investigation. However, it is also correctly noted that these late-period energy cost increases could not possibly have contributed to serious declines in the condition of the industry during the three years prior to this period, when there was no evidence of significant changes in energy costs. As a result, it reasonably concluded that the declines in the industry's condition that occurred during 2000 and interim 2001 were substantially caused by imports, even though energy costs increased during the latter months of 2000 and in interim 2001.[3233]

7.1389 In counter-response, the European Communities argues that the USITC recognizes that energy costs had an effect on the domestic industry – by concluding that this causes is less important than increased imports, the USITC did not separate and distinguish the effects of alternative causes and increased imports.[3234]

Increases in nickel prices

7.1390 The European Communities submits that the USITC acknowledged that stainless steel bar prices "track the price of nickel" and that nickel prices rose in 1999 and 2000. Yet, according to the European Communities, it baldly concluded that price underselling by imports "suppressed and depressed prices to a serious degree" without attempting to separate the effect of developments in the nickel price on prices and not to attribute it to increased imports. The European Communities submits that, in fact, the industry's poor performance broadly coincides with decreases in the prices of nickel.[3235] The European Communities further argues that given the close correlation in prices and the collapse of the price of nickel from 1995 to 1998, it seems likely that, with the price of nickel falling, forcing down the price of stainless bar, the United States domestic industry had difficulty covering its fixed costs.[3236]

7.1391 In response, the United States notes that price is an important factor in purchasing decisions for stainless steel bar. Price is directly affected by the price of nickel. Indeed, to account for fluctuations in the price of nickel, producers impose a surcharge on the price of stainless steel bar

[3232] United States' first written submission, para. 682
[3233] United States' first written submission, para. 683.
[3234] European Communities' second written submission, para. 420.
[3235] European Communities' first written submission, para. 555.
[3236] European Communities' first written submission, para. 568.

when nickel prices increase to a specified level. Nickel prices fell through 1998 but then increased significantly in 1999 and the first half of 2000. Nickel prices then fell through interim 2001.[3237]

7.1392 The United States also questions the European Communities' assertion that the USITC "baldly conclude[d]" that imports suppressed or depressed prices in the market "without attempting to separate the effects of developments in the nickel price" on domestic prices in light of the fact that the USITC discussed this issue at length in its opinion.[3238] In its analysis, the USITC examined the relationship between nickel price movements and movements in the price of stainless steel bar in its opinion and concluded that nickel price movements had not caused the price suppression in the market. In particular, the USITC specifically found that market participants expect stainless prices to move in tandem with nickel prices because of the importance of nickel in the production of stainless steel bar. As a result, it specifically analysed whether movements in the industry's net unit prices for stainless steel bar and its costs had tracked the price of nickel during the period. Although it found that stainless bar prices had tracked nickel prices somewhat during the first years of the period, it also stated that the industry's net sales revenues and unit sales prices failed to keep pace with movements in nickel prices during the second half of the period of investigation, which resulted in decreasing unit profitability margins for the industry during this period. Moreover, the USITC found, the decreasing spread between its unit costs and unit prices – the result of price declines exceeding declines in its COGS, including nickel costs – directly caused declines in the industry's net sales values and its operating income margins during the last two-and-a-half years of the period of investigation, even as nickel prices increased.[3239] The United States argues that clearly, then, the USITC did examine this issue in detail and correctly concluded that nickel prices had not caused the declines in the industry's profitability levels during the period. The European Communities' argument concerning the USITC's discussion of nickel prices has no merit whatsoever.[3240]

7.1393 The United States argues that by focusing on the change in spread between the industry's costs (which included its nickel costs) and its sales values in its discussion of the impact of nickel costs on domestic pricing, the USITC was clearly able to assess the extent to which the industry was unable to increase its prices to fully recover its nickel costs because of import competition. Accordingly, the USITC clearly separated and distinguished the effects of imports from the effects of nickel cost changes in its analysis.[3241]

Poor operations of Al Tech/Empire and Republic

7.1394 The European Communities argues that the USITC did not explain what it determined with respect to arguments raised on the poor operations of Al Tech/Empire and Republic. This information was kept confidential. However, the USITC implied that these operations were also a source of injury to the domestic industry since it claimed that the trends it had identified would have continued even if the operations of those two companies were factored out of the data analysed.[3242]

7.1395 The United States responds by arguing that the USITC considered whether the poor performance of two particular domestic producers was a possible source of injury to the industry during the period of investigation. Although the specific information on these producers' problems and their operating results are confidential, the USITC's discussion of the issue makes clear that it

[3237] USITC Report, p. 209; United States' first written submission, para. 663.
[3238] United States' first written submission, para. 673.
[3239] United States' first written submission, para. 674.
[3240] United States' first written submission, para. 675.
[3241] United States' first written submission, para. 688.
[3242] European Communities' first written submission, para. 557.

examined the record evidence relating to these issues and discussed the nature and extent of these producers' difficulties in detail.[3243] In this regard, it specifically noted that it took into account the arguments made by the foreign producers and rejected their assertions that the industry's operating results had been skewed by the non-import problems of the producers. Moreover, the USITC considered whether exclusion of the two companies from the industry data would substantially alter the downward trends in the industry's condition in those years, and found that it did not. By engaging in this analysis, the USITC clearly separated and distinguished the impact of imports on the industry from the effects of these producers operations and found that the industry's problems were genuinely and substantially the result of increased imports.[3244]

NAFTA imports

7.1396 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic stainless steel bar industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3245]

7.1397 China further argues that in the Supplementary Report, the USITC was required to assess the injury caused by imports from Mexico and Canada and to ensure that this injury would not be attributed to increased imports from non-NAFTA countries. China argues that it did not do so. China further argues that the USITC provided no explanation whatsoever that injury caused by imports from Mexico and Canada was not attributed to increased imports and there is no reason to believe that injury caused by imports from Mexico and Canada were not in fact attributed to increased imports.[3246]

7.1398 In this regard, the European Communities notes that the USITC concluded that "imports from Canada contributed importantly to the serious injury suffered by the domestic industry". However, the European Communities submits that this finding was made after the USITC had already concluded that "increased imports are a substantial cause of serious injury" and the USITC did not even attempt to factor this element into its analysis of the alleged causal link between serious injury and increased imports. Indeed, according to the European Communities, it is quite obvious that the USITC's initial analysis included imports from Canada in assessing whether increased imports have caused serious injury. The European Communities argues that no effort is made to distinguish the effect of Canadian imports and to make sure that the such effects are not attributed to imports from other sources.[3247] In light of the foregoing, it is China's view that the USITC failed to comply with Article 4.2(b) of the Agreement on Safeguards.[3248]

7.1399 For the United States' response, see paragraph 7.1066 *et seq*.

[3243] USITC Report, p. 212.
[3244] United States' first written submission, paras. 685-86.
[3245] China's first written submission, para. 483.
[3246] China's first written submission, para. 486; China's second written submission, para. 263
[3247] European Communities' first written submission, para. 560.
[3248] China's first written submission, para. 486; China's second written submission, para. 263

Failure to provide reasoned and adequate explanation

7.1400 China argues that to be certain that the injury caused by these other factors, downturn in demand and increases in energy costs, whatever their magnitude, was not attributed to imports, the USITC had to assess the injurious effects of these other factors. However, according to China, the USITC failed to do so, as there is no information to that effect in the USITC Reports.[3249] China states that, in sum, China believes that the injurious effects of the other factors that have caused the injury at the same time as the increased imports had not been properly assessed by the USITC. Thus, it is impossible to determine whether the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3250] China further argues that the USITC failed to adequately evaluate the complexity of the alleged injury factors. According to the European Communities and China, it also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3251]

7.1401 The United States argues that the USITC performed a thorough and objective analysis of the record. It thoroughly assessed the nature and scope of the effects of other factors and ensured that it did not attribute the effects of these factors to imports.[3252]

(ix) Stainless steel wire

Decision-making

7.1402 China notes that it is the determination of Chairman Koplan which becomes relevant to examine in relation to stainless steel wire for he is the only Commissioner to have made his determination on the product on which the President imposed a safeguard measure.[3253]

7.1403 In response, the United States submits as an initial matter, that China mistakenly asserts in its brief that the President relied solely on Commissioner Koplan's causation findings for stainless steel wire products when determining to impose a safeguard remedy on stainless steel wire. Three Commissioners found that stainless steel wire was causing serious injury or threatening to cause such injury to the domestic tin mill industry: Commissioners Koplan, Bragg and Devaney. Commissioner Koplan found stainless steel wire to be a separate like product and made an affirmative threat of injury finding for that product; Commissioners Bragg and Devaney found stainless wire to be part of the same like product as stainless steel wire rope and made an affirmative determination for that like product.[3254]

7.1404 The United States further submits that under the United States statute, the President cannot simply decide to treat an individual affirmative finding of one Commissioner as a basis for imposing a remedy, as the complainants allege. Instead, under the United States statute, the President may only impose a remedy if at least half of the Commissioners then in office make an affirmative finding of causation and injury. In this case, the President was able to impose a remedy on stainless steel wire only because three of the six Commissioners had found that stainless steel wire, whether or not treated

[3249] China's first written submission, para. 476.
[3250] China's first written submission, para. 477.
[3251] European Communities' first written submission, para. 569; China's first written submission, para. 482.
[3252] United States' first written submission, para. 689.
[3253] China's first written submission, para. 534.
[3254] United States' first written submission, para. 723.

as a separate like product, had caused or threatened to cause serious injury to the industry. Indeed, in his official announcement of the imposition of these remedies, the President specifically stated that he considered the "determinations of the groups of Commissioners voting in the affirmative with regard to" stainless steel wire to be the determination of the USITC. In other words, the President specifically and clearly stated that he relied on the affirmative determinations of Commissioners Koplan, Bragg, and Devaney as grounds for his stainless steel wire remedy. Accordingly, the President's remedy finding simply does not indicate that he adopted the like product decision or injury finding of Commissioner Koplan as his own.[3255]

7.1405 The United States argues that, therefore, it is legally and factually incorrect for China to assert that the President adopted the injury and causation findings of Commissioner Koplan as the sole basis for his remedy decision. Nonetheless, because China and the European Communities focus their arguments concerning stainless steel wire entirely on Commissioner Koplan's causation analysis for stainless steel wire, the United States also focuses its discussion on his analysis as well.[3256] However, the United States notes that neither China nor the European Communities make any arguments challenging the affirmative injury findings of Commissioners Bragg and Devaney on stainless steel wire and rope. Accordingly, they have failed to make a prima facie showing that Commissioners Bragg and Devaney's analysis violated the causation requirements of the Agreement on Safeguards. The United States argues that the panel should therefore find that the causation analyses of these Commissioners have not been placed at issue in these proceedings and should affirm them.[3257]

7.1406 In counter-response, China argues that in its view, only Commissioner Koplan correctly identified the like product – stainless steel wire – to be a separate like product, in contrast to Commissioners Bragg and Devaney who found stainless wire to be part of the "stainless steel wire and rope" product category. Therefore, according to China, only Commissioner's Koplan findings could have been taken as the correct basis for imposing a remedy.[3258]

Factors considered by the USITC

Decline in consumption

7.1407 China argues that although Chairman Koplan refers to the extent of the decline in consumption, there is no information on his view concerning the extent of the contribution of the decline in consumption and the increase in unit costs on the overall situation of the industry. Similarly, Chairman Koplan did not state what portion of the decline in the industry's performance was attributable to the decline in demand for stainless steel wire.[3259]

7.1408 In response, the United States submits that Commissioner Koplan thoroughly examined the record evidence relating to the demand decline in interim 2001 and discussed the nature and extent of that decline in detail. In this regard, he recognized that apparent consumption of stainless steel wire declined by 16.1% between interim 2000 and 2001 and noted that the decline was related to the overall decline in the United States economy in interim 2001. He specifically acknowledged that the demand decline in interim 2001 had together with imports caused prices to fall in the market interim 2001 and that therefore "some portion of the observed declines in the industry's performance between the interim periods is attributable to an apparent decline in demand". Nonetheless, he also found that

[3255] United States' first written submission, para. 724.
[3256] United States' first written submission, para. 725.
[3257] United States' first written submission, para. 726.
[3258] China's second written submission, paras. 289 and 290.
[3259] China's first written submission, para. 538.

the decline in demand did not "explain the rapid deterioration in the domestic industry's financial performance" in interim 2001, because the "decline in United States production and shipments exceeded the total decline in apparent domestic consumption". After noting that there had been a "significant increase in imports" and a "rapid increase in the proportion of the domestic market supplied by imports" during interim 2001, he correctly concluded that imports had had a greater impact on domestic price and profitability declines in interim 2001 than demand declines.[3260]

7.1409 The United States submits that, given the foregoing, it is clear that Commissioner Koplan thoroughly and adequately discussed the nature and extent of the effects of the demand declines in interim 2001 and distinguished the effects of this decline from that of imports during the period of investigation. In particular, he acknowledged that some of the price and profitability declines suffered by the industry were attributable to the demand decline in interim 2001, but he also found that the industry's production and shipment levels had declined at a substantially faster rate than demand in interim 2001, which was due to the substantial increase in import market share during interim 2001.[3261] The United States argues that given these trends, it was reasonable for Commissioner Koplan to conclude that imports had had a greater hand in price declines in interim 2001 than demand. Moreover, by focusing on the fact that there was a faster rate of change for industry production levels than demand in interim 2001, he was able to separate and distinguish the effects of the demand declines from those attributable to imports in interim 2001. In other words, by examining the differences in the rates of decline between industry production and shipment levels and demand declines in interim 2001, he was able to conclude that the differential between these declines had been caused by the substantial increases in import volumes and market share in interim 2001. As a result, he was able to, and did, attribute to imports the bulk of the declines in the industry's pricing and profitability levels that occurred in interim 2001. By performing this qualitative assessment of the extent of the effects attributable to imports, he was able to distinguish the effects of the two factors and ensure that he did not attribute to imports the effects of the demand decline.[3262]

COGS

7.1410 The European Communities argues that while Chairman Koplan weighed the effect of decrease in demand against increases in imports and found that domestic production had fallen further than the decrease in demand, he did not consider the effect of increased COGS on the deteriorating operating margin of domestic producers. The European Communities submits that had he examined this factor, he may have found that increased COGS had such an effect that increased imports did not cause the decline in operating margins registered in this period. In failing to do so, Chairman Koplan failed to separate out and distinguish the effects of other factors and failed to ensure that the effects of these factors were not attributed to increased imports, thus acting inconsistently with Article 4.2(b) of the Agreement on Safeguards..[3263]

7.1411 In response, the United States argues that Commissioner Koplan very clearly did "consider the effects of increased costs of goods sold on the deteriorating operating margin of the industry". In particular, he discussed in detail the nature and extent of the effects that cost increases had on the condition of the industry. Although the industry's unit costs had increased in interim 2001, Commissioner Koplan correctly acknowledged that the industry had not been able to maintain its profitability margins in interim 2001 as it had earlier in the period, by keeping its prices in line with changes in its unit costs. He also reasonably concluded that the price declines in interim 2001, which

[3260] United States' first written submission, para. 742
[3261] United States' first written submission, para. 743
[3262] United States' first written submission, para. 744
[3263] European Communities' first written submission, para. 579.

directly led to reduced industry profitability, had been caused by imports and demand changes, after noting that the two major changes in the market in interim 2001 had been a substantial increase in import market share and a decline in demand.[3264] The United States argues that by focusing on the changes in unit margins that occurred during interim 2001, he was able to separate and distinguish the effects of increasing costs from those of imports and demand changes in his analysis. In this regard, his examination of the unit profits of the industry, and the relationship between the industry's profits, costs and prices, enabled him to establish that the decline in industry profitability in interim 2001 was caused not by rising costs but by a decline in the prices related to price competition from imports during a period of demand decline. Accordingly, it is clear that he properly assessed the amount of effect that these cost increases had had on declines in domestic operating income levels during interim 2001 and reasonably concluded that these declines were more appropriately considered to be a result of falling prices, not increasing costs. By doing so, he ensured that he was able to distinguish the effects of the cost increases from those of imports on the declines in the industry's condition and ensured that he did not attribute to imports the effects of these cost increases.[3265]

7.1412 In counter-response, the European Communities argues that Commissioner Koplan's opinion rested on developments in interim 2001 which led him to consider that increased imports posed a threat of serious injury. He identified three factors "which contributed" to the domestic industry's decline.[3266] The first two were imports and declining demand. Thirdly, "unit costs of goods sold increased by ***%" (all financial data for Stainless Steel Wire is confidential).[3267] He noted that "the falling prices and rising costs led to a *** percentage point loss [sic] in the operating income to sales ratio between interim 2000 and interim 2001".[3268] That is all the discussion of rising costs in interim 2001 that the USITC Report contains. The European Communities submits that the discussion in the United States' submissions cannot make up for this total lack of reasoned and adequate explanation. As the financial data is confidential, there is no reasoned and adequate explanation of how the facts support the findings, especially in the absence of a non-confidential indexed version of the data. There is no examination of the relevance or cause of increased costs, no separation and distinction, and thus no non-attribution.[3269]

NAFTA imports

7.1413 China argues that Chairman Koplan's determination of the existence of a causal link between the increased imports and the threat of serious injury to the domestic stainless steel wire industry, was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, what had to be determined was in fact whether total increased imports, with the exception of imports from NAFTA-countries, threatened to cause serious injury to the domestic industry. As a result, since the determination of causality at hand required that "increased imports" only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "another factor". Thus, in respect of Article 4.2(b) of the Agreement on Safeguards, this new determination also required that threat of injury due to movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3270] China argues that such a new determination was not done concerning this

[3264] United States' first written submission, para. 738.
[3265] United States' first written submission, para. 739.
[3266] USITC Report, Vol. I, p. 259.
[3267] USITC Report, Vol. I, p. 259.
[3268] USITC Report, Vol. I, p. 259.
[3269] European Communities' second written submission, para. 433.
[3270] China's first written submission, para. 541.

product. According to China, this is especially surprising, given that the Chairman Koplan acknowledged that imports from Canada and Mexico were threatening to cause injury by stating that "imports of stainless steel wire from Canada […] did not contribute importantly to the serious injury" and "imports of stainless steel wire from Mexico […] did not contribute importantly to the serious injury". In other words, imports from NAFTA countries contributed in threatening to cause the injury, although this contribution was not substantial.[3271] China asserts that since it did not proceed to a new determination of causality between increased imports from non-NAFTA countries and the threat of serious injury to the domestic industry, there was consequently a failure to assess the injurious effects caused by imports from Mexico and Canada and a failure to ensure that they would not be attributed to increased imports from non-NAFTA countries. Therefore, the investigating authority did not comply with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3272]

7.1414 The European Communities also argues that in failing to analyse imports from Canada and Mexico as alternative causes of injury, the USITC also acted inconsistently with Article 4.2(b).[3273] The European Communities argues that the USITC Report does not provide a reasoned and adequate explanation of whether NAFTA imports were causing injury and how any such injury caused was not attributed to non-excluded imports. Chairman Koplan simply concludes that imports from neither Mexico or Canada were in the top five suppliers during the period of investigation. He does not even attempt to analyse whether such imports caused any injury and does not, therefore, ensure that any such injury is not attributed to non-excluded imports.[3274]

7.1415 For the United States' response, see paragraph 7.1066 *et seq*.

Failure to provide reasoned and adequate explanation

7.1416 The European Communities and China note, that in his separate views on injury, Chairman Koplan expressly stated that three other factors contributed to the threat of injury, i.e. a rapid decline in consumption, an increase in the unit costs of goods sold and declining demand.[3275] The European Communities argues that Chairman Koplan's conclusions, upon which it asserts that the safeguard measure for stainless steel wire are based, are directly contradicted by the opinion of the majority.[3276] The European Communities argues that in order to provide a reasoned and adequate explanation of Chairman Koplan's findings there would have to be a clear rebuttal of this finding. There is none, and this brings into question, therefore, the basis for the finding of a causal link between increased imports and a threat of serious injury. For this reason, the European Communities argues that the safeguard measures imposed on this basis are unjustified and are thus inconsistent with Article 2.1 and 4.2(b) of the Agreement on Safeguards, and additionally Articles 3.1 and 4.2(c).[3277]

7.1417 In response, the United States submits that, as an initial matter, the Agreement on Safeguards does not require that all six individual decision-makers reach the same conclusion, or that the individual Commissioners must rebut the findings of others with different conclusions, but requires that the determination, as the Appellate Body said in *US – Line Pipe*, meets the obligations contained in the Agreement on Safeguards. The determination of Commissioner Koplan meets those requirements. Indeed, the fact that Commissioners Miller, Hillman and Okun disagreed with

[3271] China's first written submission, para. 542.
[3272] China's first written submission, para. 543; China's second written submission, para. 293
[3273] European Communities' first written submission, para. 579.
[3274] European Communities' first written submission, para. 435.
[3275] European Communities' first written submission, para. 578.
[3276] European Communities' first written submission, para. 580; China's first written submission, para. 535.
[3277] European Communities' first written submission, para. 581.

Commissioner Koplan no more makes his analysis unreasonable than his disagreement with them makes their analysis unreasonable.[3278]

7.1418 The United States submits further that Commissioner Koplan's pricing analysis is actually not inconsistent with the pricing findings of Commissioners Miller, Hillman and Okun. Like these three Commissioners, Commissioner Koplan specifically found that imports had consistently undersold domestic stainless steel wire during the period from 1996 to 2000, but that this consistent underselling had not impacted domestic pricing adversely because the "domestic industry had kept prices of the domestic [wire] product in line with its costs" during that five year period. However, unlike the other three Commissioners, Commissioner Koplan also focused his analysis on pricing data for imports and domestic product in interim 2001 and noticed that lowered import pricing had begun interfering with the ability of domestic industry to keep its prices in line with its costs. In particular, he found that, in combination with declining demand, the increase in import volumes and market share caused the price of domestic wire to fall during a period of rising costs and led directly to a decline in the industry's operating income levels in interim 2001. As a result, he reasonably found, the increase in imports and their concurrent underselling had caused the substantial declines in the industry's condition in the final months of the period of investigation, thus showing that imports threatened the industry with imminent serious injury. In other words, Commissioner Koplan's findings about price competition in the market during the first five years of the period were, in fact, consistent with the findings of the other three Commissioners. However, Commissioner Koplan simply placed more emphasis than the other Commissioners on the pricing effects of imports during the last six months of the period, which is a reasonable choice given his finding that imports threatened serious injury to the stainless steel wire industry.[3279]

7.1419 China argues that to be certain that the injury caused by these three other factors, that is a rapid decline in consumption, an increase in the unit costs of goods sold and declining demand whatever their magnitude, was not attributed to imports, the USITC had to assess the injurious effects of these other factors. China believes that it failed to do so.[3280] China states that, in sum, China believes that the injurious effects of the three other factors that were threatening to cause injury at the same time as the increased imports were not properly assessed by Chairman Koplan. Thus, it is impossible to determine whether he properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3281] China argues that, as a result, the investigating authority also failed to establish explicitly, with a reasoned and adequate explanation, that threat of injury due to other factors was not attributed to increased imports. Therefore, China believes that the "substantial cause" determination was inconsistent with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3282]

(x) Stainless steel rod

Factors considered by the USITC

Downturn in demand

7.1420 The United States argues that the USITC explained, in a reasoned and thorough manner, the nature and extent of the injurious effect attributable to these demand declines, and distinguished that

[3278] United States' first written submission, para. 732
[3279] United States' first written submission, para. 733.
[3280] China's first written submission, para. 537.
[3281] China's first written submission, para. 539.
[3282] China's first written submission, para. 540.

effect from the effects of imports. More specifically, the USITC recognized that, after remaining stable through most of the period of investigation, demand for stainless steel rod did decline in late 2000 and interim 2001. However, the USITC correctly noted that the industry had been experiencing declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the period from 1996 to 1999, when imports had exhibited increasing volumes as well. Moreover, it also specifically found that "it is clear imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines" because there had been a "substantial increase in import quantities and market share during the last year-and-a-half of the period" of investigation.[3283]

7.1421 The United States argues that it is clear that the USITC closely examined the nature of the injury that was attributable to demand declines during the period. In particular, the USITC properly noted that demand declines had become evident only during the final three quarters of the period of investigation. However, it also correctly noted that these late-period demand declines could not possibly have contributed to the serious declines in the condition of the industry during the three years prior to this period, when demand remained stable. Indeed, given that demand not only remained stable but actually increased slightly in 2000 over 1999 and 1998, it is clear that demand declines had no impact at all on the condition of the industry during 2000 as well. By examining whether imports caused injury to the industry during a period of increasing demand, the USITC was able to distinguish the effects of the demand declines in the final quarters of the period of investigation from those attributable to imports during prior periods. Accordingly, the USITC properly separated and distinguished the effects of demand declines from those of imports in its analysis.[3284]

Increases in capacity

7.1422 The European Communities argues that the USITC Report indicates that substantial increases in capacity were made in 1998 to 2000 and 2001. However, according to the European Communities, there is no analysis of the extent to which such increased capacity might have caused injury to the domestic industry.[3285]

7.1423 In response, the United States submits that none of the parties argued before the USITC that the industry's increased capacity levels was a source of injury to the industry during the period of investigation. While Members are not barred from raising before panels issues that were not raised before the USITC during its investigation, it remains the case, however, that the European Communities's arguments on this score, if valid, should have been significant enough for the European rod producers to have raised this as an argument before the USITC. The fact that they did not strongly suggests, as a matter of fact, that the European participants in the stainless steel rod market did not view industry capacity as an especially significant factor in the industry's declines during the period of investigation.[3286]

7.1424 The United States argues, secondly, that the USITC clearly did recognize the fact that the industry had increased its aggregate capacity levels during the period and that the industry's capacity utilization rates declined during the period as well. However, even with this capacity increase, the record also showed as the USITC found that the industry's actual production levels and shipments actually declined during the period from 1996 through 2000, primarily because imports increased their volumes and market share through price underselling during the period of investigation.

[3283] United States' first written submission, paras. 706-707.
[3284] United States' first written submission, paras. 708-709.
[3285] European Communities' first written submission, para. 573.
[3286] United States' first written submission, para. 717.

Accordingly, the USITC properly recognized that the industry's capacity increases had little effect in the market because the industry's production, shipment and market share levels would have declined by the same amounts even if the industry had not increased its capacity levels. Moreover, because the industry's production and shipment levels declined substantially from 1996 through 2000 as a result of import competition, it is also clear that the import increases had an effect on the industry's capacity utilization rates as well, as the USITC found.[3287]

7.1425 The United States argues, in sum, that the USITC was aware of the industry's capacity increases, discussed them in some detail, and correctly found that they had not had an impact on the declines in the industry's overall condition. The USITC properly considered their effects and discounted them as a source of serious injury.[3288]

7.1426 In counter-response, the European Communities notes that capacity increases occurred between 1998 and 2000, and it has been established, that while imports only increased slightly between 1998 and 1999, the industry's operating income "dropped dramatically to a loss of US$*** million in 1999 and a loss of US$*** million in 2000".[3289] The United States tried to explain this away by claiming that that the industry's production levels and shipments declined between 1996 and 2000.[3290] However, a decline in production levels and shipments does not necessarily mean that an industry makes losses – such events could also incur when an industry is profitable. Rather, an industry makes losses when the value at which it sells does not cover its costs. Increasing capacity, especially when demand is stable[3291], will only lead to increased costs, and must be an element explaining the "dramatic" losses in 1999. However, the USITC does not provide a reasoned and adequate explanation of the effects such capacity increases had on the industry's performance, and it is impossible to fully comprehend the underlying trends in the absence of data or on indexed summary of such data.[3292]

NAFTA imports

7.1427 China notes that the determination of the existence of a causal link between the increased imports and serious injury to the domestic stainless steel rod industry, which is found in the USITC Report was made on the grounds of data which included imports from NAFTA countries. However, China believes that, since imports from NAFTA countries were excluded from the application of the safeguard measure, the USITC had to determine whether total increased imports, with the exception of imports from NAFTA-countries, caused serious injury to the domestic industry. China argues that as a result, since the determination of causality required that "increased imports' only consist of imports originating from non-NAFTA countries, the movements in imports from Canada and Mexico had to be regarded as "an other factor". Article 4.2(b) of the Agreement on Safeguards also required that injury caused by movements in imports from Canada and Mexico not be attributed to increased imports (from non-NAFTA countries).[3293]The European Communities also argues that in failing to analyse imports from Canada and Mexico as alternative causes of injury, the USITC also acted inconsistently with Article 4.2(b).[3294] The European Communities notes in this regard that the USITC concluded, both for Canada and Mexico, that NAFTA imports did not "contribute importantly" to

[3287] United States' first written submission, para. 718.
[3288] United States' first written submission, para. 719.
[3289] USITC Report, Vol. I, pages 215 and 216.
[3290] United States' first written submission, para. 718.
[3291] USITC Report, Vol. I, p. 217.
[3292] European Communities' second written submission, para. 428.
[3293] China's first written submission, para. 500.
[3294] European Communities' first written submission, para. 572.

serious injury. According to the European Communities, this does not suggest that such imports had no effect – the USITC failed to separate and distinguish this effect, and ensure that it was not attributed to non-excluded imports.[3295]

7.1428 For the United States' response, see paragraph 7.1066 *et seq*.

Failure to Provide Reasoned and Adequate Explanation

7.1429 China argues that to be certain that the injury caused by these other factors, downturn in demand and increases in energy costs, whatever their magnitude, was not attributed to imports, the USITC had to assess the injurious effects of these other factors. However, the USITC failed to do so, as there is no information to that effect in the USITC Reports.[3296] China states that, in sum, China believes that the injurious effects of the other factors that have caused the injury at the same time as the increased imports had not been properly assessed by the USITC. Thus, it is impossible to determine whether the USITC properly separated the injurious effects of these factors from the injurious effects of the increased imports.[3297] China argues that, in sum, the USITC failed to adequately evaluate the complexity of the alleged injury factors. It also failed to provide a sound, clear and straightforward explanation of how it ensured that injury caused by other factors was not attributed to increased imports. Therefore, China believes that the USITC acted inconsistently with Articles 2(1) and 4.2(b) of the Agreement on Safeguards.[3298]

7.1430 The European Communities further argues that it is practically impossible to ascertain whether the USITC's determination with respect to stainless steel rod is justified since all data other than absolute imports has been kept confidential.[3299]

7.1431 In response, the United States notes that the USITC has treated as confidential and therefore not disclosed the bulk of the trade, employment, and financial data for the stainless steel rod industry. The USITC redacted this data from its opinion because the stainless rod industry is dominated by the only large domestic producer of stainless steel rod, Carpenter/Talley and Carpenter/Talley's operating and trade data essentially are the same as the aggregate industry data. Disclosing the aggregate confidential competitive data of the industry would therefore actually reveal the specific details of Carpenter/Talley's operations. The USITC is barred by United States law – as well as Article 3.2 of the Agreement on Safeguards – from disclosing such confidential company-specific competitive information without the consent of the provider. However, when the USITC is prohibited from disclosing confidential competitive data for a company, the USITC treats only the specific numeric data of the company as confidential; it may and does discuss trends in industry data (or other confidential data) in general but descriptive terms.[3300]

7.1432 The United States argues that, bearing this in mind, the European Communities' contention that the USITC failed to provide an adequate statement of its rationale for stainless steel rod is misplaced. First, as the United States had previously discussed, the Agreement on Safeguards not only permits, but indeed requires, a competent authority not to disclose any information that is submitted to it on a confidential basis, unless the submitting party consents to the disclosure. In fact, two panels have stated that the Agreement on Safeguards authorizes the United States not to disclose

[3295] European Communities' second written submission, para. 431.
[3296] China's first written submission, para. 493.
[3297] China's first written submission, para. 494.
[3298] China's first written submission, para. 499.
[3299] European Communities' first written submission, para. 570.
[3300] United States' first written submission, para. 693.

confidential data in its determination, even if that data is aggregated data. Moreover, these panels have rejected the argument that the USITC's analysis does not constitute a "reasoned and adequate explanation" of its findings simply because it has not disclosed confidential data in its analysis.[3301] Second, even though a substantial amount of confidential industry data is redacted from the USITC's opinion, its analysis is still sufficiently detailed and clear that the Panel can read the analysis and assess whether it meets the causation requirements of the Agreement on Safeguards. The USITC's decision, while deleting specific numeric data reflecting the operations of a company Carpenter/Talley, nonetheless describes in detail the trends in import and industry data, the clear correlations between those trends, and the extent to which other factors impacted the industry. It is clear that redaction of the data should not hamper the Panel's review of the USITC's analysis, especially given that redaction of this data is fully consistent with the provisions of the Agreement on Safeguards .[3302]

4. Effect of violations of other provisions of the Agreement on Safeguards

7.1433 The European Communities and Switzerland argue that the USITC's causation analysis will automatically be flawed if the Panel finds that the United States' determination of increased imports is flawed.[3303] More particularly, the European Communities argues that the USITC's analysis of increased imports which is based on an end-to-end comparison over the investigation period is inconsistent with the United States' obligation only to find increased imports where it determines the existence of an increase of imports recent enough, sudden enough, sharp enough and significant enough qualify as increased imports in the sense of the Agreement on Safeguards. The European Communities argues that this analytical error taints the USITC's causation analysis more generally, because the USITC only attempts to determine whether imports which have increased over the period of investigation have caused serious injury. It does not determine whether imports which have increased recently enough, suddenly enough, sharply enough and significantly enough are causing serious injury. This has two operational consequences. First, injury which has manifested itself before such increased imports cannot be ascribed to these increased imports. Second, if the level of imports increases and then drops away, injury which appears as imports drop away cannot be ascribed to such lower level imports even if they are low priced, because they are not recent enough, sudden enough, sharp enough or significant enough. Injury which appears after the level of imports has dropped away must be shown to be caused by imports which were, as a matter of fact, recent enough, sudden enough, sharp enough and significant enough to meet the standards of the Agreement on Safeguards. The further the lapse in time between such increased imports and the serious injury to the domestic industry, the more compelling must be the analysis of causal link.[3304] [3305]

7.1434 Korea argues that Article 3.1 of the Agreement on Safeguards imposes an obligation on the competent authorities to publish "their findings and reasoned conclusions" regarding "all pertinent issues of fact and law". Article 4.2(c) of the Agreement on Safeguards requires the competent authorities to "publish promptly" a detailed analysis of the results of the investigation, including "the relevance of the factors examined". Finding causality between an increase in imports and the serious injury is a "pertinent issue of fact and law". The United States did not provide any explanation on

[3301] United States' first written submission, para. 694.
[3302] United States' first written submission, para. 695.
[3303] European Communities' first written submission, para. 432; Switzerland's first written submission, para. 277.
[3304] Appellate Body Report, *Argentina – Footwear (EC)* para. 144.
[3305] European Communities' second written submission, para. 369.

how the increase in import of tin mill caused the serious injury of the United States industry producing the like product.[3306]

7.1435 Korea also argues that there is only one reasoned explanation in the USITC Report regarding causation for tin mill products.[3307] That reasoned explanation demonstrates why, in the view of the USITC, the increase in imports of tin mill products is *not* a substantial cause of serious injury to the domestic tin mill industry. The published report of the United States does not contain *any* findings or explanation to dispute or contradict the cited reasoned explanation contained in the USITC Report. Since the United States reached a legal conclusion that imports were a substantial cause of serious injury to the domestic industry without providing *any* explanation to support the conclusion, the United States is in violation of Articles 2, 3 and 4 of the Agreement on Safeguards.[3308]

I. ARTICLE 5

1. Requirements of Article 5.1

(a) General

7.1436 The remedy recommendations made by the USITC are listed in paragraph **Error! Reference source not found.**. The safeguard measures finally imposed by the US President are listed in paragraph **Error! Reference source not found.**.

7.1437 The complainants claim that Article 5.1 of the Agreement on Safeguards imposes on Members an obligation to ensure that the measure applied is proportionate, i.e. that it does not go beyond what is necessary to prevent or remedy the serious injury. They refer to the Appellate Body in *Korea – Dairy* which stated that Members must ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment and that this obligation applies regardless of the particular form that a safeguard measure might take.[3309] Norway, on behalf of the complainants, argued that the United States has not fulfilled its obligations under the Agreement on Safeguards in determining whether safeguard measures could be imposed in the first place. Therefore an infringement of these requirements automatically raises *ipso facto* or, at least, prima facie a presumption of violation of Article 5.1 of the Agreement on Safeguards. Should the Panel, however, reach a different conclusion on the preceding claims made by the complainants, the complainants are of the view that the United States, in any case, also violated the requirement laid down in Articles 5.1 of the Agreement on Safeguards that the safeguard measures be applied only to the extent necessary.[3310] Finally, they claim that the remedy and the choice of measure needed to be explained and justified before, or at the time, it was applied and that this was not done in this case.[3311]

7.1438 The United States responds that its safeguard measures were imposed to a level and for a duration that complies with the requirements of Article 5 of the Agreement on Safeguards. It is evident, through both a qualitative and a quantitative assessment of the effects of imports on the relevant domestic industries and of the measure taken, that the relief provided was only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. It emphasizes that it is

[3306] Korea's first written submission, para. 167.
[3307] USITC Report, Vol. I, pp. 74-77 (Exhibit CC-6).
[3308] Korea's first written submission, para. 168.
[3309] Norway's first oral statement on behalf of all complainants, para. 6, citing Appellate Body Report, *Korea – Dairy*, para. 96; Norway's first written submission, paras. 347-348; Japan's first written submission, paras. 317-318.
[3310] Norway's second oral statement on behalf of the complainants, paras. 1-7 and Chapter III.
[3311] Norway's second oral statement on behalf of the complainants, paras. 8 and 22-27.

"impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions … ".[3312] The United States adds that any numerical analysis is, at best, an approximation that might assist a Member or a panel in evaluating whether a measure is commensurate with the injury caused by increased imports and the need for adjustment While numerical estimates are necessarily limited in their ability to precisely quantify and isolate the full effect of imports and the appropriateness of remedial measures, they may be useful to test whether a measure is set at an order of magnitude consistent with Article 5.1.[3313] It also claims that it has rebutted all allegations of inconsistency of its safeguard measure with Articles 2 and 4 and, thus, the burden of proof that its safeguard measures are inconsistent with Article 5.1 is on the complainants. Moreover, the United States asserts that it was under no obligation to explain, justify or publish anything relating to its choice of remedy until challenged in a WTO dispute settlement process.[3314]

7.1439 The United States also contends that Member may apply a safeguard measure in any form and at any level that falls within the parameters of Article 5.1, which states that a safeguard measure may be applied to "to prevent or remedy serious injury and to facilitate adjustment." It also states that a Member may apply a safeguard measure "only to the extent necessary" for these purposes. Article 5.1 does not restrict a Member's discretion to act within this limitation. The Member may choose any form for the measure – for example, a tariff, tariff_rate quota, or quantitative restriction. Within this limitation, the Member may also choose the level of the measure – an *ad valorem* duty rate, a specific duty amount, the volume subject to a quota, etc.[3315]

(b) Extent and level of the safeguard measures

(i) "… to the extent necessary …"

7.1440 New Zealand argues[3316] that the requirement to apply a safeguard measure only to the extent necessary to remedy serious injury caused by imports and to facilitate adjustment by the domestic industry also carries with it the consequence that the least trade restrictive measure must be chosen. Furthermore, as panels in *US – Gasoline* and *Canada – Periodicals* have pointed out, a measure must be capable of achieving its objectives before it can be determined to be "necessary".[3317]

7.1441 The United States disagrees with New Zealand's argument that the measure should be no more restrictive than necessary. The United States argues that the Appellate Body did not state that Article 5.1 requires that safeguard measures be "no more restrictive than necessary". Its actual statement was that safeguard measures "may be applied only to the extent necessary" – a direct quote from Article 5.1.[3318] [3319] In the United States' view, New Zealand's interpretation conflicts with the ordinary meaning of Article 5.1 and the object and purpose of the Agreement on Safeguards. It suggests that the term "necessary" in Article 5.1 is linked to the words "to prevent or remedy serious injury and to facilitate adjustment". Thus, "necessary" relates to the preventive, remedial, and facilitative effect of the measure, and not to its trade restrictive effect. In short, the need for relief and adjustment defines what is "necessary". The final sentence of Article 5.1 advises that "Members should choose measures most suitable for the achievement of these objectives". This admonition

[3312] *US – Fur Felt Hats*, para. 35.
[3313] United States' first written submission, paras. 1060-1062.
[3314] United States' second oral statement, paras. 114-121.
[3315] The United States' executive summary of its first written submission, para. 111.
[3316] New Zealand's first written submission, para. 4.196.
[3317] Panel Report, *US – Gasoline*, para. 6.31; Panel Report, *Canada – Periodicals*, para. 5.7.
[3318] Appellate Body Report, *US – Line Pipe*, para. 260.
[3319] United States' first written submission, para. 1031.

shows that many potential measures might satisfy the requirements of the first sentence of Article 5.1, and that Members have discretion in choosing which, among them, best meets the objectives of preventing or remedying serious injury and facilitating adjustment. The cited passages of *US – Gasoline* and *Canada – Periodicals* did not equate necessity with the capability to achieve objectives. Even if "necessary" had been given the meaning attributed to it by New Zealand, the safeguard measures applied by the United States are capable of preventing or remedying serious injury and facilitating the adjustment of the relevant domestic industries.[3320]

7.1442 New Zealand responds that, in an effort to blunt the remedy standard to the point where it is impossible to make an objective determination as to whether it has been met, the United States suggests that what the standard really means is a measure can be applied "*as long as it is necessary* to remedy (or prevent) the serious injury and to facilitate adjustment"[3321], thereby taking the emphasis away from the limitation inherent in "extent". According to New Zealand, in this way, the United States seeks to unjustifiably broaden the scope of Article 5.1 so that any measure a Member asserts as being for the purpose of remedying or preventing serious injury and facilitating adjustment would be permitted. For this reason, the United States disputes[3322] New Zealand's statement that, in accordance with *US – Gasoline* and *Canada – Periodicals*, a measure must be capable of achieving its objectives before it can be determined to be "necessary".[3323] In doing so, New Zealand asks, is the United States seriously asking the Panel to conclude that a measure can be necessary to achieve an objective, without actually being capable of achieving it? To do so would be to render meaningless the concept of "to the extent necessary" as it appears in Article 5.1. New Zealand submits that the United States seeks to argue that the remedy standard in Article 5.1 implies a broad discretion, noting that a Member has the discretion to apply a measure that is "less than necessary".[3324] Yet New Zealand queries why a Member genuinely concerned with the effect of increased imports on its domestic industry would consciously choose a remedy that would be less than effective in remedying the serious injury caused by those imports. According to New Zealand, the United States point goes nowhere. It is simply a device used by the United States to support the notion of a broad discretion in Article 5.1 that disregards the actual standard contained in Article 5.1. As the Appellate Body has made clear, Article 5.1 instructs WTO Members to focus on what is "necessary" to fulfil that limited objective.[3325] Therefore, the clear purpose of safeguard measures is to prevent or remedy serious injury and facilitate adjustment. This was recognized by the Appellate Body in *Korea – Dairy* when it stated that a Member must ensure that the measure applied "is commensurate with the *goals of* preventing or remedying serious injury and of facilitating adjustment".[3326]

7.1443 New Zealand submits that in a further attempt to negate the words of Article 5.1, the United States also challenges New Zealand's statement that the requirement to apply a safeguard measure only to the extent necessary to remedy a serious injury caused by imports and facilitate adjustment by the domestic industry also carries with it the consequence that the least trade restrictive measure must be chosen. The implication appears to be that the United States interprets Article 5.1 as allowing a Member to take a more trade restrictive measure to achieve the objective of remedying serious injury caused by imports and facilitate adjustment when a less trade restrictive measure could achieve the same objective. Such an interpretation ignores altogether the requirement that a measure be applied

[3320] United States' first written submission, paras. 1029-1031.
[3321] United States' first written submission, para. 1021 (emphasis added).
[3322] United States' first written submission, para. 1031.
[3323] New Zealand's first written submission, para. 4.196, citing Panel Report, *US – Gasoline*, and Panel Report, *Canada – Periodicals*.
[3324] United States' written reply to Panel question No. 100 at the first substantive meeting.
[3325] Appellate Body Report, *US – Line Pipe*, para. 246.
[3326] Appellate Body Report, *Korea – Dairy*, para. 96, (emphasis added).

"only to the extent necessary" to achieve the specified objectives. It also ignores the requirement that Members choose measures "most suitable" for the achievement of those objectives.

7.1444 Japan adds that when Article 5.1 says "only to the extent necessary", the text imposes a strict standard. The use of "only" means that the measure can be less restrictive than necessary, but cannot be more restrictive than necessary. Thus, when there is doubt regarding the effect of a remedy, the authorities must err on the side of a less restrictive measure.[3327] Japan puts forth the following simple example. Suppose the authority concludes it needs to raise domestic prices by 10% to remedy the injury. The economic studies show that a 12% tariff will raise prices by some amount between 8 and 10%. The economic studies also show that a 14% tariff will raise prices by some amount between 10 and 12%. It is common for such studies to provide reliable indications of ranges, but not precise figures. In this situation, the authorities could impose a 12% tariff but not the 14% tariff. In each case, Japan suggests, the tariff might completely eliminate the injury. However the possibility that the 14% tariff might over compensate renders that tariff level WTO inconsistent.[3328]

7.1445 The United States notes that Japan argues that when an economic model produces a range of estimated effects of imports, Article 5.1 allows the safeguard measure to address only the lowest estimated effect because "the possibility that the 14% tariff might over compensate renders that tariff level WTO inconsistent".[3329] The United States argues that this argument rests on three fallacies. First, it incorrectly views "no more than the extent necessary" in Article 5.1 as requiring a Member to ensure from the outset that a measure will never exceed the extent necessary. The GATT Contracting Parties recognized in *US – Fur Felt Hats* that such certainty is impossible. Moreover, the chance that a safeguard measure consistent with Article 5.1 may need modification in the course of events is built into the requirement under Article 7.4 for a Member to "review the situation" at the mid-term of a safeguard measure and "if appropriate, withdraw it or increase the pace of liberalization". This provision would be unnecessary if Article 5.1 required a Member to apply a safeguard measure less than the lowest possible effect of increased imports. Second, Japan fails to account for progressive liberalization of safeguard measures under Article 7.4. Automatic reductions in the extent of application of the measure lessen any uncertainty over whether the overall effect of the measure over its lifetime is consistent with Article 5.1. In this regard, it is noteworthy that an aggressive rate of liberalization is built into the steel safeguard measures – 6% per year for the 30% tariffs. Third, Japan mistakenly views the range of outputs of an economic model as actual effects of a measure and actual effects of increased imports that can be compared with pinpoint accuracy. They are not. At most, they indicate the general magnitudes of injurious and remedial effects. The Appellate Body recognized the inherent uncertainty of such a comparison when it described Article 5.1 as requiring that a safeguard measure be "commensurate" with – not equivalent or equal to – "the goals of preventing or remedying serious injury and facilitating adjustment".[3330] The United States argues that that is what it has done, and is the reason the Panel should find the measures to be consistent with Article 5.1.[3331]

(ii) "… to prevent serious injury attributed to 'increased imports' "

7.1446 The complainants submit that only the effects of the increase in imports and not the totality of the imports are to be remedied by a safeguard measure. Indeed, competition against imports is a normal feature in an open free trade system and the objective of safeguard measures cannot be the

[3327] Japan's written reply to Panel question No. 115 at the first substantive meeting.
[3328] Japan's written reply to Panel question No. 112 at the first substantive meeting.
[3329] Japan's written reply to Panel question No. 155 at the first substantive meeting.
[3330] Appellate Body Report, *Korea – Dairy*, para. 96.
[3331] United States' second written submission, paras. 224-226.

eradication of all imports. Safeguard measures cannot target adjustment to competition against imports as a whole and remain below the maximum permitted level under Article 5.1. The Appellate Body has interpreted the whole phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" as requiring that safeguard measures apply only to the extent that they address serious injury attributed to increased imports. This conclusion clearly rules out any interpretation which would allow safeguard measures to address more than the injury caused by increased imports on the basis that it would be necessary "to facilitate adjustment". In other words, the objective of "facilitating adjustment" does not mean that safeguard measures can address competition against the totality of imports.[3332]

7.1447 Switzerland submits that more particularly in *US – Line Pipe*[3333], the Appellate Body stated that Article 5.1, first sentence does not permit a Member to apply a safeguard measure to prevent or remedy "the *entirety* of the serious injury experienced by the domestic industry". The Appellate Body goes on to say that the words "only to the extent necessary" instruct WTO Members to focus on what is "necessary" to fulfil that limited objective, which is to prevent or remedy serious injury and facilitate adjustment".[3334] [3335] The European Communities and Japan suggest that this interpretation is supported by the second sentence of Article 5.1, which sets a limit to safeguard measures implemented in the form of quantitative restrictions. Indeed, quantitative restrictions cannot 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. Thus, the second sentence of Article 5.1 prohibits, in principle, remedies which would have an impact on the totality of the imports and strongly suggests that safeguard measures can only address the increase in imports. The maximum permitted level of the safeguard measures should, in practical terms, be lower if the remedy can address only the increase in imports than if it is permissible to tackle the totality of the imports. In particular, safeguard measures cannot aim at cutting back imports to below the non-injurious level preceding the increase.[3336]

7.1448 Japan argues that the Agreement on Safeguards is meant to address changes in the competitive dynamic between imports and the domestic industry, whether it manifests itself as an absolute increase in imports or an increase relative to domestic production. The issue is not the effects of imports *per se*, but the effects of the import increase. It is critical also that the measure not attempt to address the effects of other factors, and that it take into account the remedial effects already at work in the market, such as anti-dumping and countervailing duties measures imposed since the increase in imports occurred.[3337] Norway adds that competition against imports is a normal feature in an open rule based free trading system and the objective of safeguard measures cannot be the eradication of all imports. It is only the sudden, recent and sharp increase which causes the serious injury that the measure can address.[3338]

7.1449 Korea submits that the difference between focussing on all imports and only on imports that have increased can be important. First, the authorities could quantitatively determine the amount of injury caused by increased imports alone (e.g., imports caused a 20% decline in profitability).

[3332] Norway's second oral statement on behalf of all complainants, paras. 9, 13 and 14.
[3333] Appellate Body Report, *US – Line Pipe*, para. 243.
[3334] Appellate Body Report, *US – Line Pipe*, para. 246.
[3335] Switzerland's second written submission, paras. 109-110.
[3336] Complainants' written replies to Panel question No. 153 at the first substantive meeting.
[3337] Japan's written reply to Panel question No. 153 at the first substantive meeting.
[3338] Japan's written replies to Panel questions Nos. 112 and 115 at the fist substantive meeting; Norway's written reply to Panel question No. 153 at the first substantive meeting.

Therefore, the remedy would be to return the industry to that level of profitability (20%). In this example, only the increase in imports would be addressed. Second, if the authorities are unable to specifically identify the exact amount of injury from increased imports, the measure should address the volume of import increases by reducing the volume of the increase to the extent of increase and its injurious effects. This is an alternative approach. Under either approach, if the entire amount of the imports rather than the increase is used, the result would be very different. In fact, it was only when the imports reached a certain level that they became injurious.[3339]

7.1450 Brazil adds that the entire safeguard mechanism is dependent on there being increased imports. This is what triggers an investigation and is a threshold condition under Article 2.1 for the application of safeguard measures. It is clear that the central purpose of safeguard measures is to address serious injury or the threat thereof from increased imports. Article 5.1 cannot be interpreted in a manner contrary to this purpose. In Brazil's view, Article 5.1 itself supports the notion that the purpose of the Agreement on Safeguards is to restore the *status quo ante*, specifically the condition of the domestic industry before the effect of increased imports. The limitation of quantitative measures to the average of the last three representative years is indicative of restoring the *status quo ante*. In effect, it suggests a rollback to the pre-increase in imports level and puts the burden on the competent authorities to justify quantitative restrictions which roll back imports below a representative former period.[3340] The European Communities, Korea and Brazil add that they would distinguish between the application of safeguard measures to imports as a whole and the application of safeguard measures to remedy the serious injury from increased imports. Because safeguard measures are on the face of the Agreement on Safeguards about remedying serious injury from increased imports, this limitation is implicit in Article 5.1. However, in their opinion, Article 5.1 does not limit the application of safeguard measures only to the increased imports, but rather permits competent authorities to apply safeguard measures to all imports so long as the remedial effect is limited to remedying the serious injury from increased imports.[3341]

7.1451 The United States responds that, based on the reasoning leading up to paragraph 260 of the *US – Line Pipe* Appellate Body Report, which relied heavily on Article 4.2[3342], "increased imports" in that paragraph must be read as referring to "increased imports" within the meaning the meaning of Article 4.2. "Increased" is a past participle modifying imports, so the ordinary meaning of the expression is imports that have "become greater in size, amount, duration, or degree; enlarge[d], extend[ed], intensif[ied]".[3343] Since the imports that have increased are all imports, the expression is to be understood as referring to the totality of imports. The United States submits that this expression must have a different meaning from the expression the "increase in imports". In that case, "increase" is a noun, and means "[t]he result of increasing; the amount by which something is increased, an addition".[3344] Thus, "increase in imports" is equivalent to the expression "only the increase". The context of the expression "increased imports" and "increase in imports" in Article 4 confirms this interpretation. Under Article 4.2(a), the "rate and amount of the increase in imports" and "the share of the domestic market taken by increased imports" are both factors that the competent authorities must consider in their analysis of whether increased imports have caused serious injury. Since a rate is relevant only in evaluating a change, "increase in imports" would indicate the change in imports from their previous levels – that is, it would refer to "only the imports". In contrast, "increased imports" is

[3339] Korea's written reply to Panel question No. 154 at the first substantive meeting.
[3340] Brazil's written reply to Panel question No. 46 at the second substantive meeting.
[3341] The European Communities, Brazil's and Korea's written reply to Panel question No. 47 at the second substantive meeting.
[3342] Appellate Body Report, *US – Line Pipe*, paras. 249-252.
[3343] The New Shorter Oxford English Dictionary, p. 1342.
[3344] The New Shorter Oxford English Dictionary, p. 1342.

the one factor listed in Article 4.2(a) that is not characterized as a "rate of increase" or a "change in the level". Thus, it must refer to "the totality of imports, including the increase".[3345]

7.1452 The United States submits that Article 4.2(b) further confirms this understanding. It calls for a finding of a causal link between "increased imports" and serious injury, and provides for non-attribution when "factors other than increased imports are causing injury to the domestic industry at the same time". If "increased imports" meant only the increase in imports, then the causation analysis would apply only to the increase, and would have to ignore pre-existing import levels. If the Agreement on Safeguards required such an artificial analysis, the United States argues that it would expect it to say so in clearer terms. Practical considerations further support this conclusion. Unlike imports of a certain type of product, imports from a particular source, or products of a particular company, it is impossible to identify the "increase in imports" as a discrete presence in the market and determine its effect on the domestic industry. For example, if imports from all sources increase from 100 units to 150 units between 1999 and 2000 there is clearly a 50 unit increase. However the competent authorities cannot identify any particular 50 of the 150 units imported in 2000 as "the increase". It would, therefore, be impossible for them to perform an analysis of "the increase" by itself that would satisfy the requirements of the Agreement on Safeguards.[3346]

7.1453 The United States also reiterates that nothing in Article 5.1 indicates that safeguard measures are limited to the increase in imports, as opposed to all of the imports that have increased, arguing that Article 1 confirms this conclusion. Article 1 defines a safeguard measure as a "measure[] provided for in Article XIX of GATT 1994". That provision, in turn, provides that if:

> "[A] *product* is being imported into the territory of [a Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers ... of like or directly competitive products, the [Member] shall be free, in respect of such *product* ... to suspend the obligation in whole or in part or to withdraw or modify the concession."

7.1454 The United States argues that, therefore, by definition, a safeguard measure may be applied to a product as such, and not merely to the increase in imports of that product. Article 2.1 mirrors Article XIX in specifying that a Member "may apply a safeguard measure to a *product*" only if it determines that "such *product* is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury". Thus, the determination of serious injury also applies to the entirety of the imported product. Article 4 lays out the requirements for making such a determination, which Article 4.2(a) describes as the determination "whether increased imports have caused or are threatening to cause serious injury ..." Thus, the determination described in Article 4.2 is the same as the determination described in Article 2.1.[3347] Accordingly, "increased imports" in Article 4.2(a) – and elsewhere in that Article – refers to the "product being imported in such increased quantities and under such conditions" under Article 2.1.[3348] Thus, the determination under Article 4.2 has the same scope as the determination described in Article 2.1 – increased imports

[3345] United States' written reply to Panel question No. 153 at the first substantive meeting.

[3346] United States' written reply to Panel question No. 153 at the first substantive meeting.

[3347] The Appellate Body has found that Article 2.1 "as elaborated in Article 4 of the *Agreement on Safeguards*, sets forth the *conditions* for imposing a safeguard measure". Appellate Body Report, *US – Wheat Gluten*, para. 95.

[3348] As the Appellate Body noted in *US – Wheat Gluten*, "[i]n the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2". Appellate Body Report, *US – Wheat Gluten*, para. 96.

as a whole. Article 4.2(a) uses the term "increase in imports" to refer to the change in imports, and the term "increased imports" to refer to all imports.[3349]

7.1455 For the United States, the above-mentioned provisions of the Agreement on Safeguards and Article XIX indicate that the investigation of serious injury, determination of the competent authorities, and resulting application of a safeguard measure are all with regard to increased imports as a whole, and not merely the increase in imports. The United States submits that it is clear that the inquiry under Article 5.1 is based on imports as a whole.[3350]

(c) "Facilitate adjustment"

7.1456 The United States submits that the ordinary meaning of the words in Article 5.1 indicates what effect a safeguard measure may have. "Prevent" means "to forestall or thwart by previous or precautionary measures;" "provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening".[3351] "Remedy" means "put right, reform, (a state of things); rectify, make good".[3352] Thus, a safeguard measure is permissible if it rectifies existing injury attributed to increased imports or forestalls such injury in the future. "Facilitate adjustment" means to promote the adaptation to changed circumstances.[3353] Practice under GATT 1947 indicates that the comparison between the remedial effect of a measure and the injury caused by increased imports is not a matter of scientific precision and this was already recognized in the *US – Fur Felt Hats* Working Party which stated that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties.[3354] [3355]

7.1457 The United States argues that "facilitate adjustment" means to promote the adaptation to changed circumstances.[3356] In light of the other provisions of the Agreement on Safeguards, the United States considers that the changed circumstances in question are the continuation of imports in such increased quantities and under such conditions as to cause or threaten serious injury, which the domestic industry will have to face after the termination of a safeguard measure. Serious injury is defined in terms of the factors listed in Article 4.2(a). A remedy to "facilitate adjustment" could address all of these factors. The United States submits that the reference to "facilitate adjustment" in Article 5.1 means adjustment to a "product ... being imported ... in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause serious injury ..." under Article 2.1. A safeguard measure may facilitate adjustment to both the injurious effects of the increased imports and also the "conditions" associated with those imports that cause serious injury, such as the prices of those imports. The United States further submits that Article 5.1 contains an additive authorization – the measure may both prevent or remedy serious injury and facilitate

[3349] United States' written reply to Panel question No. 47 at the second substantive meeting.
[3350] Appellate Body Report, *US – Line Pipe*, para. 262.
[3351] New Shorter Oxford English Dictionary, p. 2348.
[3352] New Shorter Oxford English Dictionary, p. 2540.
[3353] New Shorter Oxford English Dictionary, pp. 27 and 903.
[3354] *US – Fur Felt Hats*, para. 35. The Appellate Body cited this report as part of the GATT 1947 *acquis*. Appellate Body Report, *US – Line Pipe*, para. 174.
[3355] United States' first written submission, para. 1025.
[3356] United States' first written submission, para. 1025, citing *The New Shorter Oxford English Dictionary*, pp. 27 and 903(defining facilitate as "[m]ake easy or easier; promote, help forward (an action, result, etc.)" and adjustment as "the process of adjusting", which is defined in turn as "[a]dapt oneself (*to*); get used to changed circumstances, etc.").

adjustment. Thus, if a measure that fully remedies serious injury does not fully facilitate adjustment to increased import competition, a Member may apply a measure to a greater extent. The United States clarifies that "facilitate adjustment" means to promote the domestic industry's adaptation to increased imports, not to other potential causes of injury. For example, if the competent authorities determine that factors other than increased imports – such as bad managerial decisions or decreased demand – also caused injurious effects to the domestic industry, Article 5.1 would not authorize application of a measure to facilitate adjustment with respect to those injurious effects. In the United States' view, this is not an issue that the Panel need address in this dispute, since the United States applied the safeguard measure to the relevant product no more than the extent necessary to remedy the injurious effects of imports. The level of the application of the measures was not increased to facilitate adjustment.[3357]

7.1458 The United States submits that any numerical approach focusing merely on remedying the lost profits suffered by a domestic industry during a period of investigation and returning it to a normal level of profitability cannot adequately capture the full breadth of the need to "facilitate adjustment" to import competition pursuant to Article 5.1. To facilitate adjustment, the relief in question must, among other things, allow firms to make necessary new capital investments, consider restructuring and consolidation measures, improve their ability to raise capital, and often take extraordinary steps to make up for lost ground during the period of injury caused by imports. To this extent, such numerical estimates are, of necessity, inadequate to fully account for both the injury suffered by a domestic industry and the remedial measures necessary to facilitate adjustment.[3358]

7.1459 For the complainants, the permitted maximum level of the remedy under Article 5.1, as regards the profitability of the domestic industry, should be an improvement of that profitability limited to the extent that it has been depressed by increased imports. For instance, if increased imports have been found the cause of an X% decline in the profitability of the domestic industry, then the remedy cannot aim at raising profitability by more than X%. This pre-supposes a determination of the extent of the injury suffered by the domestic industry in terms of profitability decline as a result of increased imports.[3359]

7.1460 In the opinion of the United States, the complainants ignore the ordinary meaning of the words. They argue that "the permitted maximum level of the remedy ... should be an improvement of that profitability limited to the extent that it has been depressed by increased imports".[3360] However, their view ignores the accumulation of injurious effects caused by increased imports, which may be as grave a problem as the ongoing injury. Their interpretation of "remedy" also ignores the immediate context of the Article 5.1 reference to "facilitat[ing] adjustment". A measure that only returned the *status quo* in prices or profitability might give the industry a three-year respite, but leave it in no better position to respond to increased imports than it was prior to the measure. The United States further submits that the complainants' view that the measure can only remedy injury attributed to increased imports[3361], disregards the Appellate Body's silence on the significance of "and to facilitate adjustment".[3362] In any event, Article 3.2 of the DSU clearly prohibits the European Communities'

[3357] United States' written reply to question No. 56 at the second substantive meeting.

[3358] United States' first written submission, para. 1063.

[3359] *See*, for example, European Communities' written reply to Panel question no. 113 at the first substantive meeting.

[3360] European Communities' written reply to Panel question No. 112 at the first substantive meeting; Korea and Brazil make similar points in their written replies to Panel question No. 112 at the first substantive meeting.

[3361] European Communities' written reply to Panel question No. 153 at the first substantive meeting; Korea adopts a similar position in its written reply to Panel question No. 115 at the first substantive meeting.

[3362] Appellate Body Report, *US – Line Pipe*, para. 243.

interpretation, as it would effectively excise the words "and to facilitate adjustment" from Article 5.1. Therefore, for the United States, the Agreement on Safeguards establishes "to prevent or remedy serious injury" and "to facilitate adjustment" as additive objectives. The Appellate Body has recognized that one of the objectives of Article 5.1 is to facilitate adjustment.[3363] In fact, "facilitating adjustment" and preventing or remedying serious injury are equally important objectives. Absent adjustment, a safeguard measure would serve no purpose other than to provide a temporary respite, after which the industry would be no better off than it was when the measure began. On the other hand, if the measure succeeded in promoting adjustment, the industry might emerge from the safeguard measure better able to face import competition without the need of trade remedies. Furthermore, the preamble of the Agreement on Safeguards "[r]ecogniz[es] the importance of structural adjustment and the need to enhance rather than limit competition in international markets". By allowing a domestic industry to adjust to import competition, a safeguard measure may enhance the competitiveness or efficiency of that industry, thereby bolstering the long-term degree of competition in international markets.

7.1461 The complainants contest the notion advanced by the United States that it is entitled to remedy or, rather, "compensate" its industry for the accumulated effects of past increased imports.[3364] They also argue that there is no authority in Article 5.1 to remedy injury other than serious injury, suggesting that even if compensation for past serious injury were permitted, the competent authorities would have to determine precisely when serious injury caused by increased imports occurred in order to determine the level of compensation permitted. The European Communities adds that it is strange that the United States applies an accumulation theory to increased imports but refuses to "accumulate" the effects of the various causes of injury other than increased imports in its non-attribution and causation analysis. This should be especially true for alternative causes of injury that are more sensitive to accumulated effects, such as legacy costs or over capacity, for which an analysis of the trends is obviously not enough. Indeed, legacy costs and over capacity do not only have injurious effect if they increase over the period of investigation, but also and mostly because they accumulate.[3365]

7.1462 The European Communities recalls the text of the Presidential Proclamation where it is said that the measures were designed to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.[3366] The European Communities' submits that, according to the United States, a domestic industry is entitled to a further bonanza (going beyond the "bonanza" of protecting against all imports rather than just the increase in imports) when it secures a safeguard measure since the United States considers that "facilitate adjustment to import competition" includes enabling firms to make necessary new capital investments and improve their ability to raise capital. For the United States, returning to a "normal level of profitability" would not be enough and it would be necessary to allow investment, restructuring and capital raising. The European Communities disagrees and submits that the fact that the United States designed its safeguard measures "to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs" demonstrates by itself that the safeguard measures go beyond the extent allowed by Article 5.1 of the Agreement on Safeguards.[3367]

[3363] Appellate Body Report, *Korea – Dairy*, para. 96 (obligation "*to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment*".).

[3364] Norway's second oral statement on behalf of the complainants, paras. 16-19.

[3365] Complainants' written replies to Panel question No. 46 at the second substantive meeting.

[3366] Presidential Proclamation No. 7529 of 5 March 2002, para. 14 (Exhibit CC-13).

[3367] European Communities' second written submission, paras. 508-512.

7.1463 The United States reiterates that Article 5.1 treats the two objectives of preventing or remedying serious injury and facilitating adjustment as additive. That is, if application of a measure necessary to prevent or remedy injury attributed to increased imports would not fully facilitate adjustment to increased imports, a Member could apply the measure to a greater extent.[3368] The United States submits that, however, even if the steel safeguard measures were judged solely on the basis of their necessity to prevent or remedy serious injury, they would meet the requirements of Article 5.1. The United States argues that the numerical analyses (explained below) demonstrate that the safeguard measures did precisely that.[3369]

7.1464 Japan and Korea challenge[3370] the United States' interpretation of Article 5.1 as being "additive". According to the United States, if a measure is sufficient to remedy serious injury but will not facilitate adjustment, a more restrictive measure is allowed under Article 5.1. According to Japan and Korea, the United States asserts that adjustment is not limited to that adjustment which is required in response to increased imports. In sum, the United States appears to claim that it can impose measures sufficient to remedy serious injury from all sources and, if necessary, increase that remedy to facilitate adjustment from all sources of that injury. For Japan[3371], this is inconsistent with the rationale in *US – Line Pipe*, which links the Article 4.2(b) non-attribution analysis to the extent of the measures under Article 5.1. It is also contrary to the limitations on quantitative measures under Article 5.1, which imply restoration of the *status quo ante* as a limitation on measures in general.[3372] Korea[3373] notes that the United States is basically justifying its additional level of relief by arguing that there are direct injurious effects from imports (which their base period corrects), but then somehow there are additional injurious effects that have "accumulated" which justify doubling the profit margin shortfall.[3374]

7.1465 The complainants argue that the United States tries to justify its view by stating that an industry that has suffered from import competition should not only be placed in the same position as before the increase in imports occur, but in an even better position through extra resources to perform a structural adjustment.[3375] In their opinion, the United States claims that the objective to "facilitate adjustment" is "additive" to remedying the serious injury.[3376] Article 5.1 of the Agreement on Safeguards imposes two cumulative limits on the extent of a safeguard measure. The first limit is "the extent necessary to prevent or remedy serious injury" and the second limit is "the extent necessary ... to facilitate adjustment". If the domestic industry already has some ability to adjust to the increase in imports then the relief provided cannot remove all the injury caused by the increased imports, but only

[3368] The United States writes that this formulation does not suggest that a Member may apply a measure to facilitate adjustment to injury attributable to factors other than increased imports. Rather, this formulation recognizes that remedying injury attributable to increased imports and facilitating adjustment *to increased imports* are both equally valid objectives of a safeguard measure under Article 5.1. For example, if a Member considered that a measure that remedied injury attributable to increased imports would not facilitate adjustment to those imports, it might apply the measure to a greater extent. However, if it considered that the same measure did not facilitate adjustment to other factors – such as decreased demand – applying the measure to a greater extent would not be permitted.

[3369] United States' first written submission, para. 1079.

[3370] Japan's and Brazil's written replies to Panel question No. 112 at the first substantive meeting.

[3371] Japan's written reply to Panel question No. 112 at the first substantive meeting.

[3372] Japan's second written submission, para. 166, Brazil's second written submission, para 111.

[3373] Korea's written reply to Panel question No. 46 at the second substantive meeting.

[3374] United States' Step 2 in its "Safeguard Measure Worksheets" at US Exhibit 56.

[3375] United States' second written submission, paras. 184 and 187. United States' written reply to Panel question No. 112 at the first substantive meeting. Norway's second oral statement on behalf of all complainants, paras. 15-17.

[3376] United States' second written submission, para. 189.

that which the domestic industry cannot achieve itself.[3377] In this regard, Brazil[3378] argues that "facilitate" is defined by *The New Shorter Oxford English Dictionary* as: make easy or easier; promote, help forward (an action, result, etc.). Notably, Article 5.1 is not written in terms of "ensure adjustment", "make certain of adjustment", or "accomplish adjustment", all phrases which imply something more than simply facilitating or assisting adjustment. Brazil believes that the "facilitate adjustment" language of Article 5.1 is intended to impose a limitation on safeguard measures beyond "only to the extent necessary to prevent or remedy serious injury". The additional limitation is that the measures necessary to prevent or remedy serious injury must also facilitate adjustment. That is, measures which prevent or remedy serious injury may be excessive to the extent that those measures do not facilitate adjustment. Put differently, measures may not be imposed unless: (i) they are limited to the extent necessary to prevent or remedy serious injury; and (ii) within this limitation, they facilitate adjustment. This reading of Article 5.1 is consistent with the preamble of the Agreement on Safeguards which indicates the desire to balance "the importance of structural adjustment" with "the need to enhance rather than limit competition in international markets". Consistent with these objectives, a measure which prevents or remedies serious injury but does not facilitate adjustment is excessive. In terms of the injury that is remedied and the adjustment that is facilitated, these are limited to the effects of increased imports. The Appellate Body in *US – Line Pipe* makes this clear.[3379] The objective of the Agreement on Safeguards is to provide a temporary period during which a domestic industry can adjust to import competition which has manifest itself in the form of increased imports. The objective of the Agreement on Safeguards is not to prevent or remedy injury from non-import sources or to facilitate the ability of a domestic industry to cope with competitive factors other than increased imports. Thus, the fact that the affected industry may be financially stronger after a period of protection is irrelevant unless it has made adjustments which will make it more able to compete against imports, in view of the circumstances which led to the increased imports, after the relief expires.[3380]

7.1466 Korea notes that the model used by the United States in its 5.1 analysis doubled operating margins over that of the base period ostensibly to take account of the need to facilitate adjustment.[3381] If the United States did not intend to rely on this "injury plus adjustment" approach[3382] – and the United States cannot, as the Appellate Body has already stated in *US – Line Pipe* – then the entire United States justification is fatally flawed.[3383]

7.1467 In response, the United States argues that increased imports may have immediate injurious effects on the domestic industry. For example, the mere fact of an increase may cause the domestic industry to lose sales volume and market share, which would translate into a loss in revenue. This development might impel the domestic industry to reduce its prices to regain volume or market share. The circumstances of the increased imports – that is, the conditions under which they are being imported – may also have immediate injurious effects. In either case, the industry will immediately

[3377] Norway's second oral statement on behalf of the complainants, paras. 15-17.
[3378] Brazil's written reply to Panel question No. 56 at the second substantive meeting.
[3379] Appellate Body Report, *US – Line Pipe*, para. 260.
[3380] Brazil's written reply to Panel question No. 56 at the second substantive meeting.
[3381] United States' first written submission, para. 1074 states "Any price increase would have to return domestic prices at least to a level that would provide operating income equal to a level that does not reflect the price effect of increased imports and then increase prices by a further amount to counteract the negative effects of imports from 1998 to 2000 *and to facilitate adjustment*". (emphasis added). United States' first written submission, para. 1097 and Exhibit US-56, "Safeguard Measures Worksheets", calculations in Step 2 for each product. Korea's Exhibit 14 criticizing the necessity of this additional adjustment in the targeted operating income.
[3382] United States' second written submission, para. 189.
[3383] Korea's written reply to Panel question No. 46 at the second substantive meeting.

suffer a reduction in revenue and profits, and probably a reduction in its profit margin. The decrease in revenue is also likely to reduce the industry's cash flow. These immediate effects may also lead to long-term effects. An industry suffering an import-related decrease in revenue, sales volume, prices, and/or profits will have fewer funds to spend on buying necessary new equipment or facilities, maintaining existing equipment and facilities, improving employee training, or implementing cost reduction programs. The industry may have to release trained workers or cut spending on research and development necessary for its products to remain competitive. Losses may force the industry to spend cash reserves. Lenders faced with this deteriorated financial condition may charge higher interest rates (to reflect the heightened risk of default) or refuse to lend at all. For publicly traded producers, share prices will be likely to fall, reducing their ability to fund new projects through equity financing. According to the United States, in addition to the effects of imports on the price, volume, and revenue of the domestic industry, there will be effects on the industry's underlying condition – its asset base, cash reserves, trained workforce, and ability to raise capital. If the immediate effects of imports go unremedied, the underlying condition of the industry will progressively worsen. The United States refers to this as the accumulation of injurious effects, and argues that the USITC data demonstrate how the injurious effects of imports can accumulate. [3384]

7.1468 By way of example, the United States notes that the state of the domestic CCFRS declined throughout the investigation period, in marked contrast to the steady and significant increase in demand that also characterized that period.[3385] In 1996 and 1997, the domestic industry earned reasonable operating profits and made substantial capital investments in a growing domestic market. In the latter part of the investigation period, however, the condition of the industry substantially deteriorated, to the point of significant losses at the very end of the period.[3386] These losses had significant adverse effects on the cash flow to the domestic industry. In 1996, the CCFRS industry saw US$2.1 billion in cash flow, rising in 1997 to US$2.7 billion, and dipping to US$2.1 billion in 1998. In 1999, cash flow had dropped to US$0.9 billion (just one-third of the 1997 level) and fell further in 2000 to US$0.7 billion. In the first six months of 2001, the domestic industry had a negative cash flow of US$0.8 billion, compared to the US$1.2 billion positive cash flow in the first six months of 2000.[3387] The change from operating income to operating losses and the loss of cash flow accompanied the decline in AUV for commercial shipments of CCFRS. In 1996, the AUV for CCFRS was US$470. By 2000, this amount had declined by 11% to US$418. In the first six months of 2001, the AUV of CCFRS had fallen to US$373, representing a 20% decline in price since 1996.[3388] The number of production workers remained steady from 1996 to 1998, but then, between 1998 and 1999, the number of production and related workers dropped by over 4,000 workers or over 4.2%.[3389] The number of hours worked followed the same pattern. Both the number of hours worked and the number of production and related workers was lower in the first half of 2001 than in the first half of 2000. As the financial performance of the industry declined, capital expenditures fell off as

[3384] United States' written reply to Panel question No. 46 at the second substantive meeting.
[3385] USITC Report, pp. 56 and 60.
[3386] The United States submits that in 1996 and 1997, the domestic industry had positive operating income margins of 4.3 and 6.1% of sales respectively. The percentage dropped to 4.0 in 1998, and into a 0.7% loss in 1999 and a 1.4% loss in 2000. In the first half of 2001, operating losses plummeted to 11.5 percent. USITC Report, p. 53. In dollar terms, the domestic industry posted an operating income of US$1.2 billion in 1996, which rose to US$1.8 billion in 1997, and then fell to US$1.1 billion in 1998. After this point, operating income turned to continually deepening losses – US$181 million loss in 1999 and a US$370 million loss in 2000. In the first six months of 2001, operating losses reached US$1.3 billion, compared to an operating income of US$538 million in the first six months of 2000. USITC Report, pp. FLAT-24 – FLAT-28, Tables FLAT-20 – FLAT-25.
[3387] Ibid.
[3388] USITC Report, p. 53.
[3389] USITC Report, p. 54.

well. From 1996 to 1998, the domestic industry devoted US$2.3 billion, US$2.5 billion, and US$2.3 billion to capital expenditures respectively. By 1999, this amount had fallen to US$1.8 billion, dropping further to US$1.5 billion in 2000. A comparison of interim period data for 2000 and 2001 demonstrates a further decline, as US$478 million was spent in the first six months of 2000, compared to US$361 million in the same period for 2001.[3390] [3391]

7.1469 Similarly, for rebar, the United States explains how imports peaked in 1999, and remained at high levels afterward. However even when imports moderated somewhat in interim 2001, they continued to have injurious effects that combined with the accumulated and continuing injurious effects of imports in prior years. Specifically, imports of rebar (both including and excluding NAFTA imports) peaked in 1999, the second to last year of the investigation period. Total rebar imports reached 1.83 million tons in that year, an increase of more than 300% from 1996 import levels. Total imports then declined slightly to 1.67 million tons in 2000, before increasing to 852,000 tons in interim 2001.[3392] Although the peak of rebar imports occurred in 1999, import levels remained substantially higher in 2000 and interim 2001 than they were in 1996 through 1998. According to the United States, the result was to drive prices even lower in 2000 and interim 2001 than they were in 1999. Unit values of domestic shipments fell from US$274/ton in 1999 to US$269/ton in 2000 and US$265/ton in interim 2001, as domestic producers cut prices in response to sustained higher levels of imports. (Net commercial sales values also bottomed out in 2000 and interim 2001, at US$266/ton. Steel, vol. 2, at LONG-35.) Rebar unit values fell another US$9 per ton from 1999 to June 2001, as import levels moderated slightly from their peak in 1999.[3393] United States rebar producers reported modest operating income of US$43.9 million in 1999, the year that imports peaked. However, the continued high levels of imports combined with lower selling prices resulted in an operating loss of US$59.9 million by 2000.[3394] As a percentage of net commercial sales, the industry's operating profit of 5.0% in 1999 became an operating loss of negative 1.6%. The decline in profitability resulted in cash flow, capital expenditures, and R&D expenses reaching their lowest levels in 2000. Capital expenditures fell from US$108 million in 1996 to US$62.1 million in 1999, and fell again to US$49.4 million in 2000.[3395] Because major capital expenditures in the steel industry require advance planning, the United States claims that it is to be expected that import surges from earlier in the investigation period would lead domestic producers to reduce their capital expenditures later in the period. (In fact, given the lead times for capital spending, an exact match in timing between an import surge and declining expenditures could be purely coincidental.) [3396]

7.1470 For Japan and Korea[3397], the remedy must be limited to the increased imports because that is what "proportionality" means. The adjustment must be to increases in imports and not to other market conditions, etc. After all, the industry must be in a position to compete with imports after the relief ends. This "temporary breathing room" provided by safeguards must be used to adjust to increased import competition. Korea adds[3398] that to suggest that the Agreement on Safeguards does not require that the relief be tailored to the industry's ability to adjust to increased imports flies in the face of the entire object and purpose of the Agreement on Safeguards. First, Article 5.1 is quite clear – there are two mutual conditions to the imposition of relief – it must be limited to the extent necessary to

[3390] USITC Report, pp. FLAT-24 – FLAT-28, Tables FLAT-20 – FLAT-25. The United States derives these figures by adding the reported capital expenditures.
[3391] United States' written reply to Panel question No. 46 at the second substantive meeting.
[3392] USITC Report, p. LONG-11.
[3393] USITC Report, p. LONG-23.
[3394] USITC Report, p. LONG-35.
[3395] USITC Report, p. LONG-35.
[3396] United States' written reply to Panel question No. 46 at the second substantive meeting.
[3397] Japan's and Korea's written replies to Panel question No. 56 at the second substantive meeting.
[3398] Korea's additional comments on Panel question No. 56 at the second substantive meeting.

prevent or remedy serious injury and to facilitate adjustment to increased imports. Moreover, the entire object and purpose of the Agreement on Safeguards would be defeated if the relief were not limited to the relief necessary to allow for adjustment to increased imports. Taking the most extreme case, if an industry were incapable of adjusting to increased imports, there would be no purpose to any relief; the need for "emergency action" would not be present. The Preamble to the Agreement on Safeguards reconfirms the "importance of structural adjustment and the need to enhance rather than limit competition". (If an industry cannot adjust to import competition, structural adjustment should occur.) Article 7.2 of the Agreement on Safeguards repeats the dual conditions for extending relief (*i.e.*, "evidence" that the industry is adjusting) and Article 7.4 makes clear that every effort should be made to facilitate adjustment by progressively liberalizing the measure. In other words, taken as a whole, the terms of the Agreement on Safeguards make clear that facilitating adjustment to increased imports must be a key factor in establishing the level of relief, liberalizing the level of relief, or extending the relief. Logically, the adjustment of the industry to import competition must be the goal of the measure, and any remedy which exceeds the relief necessary to accomplish that goal would not be limited to the permissible extent. Further evidence that such adjustment must be to import competition is found in Article 7.4, which states that the measure should be liberalized (*i.e.*, lessen the restrictions on imports) in order to "facilitate adjustment". Obviously, the relief is phased out so that the adjustment is made to import competition. To comply, there should be a finding that the industry is able to adjust to import competition and that it has a plan for doing this, so that such a finding is adequately substantiated by facts. In some circumstances, an industry may be injured by imports but be incapable of adjusting, so relief would not be justified. In other words, both requirements of Article 5.1 limit the permissible extent of relief so either requirement could result in limiting or reducing the permissible extent of the measure. Korea submits that, in any event, there is no record evidence or even evidence presented to the Panel by the United States which explains how the relief was necessary to allow for adjustment at all, let alone to adjust to increased imports alone. The United States has even denied that adjustment was a consideration in establishing the level of relief.[3399] [3400]

7.1471 China submits that the reference to "facilitate adjustments" in Article 5.1 may mean to relieve pressure of the increased imports on the domestic industry. As the measures may be applied only to the extent necessary to remedy injury caused by the surge in imports, the adjustment should not cover the imports below the trigger level for application of the safeguards measures.[3401]

7.1472 The United States challenges Korea's assertions that "[t]o comply, there should be a finding that the industry is able to adjust to import competition and that it has a plan for doing this". For the United States, nothing in the Agreement on Safeguards requires that an industry present an adjustment plan, or that the competent authorities (or the Member itself) determine that the industry is "able to adjust". Article 4.2(a) is specific about what the competent authorities must consider – "all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry". The Article establishes this obligation as part of the "investigation to determine whether increased imports have caused or are threatening to cause serious injury". It does not mention the facilitation of adjustment. Thus, the "relevant" factors are those relating to injury or causation. The industry's ability to adjust to import competition (or any industry adjustment plans) do not advance this inquiry and, therefore, are not "relevant" in the sense of Article 4.2(a). The United States submits that Article 5.1 addresses imposition of safeguard measures, and does not require the consideration of specific factors. Therefore, it does not obligate a Member to address the industry's ability to adjust, or to require an adjustment plan from the domestic industry. Indeed, reading the Agreement on

[3399] United States' second oral statement, para. 119.
[3400] Japan's and Korea's written reply to Panel question No. 56 at the second substantive meeting.
[3401] China's written reply to Panel question No. 56 at the second substantive meeting.

Safeguards to require the industry as a whole to agree on what adjustment efforts to undertake would suggest the existence of a requirement to create cartels or an endorsement of collusion among the domestic producers. Nothing in the Agreement on Safeguards supports such a conclusion.[3402]

7.1473 Also with regard to Korea's assertion, it is unclear exactly what provision Korea sees as requiring such compliance. Korea also notes that Article 7.2 requires evidence that the industry "is adjusting", and Article 7.4 requires progressive liberalization of the measure "in order to facilitate adjustment"[3403], the United States submits that Korea does not explain how either of these obligations is relevant to the initial decision whether and to what extent to apply a safeguard measure. Indeed, Article 7.2 envisages an analysis of the effectiveness of the measure after it has been in place, which a Member surely cannot perform before applying the measure. Article 7.4, which is not subject to a claim raised by any of the parties, addresses the reduction in the level of application of a measure after its initial application. It is difficult to imagine how this provision would be applicable to the decision on the initial level of application of a measure, as opposed to any subsequent reductions in application. In any event, an adjustment plan or pre-application findings regarding adjustment are not necessary for a Member to determine at a later date whether adjustment has occurred. Thus, a Member is not obliged to seek an industry adjustment plan or to make a finding that the industry is "able to adjust" in order "to comply" with Articles 7.2 and 7.4.[3404]

7.1474 The United States adds that Korea asserts that "to facilitate adjustment" in Article 5.1 means that "the industry must be in a position to compete with imports after the relief ends" and that "'the temporary breathing room' provided by safeguards must be used to adjust to increased import competition".[3405] These statements mistake the objective of a safeguard measure – to facilitate the domestic industry's adjustment to import competition – for an obligation. A Member cannot guarantee in advance that a safeguard measure will achieve a full adjustment to import competition. Other forces could frustrate the success of a measure. The United States submits that Korea's interpretation would also disregard the word "facilitate". As the European Communities and Brazil point out, "facilitate" means "make easy or easier; promote, help forward (an action, result, etc.)".[3406] Further, according to the European Communities, "it therefore implies a contribution to a result – not the assurance of a result".[3407] Thus, Article 5.1 cannot be interpreted to require a Member to ensure before taking a safeguard measure that the industry will be able to compete with imports after termination of a safeguard measure.[3408]

[3402] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3403] Korea's written reply to Panel question No. 56 at the second substantive meeting.

[3404] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3405] Korea's written reply to Panel question No. 56 at the second substantive meeting.

[3406] European Communities' written reply to Panel question No. 56 at the second substantive meeting, quoting the New Shorter Oxford English Dictionary (electronic version) (January 1997). Brazil raises a similar point in its written reply to Panel question No. 56 at the second substantive meeting.

[3407] European Communities' written reply to Panel question No. 56 at the second substantive meeting; Brazil makes a similar point in its written reply to Panel question No. 56 at the second substantive meeting. "The United States agrees with this interpretation of 'facilitate'. (Indeed, para. 1025 of the United States' first written submission cited the definition.) However, the United States disagrees with the conclusion by the European Communiteis and Brazil that this means that a Member's ability to facilitate the adjustment to import competition is delimited by the need to prevent or remedy serious injury. If "making easier" or "promoting" adjustment to the injurious effects of imports (as distinguished from the effects of other factors having injurious effects) requires application of a measure beyond the extent of remedying the injurious effects of imports, Article 5.1 would permit such a measure".

[3408] United States' additional comment on Panel question No. 56 at the second substantive meeting.

7.1475 The United States argues that, therefore, Article 5.1 does not support Korea's view that a Member should require the domestic industry to submit an adjustment plan, and make a finding that the industry is able to adjust. Articles 5.1, 7.2, and 7.4 are the only provisions of the WTO covered agreements that appear in Korea's response. Since they do not support Korea's argument, the Panel should reject it. Finally, although Article 5.1 does not require adjustment plans, or analysis of the industry's ability to adjust, the United States safeguard statute envisages the submission of adjustment plans by domestic producers.[3409] Many of the domestic producers of the ten products subject to steel safeguard measures submitted plans. In addition, the USITC asked producers to indicate what actions they would take to adjust to import competition. Producers provided this information primarily in the form of company-specific (and generally confidential) objectives.[3410] [3411]

7.1476 The United States also challenges Korea's assertion that "there is no record evidence or even evidence presented to the Panel by the United States which explains how relief was necessary to allow for adjustment at all, let alone to adjust to increased imports alone". The United States notes rather that, rather, the record does contain such evidence. For CCFRSS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel rod, the USITC majority found that imports undersold domestic products, and that this condition had a negative effect on domestic producers' prices.[3412] The USITC found further that declining prices contributed to declining profitability. Finally, the USITC found that the domestic industries' capital and research and development efforts were impaired. For each of the products, data on import volumes and values indicate that foreign producers were willing and able to increase greatly their sales of these low-priced products. For the United States, the mechanism for the suppression and depression of prices is obvious. When increased imports sell for prices lower than comparable domestic products, purchasers can switch to lower priced imports. The threat of losing sales can force domestic producers to lower their prices. As long as imports remain in the market at prices lower than comparable domestic products, it is difficult or impossible for domestic producers to improve their situation by raising prices. By demonstrating that imports can increase dramatically, a recent surge would give credibility to customers' threats to replace domestic sales with imports, and would increase their ability to obtain pricing concessions. The effect on the industry's ability to adjust is equally obvious. An industry with low or negative profitability cannot attract the funds necessary to pay for adjustment. Banks will not lend and investors will not contribute capital needed to restructure, to buy more efficient equipment, to retrain workers, or to take any other steps that would facilitate adjustment.[3413]

7.1477 The United States argues that it is beyond dispute that application of the safeguard measures would facilitate the industry's adjustment. An increase in the price for imports would lessen their negative effect on domestic producers' prices, which would likely boost profitability. The data in the USITC record demonstrate that, at least in the first half of 2001, market conditions were not such that import prices would rise sufficiently by themselves. A safeguard measure would bolster import prices

[3409] Section 202(a)(4) of the Trade Act of 1974, 19 U.S.C. § 2252(a)(4) ("A Petitioner under paragraph (1) may submit to the Commission and the United States Trade Representative . . . either with the petition, or at any time within 120 days after the date of filing of the petition, a plan to facilitate positive adjustment to import competition"). Of course, the fact that the US statute – independent of the Agreement on Safeguards or Article XIX of the General Agreement on Tariffs and Trade 1994 envisages adjustment plans does not elevate them to the status of an international obligation.

[3410] A summary of these plans appears on pp. 361-362, 374, 382, 389, 396, 403, and 412 of the USITC Report. Tabulations of proposed adjustment efforts appear on pp. FLAT-78, LONG-102 – LONG-103, TUBULAR-66, and STAINLESS-91of the USITC Report.

[3411] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3412] USITC Report, pp. 61-62, 97, 106, 113, 163, 176, 211, and 220-221.

[3413] United States' additional comment on Panel question No. 56 at the second substantive meeting.

and relieve pressure on domestic producers' prices. No party suggested an alternative means to increase domestic and import prices. Thus, the safeguard measures were necessary both to raising domestic prices and thereby providing the funds that would facilitate adjustment. There should be no concern that the tariff measures applied by the United States would also address the effects of other causes that putatively had a negative effect on the various industries. For example, they would not eliminate excess capacity, revive flagging demand, or address problems allegedly faced by particular producers, among other things. Thus, it is clear that the steel safeguard measures will facilitate the industry's adjustment to import competition.[3414]

7.1478 Finally, the United States[3415] challenges Korea's assertion that "[t]he United States has even denied that adjustment was a consideration in establishing the level of relief". For the United States, this assertion represents something of a reversal, in that complainants had previously argued that the United States was focusing on the need to facilitate adjustment, and disregarding the prevention or remedy of serious injury.[3416] The only support Korea cites for its exactly opposite characterization of the United States position is paragraph 119 of the US second oral statement.[3417] That paragraph states:

> "As we noted in our first written submission, our numerical exercises are based solely on remedying the injurious effects of increased imports as identified by the USITC, and do not assert that adjustment to import competition required application of a safeguard measure *beyond that extent*." (emphasis added).

However, Korea ignores the preceding paragraph, which states:

> "It is also clear that the concepts of remedying serious injury and facilitating adjustment overlap to a degree. 'Rectifying' or 'making good' the injurious effects of increased imports will provide the industry with resources that will enable it to compete more successfully with imports upon termination of the safeguard measure. Indeed, that is the purpose of a safeguard measure – to provide temporary breathing space so the industry *can* adjust."[3418]

7.1479 These two paragraphs reflect that the United States did consider the need to facilitate adjustment to import competition in deciding to apply the steel safeguard measures. This has been clear from the outset. In Proclamation 7529, which established the measures, the President "determined that these safeguard measures will facilitate efforts by the domestic industry to make a positive adjustment to import competition".[3419] These two paragraphs also reflect the point that the United States did not consider in this proceeding the need to facilitate adjustment as a factor indicating that any of the steel safeguard measures should be applied beyond the extent necessary to prevent or remedy the injurious effects attributable to increased imports. The United States insists that it did show that under Article 5.1, preventing or remedying serious injury and facilitating adjustment are additive bases for a safeguard measure. Therefore, the discussion of Article 5.1 has

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[3414] United States' additional comment on Panel question No. 56 at the second substantive meeting.
[3415] United States' additional comment on Panel question No. 56 at the second substantive meeting.
[3416] European Communities' second written submission, para. 509 ("The only indication we had in the Presidential Proclamation of the purpose sought to be achieved by the US safeguard measures is that they were designed to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs"). The European Communities expands on this allegation in paragraphs 510 through 512 of that submission.
[3417] Korea's written reply to Panel question No. 56 at the second substantive meeting, footnote 86.
[3418] United States' second oral statement, para. 118.
[3419] Proclamation 7529 of 5 March 2002, 67 Federal Register 10553, 10555, recital 14 (7 March 2002).

focused on confirming that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy serious injury. This was also the focus of the Appellate Body's analysis in *US – Line Pipe*.[3420] It is the United States' view that remedies applied within this limitation, like each of the steel safeguard measures, will be equally necessary to facilitate adjustment. Thus, there was no need for a further inquiry in this dispute into whether facilitating adjustment would justify applying one of the measures at a higher level. This in no way suggests that the steel safeguard measures, which were applied at or below the level necessary to prevent or remedy serious injury, would not facilitate adjustment.[3421]

7.1480 The United States concludes that in many cases, a safeguard measure that prevented or remedied serious injury would also provide all or most of the resources that the industry needed to facilitate adjustment to increased imports under such conditions as to cause serious injury. In some situations, the industry may need to make particular investments or reach a particular level of investment to adjust to the injurious effects of increased imports. If a measure that fully prevents or remedies the injurious effects of increased imports does not cover those needs, the level of the safeguard measure could be increased to do so. According to the United States, it did not increase the levels of the steel safeguard measures in this fashion.[3422]

7.1481 The complainants[3423] argue that since "facilitate adjustment" is an additional requirement which is cumulative to the limitation of the remedy to the extent necessary to address the injury caused by increased imports, the safeguard measures may not exceed the lesser of what is necessary to prevent injury from increased imports and what is necessary to facilitate adjustment. A domestic industry will often be in a position to adjust to increased imports on its own without the need for safeguard measures. In such cases, Article 5.1 makes clear that no safeguard measures are permitted. Indeed, the word "facilitate" means: make easy or easier; promote, help forward (an action, result, etc.)[3424] It therefore implies a contribution to a result – not the assurance of a result. Also, the Preamble of the Agreement on Safeguards recalls the need to balance "the importance of structural adjustment" with "the need to enhance rather than limit competition in international markets". Consistent with these objectives, a measure which prevents or remedies serious injury but is not necessary to facilitate adjustment is excessive. Therefore, a justification of the level of a safeguard measure requires both a demonstration that it is necessary to remedy injury and that it is necessary to – and will – facilitate adjustment. The latter requirement presupposes an analysis of what adjustment is needed and possible.

7.1482 The European Communities argues that by assuming that any measure needed to remedy serious injury will also be equally necessary for facilitating adjustment, the United States reveals that it takes no account of the industry's own capacity to adjust but imposes on imports the whole extent of what it considers necessary to remove the effect of increased imports (that is, in its view, the effect of imports that happen to have increased to some extent). Moreover, by presuming that "an industry [benefiting from] a safeguard measure would use any improvement in its financial position to advance preparations for the imminent removal of temporary import relief" and, therefore, that the protection

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[3420] Appellate Body Report, *US – Line Pipe*, paras. 237-262. Indeed, Norway recognizes that the Appellate Body did not need to address the role of facilitating adjustment in the Article 5.1 analysis; Norway's written reply to Panel question No. 56 at the second substantive meeting; Norway's second oral statement on behalf of the complainants, paras. 15-17.

[3421] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3422] United States' additional comment on Panel question No. 56 at the second substantive meeting.

[3423] Complainants' written replies to Panel question No. 56 at the second substantive meeting; Norway's second oral statement on behalf of the complainants, paras. 16-17.

[3424] New Shorter Oxford English Dictionary, (electronic version) January 1997.

provided will in fact be used to facilitate adjustment, the United States disregards the issue of whether the extent of the protection may go beyond what is necessary to facilitate adjustment.[3425]

7.1483 The European Communities and Korea further note that the United States repeatedly claims that: "The level of the application of the measures was not increased to facilitate adjustment.[3426] However, justification for the level of the safeguard measures given by the President states that they were designed to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs".[3427] [3428]

7.1484 For New Zealand, Article 5.1 provides that measure can only be taken to the extent necessary to remedy or prevent serious injury and facilitate adjustment. Accordingly a measure is not permitted that may be necessary to remedy or prevent serious injury, but which would not facilitate adjustment to the increase in imports resulting from the granting of the relevant tariff concession. Such an interpretation is clear from the finding of the Appellate Body that Article 5.1 imposes an obligation on a Member to ensure that the measure applied is "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment".[3429] As noted above, this was recognized by the USITC in relation to its recommendation of a tariff of 20% for certain flat steel products when it concluded that some of the proposals for higher tariffs did not "clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry's improvement".[3430] By implication therefore the application of a higher tariff by the President of 30% is in fact not necessary for facilitating adjustment, and would in fact have the opposite effect that the USITC warned of.

7.1485 The United States argues that the view that "a measure is not permitted that may be necessary to remedy or prevent serious injury, but which would not facilitate adjustment to the increase in imports resulting from the relevant tariff concession"[3431] would mean that a measure could be applied no more than the extent necessary to prevent or remedy serious or facilitate adjustment, whichever was lower. As a practical point, it is difficult to see how a measure necessary to remedy serious injury would not be equally necessary as an aspect of facilitating adjustment. If an industry continues to experience serious injury from imports, presumably it has not adjusted to import competition. Furthermore, the United States would expect that an industry subject to a safeguard measure would use any improvement in its financial position to advance preparations for the imminent removal of temporary import relief. However, according to the United States, New Zealand suggests that the objectives of remedying serious injury and facilitating adjustment were in conflict for flat-rolled steel. It alleges that the USITC "recognized" that "proposals for higher tariffs [than recommended by the USITC] did not 'clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry's improvement.'"[3432] For the United States, New Zealand misunderstands the USITC's statement. First, the USITC recommendation and explanation have no legal significance. Second, the agency raised this point with regard only to "some of the domestic industries' proposals" and placed it in a footnote to a section applicable to all of the products, rather than CCFRS.[3433] In any event, for each of the ten steel products, the President adopted a measure at a level lower than the

[3425] European Communities' additional comment on Panel question No. 56 at the second substantive meeting.
[3426] United States written reply to Panel question No. 56 at the second substantive meeting.
[3427] Para. 14 of the Presidential Proclamation No. 7529 of 5 March 2002 (Exhibit CC-13).
[3428] European Communities' and Korea's additional comments on Panel question No. 56 at the second substantive meeting.
[3429] Appellate Body Report, *Korea – Dairy*, para. 96.
[3430] USITC Report, Vol. 1, p 358 and footnote 22.
[3431] New Zealand's second written submission, para. 3.180.
[3432] New Zealand's second written submission, para. 3.180.
[3433] USITC Report, p. 358.

measure proposed by the domestic industry. Therefore, the USITC's observation about some of proposals by domestic industries does not apply to the safeguard measures established by the President, including the measure on CCFRS. The United States also argues that, as a matter of interpretation, New Zealand misreads the text of Article 5.1. Article 5.1 uses "and" to connect "facilitate adjustment" with "prevent or remedy serious injury", indicating that the two are additive. It does not suggest that they restrict each other. If that provision established two independent tests, and required a Member to choose the one that resulted in application of the measure at the lower level, it would state something like "a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury, but no more than necessary to facilitate adjustment". As it does not, the United States contends that New Zealand's understanding of Article 5.1 is plainly contrary to the established principle of interpretation that "words must not be read into the Agreement that are not there".[3434] [3435]

(d) Time reference point for analysis

7.1486 The United States argues that Article 5.1 requires only that a measure be applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment, which has been read by the Appellate Body as referring only to injury caused by increased imports. Thus, the injury is caused by increased imports, and not by the imports themselves, and the need to adjust to imports is the proper reference point for analysis of a safeguard measure. It may be that the negative effects of imports began at the same time as the increased imports. In these cases, a Member might find it appropriate to refer to the period during which imports increased to identify the injury caused by imports and devise a measure to prevent or remedy that injury and facilitate adjustment.[3436] However, the United States adds, two other scenarios are possible. It may be that at the time imports began increasing, the conditions of competition were such that the imports did not initially have negative effects on the domestic industry, or that the negative effects began so slowly as to not yet constitute serious injury. In that case, the reference period for devising an appropriate measure to prevent or remedy serious injury and to facilitate adjustment may begin after imports began increasing.[3437] It is also possible that imports had negative effects on the domestic industry before they began increasing, and that the negative effects of imports and other factors matured into serious injury only after the increase. In that case, the reference period for devising an appropriate measure to prevent or remedy serious injury and to facilitate adjustment may begin before imports began increasing. While this was not the case for any of the ten steel safeguard measures, the Panel should recognize the theoretical possibility of this occurrence in its analysis of Article 5.1. In short, in requiring that the injury to the domestic industry and its need for adjustment are the benchmark for the safeguard measure, Article 5.1 requires a consideration of the facts of each case. It does not permit an automatic recourse to the period during which imports increased.[3438]

7.1487 The European Communities submits that Article 5.1 imposes an obligation to tailor the remedy so as to address exclusively the portion of the entire injury suffered by the domestic industry which can be attributed to increased imports. This injury has to be measured in the period during which imports have increased. Accordingly, the period during which imports have increased is relevant for the determination of the level of the remedy under Article 5.1. Brazil adds that the first sentence of Article 5.1 addressing non-excessive remedies, should be read in the context of the second sentence of Article 5.1 which, by limiting quantitative restrictions to historically representative levels,

[3434] Appellate Body Report, *US – Line Pipe*, para. 250.
[3435] United States' written reply to Panel question No. 56 at the second substantive meeting.
[3436] United States' written reply to Panel question No. 152 at the first substantive meeting.
[3437] United States' first written submission, para. 1121.
[3438] United States' written reply to Panel question No. 152 at the first substantive meeting.

implies that the remedy is intended to restore the *status quo ante*, not compensate for past injury. For Brazil, as a general matter, since the objective of safeguard measures is to restore the *status quo ante* by eliminating the injurious effects of increased imports, one would expect that a parallel between the period during which increased imports are identified and the period to which reference is made for the purposes of Article 5.1 could and should be drawn. The problem in the instant case is that the increase in imports is remote and unrelated to the situation in the market in any recent period. When the period of increased imports is remote, it is difficult to see how it becomes relevant to addressing a current import problem.[3439]

7.1488 Japan argues that a parallel between the period during which increased imports are identified and the period to which reference is to be made in assessing the level of the safeguard measure might be an appropriate benchmark depending on how recently imports increased relative to the time of the investigation. The question touches upon the practical reason why, under Article 2.1 as clarified by the Appellate Body in *Argentina – Footwear (EC)*, increased imports must be recent.[3440] Where imports have been decreasing over a period of years, the issue of necessity becomes moot; drawing a parallel between the level of a measure and the now dated effect of increased imports would be inappropriate. This is consistent with the correlation requirement under Article 4.2(b), first sentence, including the understanding that increased imports normally shall coincide with declining industry performance.[3441] Brazil argues that the wider the disconnect between the two, the more difficult it is to establish a causal link. At some point, when increased imports are no longer a manifestation of the recent past, the inquiry must become moot. For Korea, it is important to recall that the increase in imports must be recent. If it is not, then the threshold for a measure has not been met. If the authorities determine that all the conditions for a measure have been met and that a measure should be imposed, then the "benchmark" for the measure must be found in the analysis by the authorities of increased imports, serious injury, and causation so in that way they must be related. Furthermore, the measure could be designed to return the industry to its state prior to the increase in imports as long as any other factors that also contributed to injury are properly isolated and evaluated so that the measure is carefully tailored to address only those effects caused by increased imports.[3442]

(e) Justification of the measure

(i) Timing of justification

7.1489 The complainants argue that the Appellate Body has made clear the obligation of explaining and justifying the extent of the measure. They refer, *inter alia*, to the statements by the Appellate Body in *US – Line Pipe*[3443] it is stated that the parties are under an obligation to "clearly explain [] and justify the extent of the application of the measure". Thus a Member must ensure that: (i) the chosen measure is proportional to the "serious injury" caused by the increase in imports alone, and not remedy the fact that there are imports at all; a proper non-attribution of the injury caused by other factors must also be made; (ii) no additional relief over and above what is necessary to remedy the "serious injury" attributed to increased imports, to assist in further adjustments of the domestic

[3439] Complainants' written replies to Panel questions Nos. 153 and 156 at the first substantive meeting.
[3440] Appellate Body Report, *Argentina—Footwear (EC)*, para. 130.
[3441] Appellate Body Report, *Argentina—Footwear (EC)*, paras. 144-145.
[3442] European Communities', New Zealand's, Norway's, Korea's, Japan's and Brazil's written replies to Panel questions Nos. 152 and 153 at the first substantive meeting.
[3443] Appellate Body Report, *US – Line Pipe*, para. 236.

industry is imposed; and (iii) it clearly explains and justifies the measure prior to or at the time it imposes the measure.[3444]

7.1490 For the European Communities, Japan, China and Switzerland, the Appellate Body in *US – Line Pipe* has made it clear that whether the conditions required to impose a safeguard measure have been met and whether a safeguard measure has been applied only to the extent necessary are two separate issues.[3445] Therefore, if the conditions pertaining to increased imports, injury and causation required to establish the right to apply a safeguard measure have not been satisfied, it is not necessary to investigate whether the extent of such safeguard measure is consistent with Article 5.1. Also, since the conditions required to impose a safeguard measure have not been met, any safeguard measure, whatever its extent might be, would fall short of the obligation set forth in Article 5.1.[3446]

7.1491 Similarly, for Norway[3447], the violation of injury determination and the violation of causal link are particularly relevant in order to conclude *ipso facto* that the United States measures go beyond the extent necessary. According to Norway, the violations of the provisions of the Agreement on Safeguards or GATT 1994 are sufficient to conclude that the United States measures, for all or some products (depending on the Panel's finding on the previous violations), also violate Article 5.1 of the Agreement on Safeguards, whatever the justification given by the United States in the USITC Report.[3448]

7.1492 Norway and Switzerland add that the justification under Article 5.1 is not only intended to help the Panel in determining if the relevant conditions are fulfilled but should also help the Member making the right decision. Attempts at a *post facto* justification will not suffice in this respect. As the justification must be determined by the Member prior to imposing the safeguard in question, there seems to be no legitimate reason why it should be kept secret and not be given to the Members concerned.[3449] Korea submits that the United States provides an *ex post* explanation of its measures and even creates an *ex post* record from which to construct that explanation.[3450]

7.1493 The United States first recalls that the assessment of consistency with the Agreement on Safeguards involves two "separate and distinct" inquiries: "first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty?" According to the United States, only the content of the first investigation is to be reported before the measure is actually imposed. Article 5.1 explicitly states that the role of applying a safeguard measure is "to prevent or remedy serious injury and to facilitate adjustment". It also states that a Member may apply a safeguard measure "only to the extent necessary" for these purposes. Thus, the serious injury experienced by the domestic industry and the need to facilitate adjustment define the limit for applying a safeguard measure. A Member may apply a safeguard measure in any form and at any level that falls within the parameters of Article 5.1 and Article 5.1 does not restrict a Member's discretion to act within this limitation. The Member may choose any form for the measure – for example, a tariff, tariff-rate quota, or quantitative restriction.

[3444] Norway's second oral statement on behalf of the complainants, paras. 8-9.

[3445] Appellate Body Report, *US – Line Pipe*, para. 242.

[3446] European Communities' written reply to Panel question No. 105 at the first substantive meeting; Japan's first written submission, paras. 319-321.

[3447] Norway's first written submission, para. 352.

[3448] Norway's first written submission, para. 351.

[3449] Switzerland's second written submission, para. 114; Norway's second written submission, para. 173.

[3450] Korea's second written submission, para. 241.

Within this limitation, the Member may also choose the level of the measure – an *ad valorem* duty rate, a specific duty amount, the volume subject to a quota, etc.[3451]

7.1494 Some complainants read the passage of the Appellate Body *in US – Line Pipe* referring to the incidental effects of a proper investigation on the chosen level of remedy as placing an affirmative procedural duty on Members to explain in a published report the "sufficient motivation" or "justification" for the measures selected.[3452] For the United States, this interpretation is devoid of merit. The reasoning in the *US – Line Pipe* report makes clear that the competent authority's "compliance with Articles 3.1, 4.2(b) and 4.2(c)" in its investigation (*i.e.*, by "separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports" in a detailed report) "*should* have the *incidental* effect of providing sufficient 'justification'" for the safeguard measure applied.[3453] This passage indicates the Appellate Body's understanding that the competent authorities will *not* explain how a safeguard measure complies with Article 5.1 – if they did, the justification would be intentional, and not an "incidental effect." In other words, although Members need not *explicitly* state the reasons for selecting safeguard measures, the need for the measures should be *implicit* from the findings of the competent authorities.[3454] The Appellate Body will use the competent authority's report as the "benchmark" to determine, on a substantive basis, whether the measures selected did, in fact, comply with Article 5.1. However, the report itself need not address this issue. Thus, a Member remains free to explain its compliance with Article 5.1 during the dispute settlement process.[3455]

7.1495 The United States notes that the Appellate Body found in *Korea – Dairy* and reaffirmed in *US – Line Pipe* that Article 5.1 does not oblige a Member to demonstrate, at the time of taking a safeguard measure, how the measure complies with Article 5.1. Nothing in Article 3.1 affects this conclusion. In *US – Line Pipe*, the Appellate Body reiterated that "[i]t is clear, therefore, that apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[3456] The texts also make clear that Articles 3.1 and 4.2(c) are obligations of the "competent authorities". The only functions assigned to the competent authorities under the Agreement on Safeguards are to investigate and make determinations of serious injury. The competent authorities are mentioned only in Articles 3, 4, and 7.2, and always in those contexts. In contrast, Articles 5 and 7.1, which address the extent and duration of a safeguard measure, make no mention of the competent authorities or their investigation. These obligations are addressed to the Member itself, which is not required to provide a report under Article 3.1.[3457] The United States recalls that, with respect to the investigation, Article 3.1 states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions". With respect to the determination of serious injury, Article 4.2(c) states that "[t]he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". As the competent authority, the USITC must comply with these requirements. However, there is no analogous provision applicable to step two, i.e., application of the safeguard measure, except with respect to certain types of quantitative restrictions that were not used in the steel case. According to the United States, neither Article 5 nor any other provision of the Agreement on Safeguards contains an

[3451] United States' first written submission, paras. 1018-1023.
[3452] Korea's first written submission, paras. 203-207; Norway's first written submission, paras. 348-350.
[3453] Appellate Body Report, *US – Line Pipe*, para. 236 (emphasis added).
[3454] United States' first written submission, para. 1051.
[3455] United States' first written submission, para. 1031.
[3456] Appellate Body Report, *US – Line Pipe*, para. 233.
[3457] United States' first written submission, paras. 1018-1023.

obligation to explain at the time of taking a safeguard measure how the measure remedies or prevents serious injury and facilitates adjustment. Thus, the President, who administers this second step, was under no obligation to provide such an explanation. The absence of an explanation of how a measure is applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment signifies only that the explanation has not been published. It does not indicate anything about whether the explanation would establish consistency with Article 5.1.[3458]

7.1496 The United States submits that the complainants are now essentially contending that Articles 3.1 and 4.2(c) create just the obligation to explain, that the Appellate Body has twice found does not arise from Article 5.1.[3459] According to the United States, the complainants argue that a safeguard measure's consistency with Article 5.1 is clearly a "pertinent issue of fact or law" and, therefore, the report of the competent authorities under Article 3.1 must contain findings or reasoned conclusions on that issue.[3460] For the United States, the text of Article 3.1 is completely at odds with this interpretation. Rather, it is clear that Article 3.1, third sentence, and Article 4.2(c) are related to the investigation of the competent authorities. Article 4.2(c) references the investigation explicitly, while the title of Article 3 is "Investigation". Article 4.2(a) specifies the purpose of this investigation – "to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry". In other words, an investigation is conducted to determine whether conditions (as set forth at Article 2.1) are such that safeguard measures may legally be applied. By the terms of Article 3.1, Members may not apply safeguard measures until the "investigation" is complete.[3461] Once the competent authorities determine that safeguard measures may be applied, the Agreement makes clear that it is the "Member", not the "competent authorities" of that Member, who decides what, if any, safeguard measures shall be applied.[3462] Although Article 3.1 provides that the "competent authorities shall publish a report setting forth their findings and reasoned conclusions", there is no similar requirement that Members publish their findings regarding how the measures should be applied. In particular, other than the requirement to justify certain quantitative restrictions, which is not applicable to this dispute, there is no provision requiring Members to publish findings regarding why the particular safeguard measures selected conform with Article 5.1. The "pertinent issues of fact and law" that must appear in the report are, therefore, those issues that relate to the "investigation" by the "competent authorities" regarding whether the conditions for applying safeguard measures have been satisfied.[3463] They do not include issues related to the Members' selection and application of a measure consistent with Article 5.1.[3464] For the United States, it is noteworthy that the Appellate Body only described Article 3 as applicable to the inquiry regarding the

[3458] United States' written reply to Panel question No. 128 at the first substantive meeting.

[3459] European Communities' first written submission, para. 632; Japan's first written submission, paras. 325-328; Korea's first written submission, paras. 203-213; Norway's first written submission, para. 357; New Zealand's first written submission, paras. 4.203-4.204; Brazil's first written submission, para. 246.

[3460] Korea's first written submission, para. 167.

[3461] Article 3.1 states that "[a] Member may apply a safeguard measure *only following an investigation* by the competent authorities of that Member". (Emphasiz added.)

[3462] Article 3.1 states that "[a] *Member* may apply a safeguard measure only following an investigation by the competent authorities of that Member;" (emphasis added) and Article 5.1 states that "[a] *Member* shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment".

[3463] Appellate Body Report, *US – Wheat Gluten*, para. 52 ("The scope of the obligation to evaluate 'all relevant factors' is, therefore, related to the scope of the obligation of competent authorities to conduct an investigation").

[3464] United States' first submission, paras. 1042-1046.

determination of serious injury under Articles 2 and 4, and not in conjunction with the consideration whether the measure is consistent with Article 5.1, first sentence .[3465]

7.1497 The complainants challenge the United States view that the United States was under no obligation to justify the safeguard measures at the time of application and that a Member remains free to explain its compliance with Article 5.1 first during the dispute settlement process.[3466] In the view of the complainants, the arguments put forward by the United States have no merit. They are of the firm view that Article 3.1 of the Agreement on Safeguards includes an obligation to provide sufficient justification for a safeguard measure.[3467]

7.1498 China argues that the United States is trying to make an artificial distinction between the investigation and the application of the measure. In particular, the United States wrongly asserts that Articles 3.1 and 4.2(c) are obligations of the "competent authorities" and that the only functions assigned to the competent authorities are to investigate and make determinations of serious injury. The distinction made by the United States is not relevant, since WTO obligations are always imposed on a WTO Member. From there on, any authority of a WTO Member is necessarily subject to the WTO obligations undertaken by this Member. On the other hand, it is always a WTO Member that is considered to be responsible for a violation of its WTO obligations committed by any of its authorities. All WTO obligations are, by nature, supported solely and finally by the WTO Members. It is, therefore, not relevant to try to make a distinction between obligations addressed to the Member itself and obligations addressed to one of its authorities. The fact that the United States decided to split its decision process in the context of safeguards investigations is not without any impact on the current proceeding. Following the reasoning of the United States, separating and distinguishing the injurious effect of factors other than increased imports from those caused by increased imports should be related to the investigation and therefore be the task of the "competent authority". However, China notes that the Appellate Body in *US – Line Pipe*[3468], refers to this task as being undertaken by "a Member proposing to apply a safeguard measure". This should bring enough evidence that there is no such division of obligations as suggested by the United States under the Agreement on Safeguards and that the related distinction between a "Member" and a "competent authority" is of no relevance.[3469]

7.1499 Korea argues[3470] that the United States must demonstrate that the reasoning of its authorities regarding increased imports, serious injury and causation, justifies the measure imposed. However, in fact, the detailed analysis and reasoned conclusions of the USITC demonstrate that the United States measure actually imposed exceeded what was "necessary". Thus, Korea argues the United States proposes instead to justify its measure through *ex post* reasoning by creating a new record with a new analysis and conclusions, which is actually is in conflict with the USITC's reasoning on serious injury in numerous respects.[3471] However, in the case of welded pipe, the USITC specifically found that only future, additional injury needed to be prevented.[3472] Moreover, Korea argues that the United States is wrong that the USITC remedy recommendation is not relevant. In fact, it provides further clarification or justification of how the remedy should be adapted to the serious injury/threat of

[3465] United States' first submission, paras. 1047-1048.
[3466] United States' first written submission, paras. 1051-1052.
[3467] Switzerland's second written submission, para. 112; Japan's first written submission, paras. 325-328; Norway's second oral statement on behalf of the complainants, para. 23.
[3468] Appellate Body Report, *US – Line Pipe*, para. 236.
[3469] China's executive summary of the second written submission, pp. 9-10.
[3470] Korea's second written submission, para. 244.
[3471] Korea's second written submission, paras. 244-245.
[3472] USITC Report, Vol. I, pp. 164 and 383 (Exhibit CC-6).

serious injury benchmark by the authors of those underlying factual and legal conclusions.[3473] While such findings are not binding or determinative for the US President under United States law, those findings and recommendations are grounded in the serious injury/threat finding which the Appellate Body has said are relevant and, therefore, those recommendations complement the serious injury findings and offer additional compelling evidence of the benchmark against which to assess the permissible extent of the measure. The United States cannot just "wish away" parts of its own published report.[3474]

7.1500 The European Communities and China state that, in principle, the Appellate Body has indicated that there is no obligation to justify, prior to the application of a safeguard measure, that it does not go beyond the extent necessary to prevent or remedy the injury and to facilitate adjustment.[3475] Therefore, an omission of a discussion as to how the safeguard measure is limited to the extent necessary to prevent or remedy the injury and to facilitate adjustment does not in itself mean that the measure at issue surpasses that extent.[3476] However, the non-attribution exercise required under Articles 3.1, 4.2(b) and 4.2(c) must result in findings and reasoned conclusions in the report of the competent authority which have to provide evidence that the safeguard measure applied on the basis of these findings and reasoned conclusions clearly does not go beyond the extent necessary to prevent or remedy the injury caused by increased imports.[3477] Therefore, in the view of the European Communities, the question is not so much whether "Article 3.1 applies to Article 5.1" as whether the safeguard measures actually imposed pursuant to Article 5.1 can be considered to be based on a determination under Article 3.1. The European Communities considers that this is not the case in respect of many of the safeguard measures imposed by the United States in this case, especially those applied on products in the CCFRS product bundle and on tin mill.[3478]

7.1501 The United States submits that the complainants rest their arguments almost entirely on their claim that the USITC determinations of serious injury were inconsistent with the Agreement on Safeguards, and that this alleged shortcoming invalidates the safeguard measures. The USITC determinations were fully consistent with the Agreement on Safeguards and GATT 1994. Therefore, the primary argument against the steel safeguard measures themselves is unfounded. However, should the Panel find some flaw with the USITC determinations, the United States submits that two simple numerical tests exist to demonstrate that the United States complied with Article 5.1. These are explained in further detail by the United States below. These tests cannot be interpreted as a quantification of injury or of the effect of a safeguard measure, which the United States shows is neither consistent with the framework established under the Agreement on Safeguards nor possible. At best, they can provide an approximation that can indicate that a measure is set at an appropriate order of magnitude. The United States written submission contains two such numerical tests, which

[3473] Presumably, Korea argues, this was the United States' rationale for requiring such a recommendation by the USITC in the first place.

[3474] Korea's second written submission, paras. 244-245.

[3475] Appellate Body Report, *Korea – Dairy*, paras. 99-100; Appellate Body Report, *US – Line Pipe*, para. 233.

[3476] The European Communities' and China's written replies to Panel question No. 111 at the first substantive meeting.

[3477] The European Communities' written reply to Panel question No. 113 at the first substantive meeting.

[3478] The European Communities' and China's written replies to Panel questions No. 110 at the first substantive meeting.

show that the magnitude of the steel safeguard measures is consistent with the injury attributable to increased non-FTA imports.[3479]

7.1502 The complainants respond that they have, however, demonstrated that the measures were unjustified based on the facts before the USITC and President. Since the complainants demonstrate that the United States failed, in many respects, to comply with the requirements of Articles 4.2(b) and 4.2(c) of the Agreement on Safeguards, they have established a prima facie case that the United States measures are applied beyond the "extent necessary" and, therefore, violates Article 5.1 of the Agreement on Safeguards.[3480]

(ii) Presidential measure differs from measure recommended by the competent authority

7.1503 The complainants note, in this regard, that the Presidential Proclamation imposed an increased tariff of: Year 1: 30%; Year 2: 24%; Year 3: 18%[3481] but there is no particular explanation for this choice. Because the President's measure diverged from the USITC's recommendation, he was required to abide by the "investigation" requirements of Article 3.1, including the requirement to provide a report setting forth "findings and reasoned conclusions reached on all pertinent issues of fact and law".[3482] In particular, the President made no attempt to demonstrate that his safeguard measures were no more restrictive than necessary under Article 5.1. The President, therefore, did not "clearly explain[] and 'justify[]' the extent of the application of the measure".[3483] Norway adds that the absence of any report containing such findings and reasoned conclusion is especially surprising given that the USTR conducted its own independent investigation on behalf of the President.[3484]

7.1504 New Zealand[3485] recalls that notwithstanding the USITC's recommendation for 20% tariff on CCFRS with the exception of slab, the President imposed a 30% tariff on these products.[3486] No analysis accompanied these contrary decisions, and no attempt was made to explain how the 30% tariff, applied to a narrower group of countries than that recommended by the USITC, was no more restrictive than necessary. In addition, it is clear that the 30% tariff applied by the President directly conflicts with the express statements made in the USITC Report regarding the measures that would need to be taken by the United States domestic industry to adjust to import competition. For example, in the context of making its recommendation of a 20% tariff remedy the USITC observed that "some

[3479] United States' first written submission, para. 1056; United States' executive summary of the first written submission, paras. 115-116.

[3480] European Communities' written reply to Panel question No. 110 at the first substantive meeting; China's second written submission, paras. 303-304; Japan's second written submission, paras. 162-165; Norway's second oral statement on behalf of the complainants, para. 20.

[3481] Annex to the Presidential Proclamation at headings 9903.73.37 through 99.03.73.39 (Exhibit CC-13); Notification by the United States pursuant to Article 12.1(c) and Article 9, footnote 2, of the Agreement on Safeguards on taking a decision to apply a safeguard measure, G/SG/N/10/USA/6 & G/SG/N11/USA/5, in point 4(i). (Exhibit CC-14)

[3482] The complainants argues that US law construct that the President rather than the competent authority, *i.e.*, the USITC, makes the final decision in safeguards cases does not absolve the USG of the obligation to abide by Article 3.1. If the President deviates from the USITC recommendations (which should be supported by its report, even if such was not in the case here), the President is required to provide an explanation for his decision. (Political expediency – the apparent reason for the decision – is not sufficient.)

[3483] Appellate Body Report, *US – Line Pipe*, para. 236.

[3484] *See* for instance Norway's second oral statement on behalf of all complainants, para. 26.

[3485] New Zealand's first written submission, paras. 4.200-4.204.

[3486] Proclamation 7529 of 5 March 2002; To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products, 67 Fed. Reg. 10553, 10587 (7 March 2002) (reducing the measure to 24% in the second year and 18% in the third year) (Exhibit CC-13).

of the domestic industries' proposals do not clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry's improvement".[3487] In the view of New Zealand, the USITC was saying that protection from imports above the 20% rate it was recommending would have an adverse impact on the ability of the industry to reduce its capacity and consolidate and thereby adjust to import competition. The USITC expressly stated that "they did not agree with the domestic industry" that "an additional 35, 40 or 50% *ad valorem* tariff is necessary to achieve the desired result, or is otherwise appropriate".[3488] In light of these statements from the USITC, the President's decision to apply a higher tariff than that recommended demanded explanation and justification. New Zealand argues that since the President's measure diverged from the USITC's recommendation, there was an obligation under Article 3.1 to set forth findings and conclusions as to why his alternative measure was justified. However, the President made no attempt to explain how his safeguard measures are no more restrictive than necessary under Article 5.1. The President, therefore, did not "clearly explain[] and 'justify[]' the extent of the application of the measure".[3489] In the opinion of New Zealand, the United States had an obligation under Article 5.1 to ensure that the safeguard measure it adopted was limited to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The Agreement does not assume that an authority has crafted the measure as narrowly as possible. Basic procedural fairness, as articulated in Article 5.1, demands an explanation setting forth the authority's "findings and reasoned conclusions".[3490]

7.1505 In the view of the European Communities and China, if a competent authority presents a recommendation, further finds that its recommendation would be adequate to address the injury found to be caused by increased import and furthermore explicitly states that any more restrictive remedy would be inappropriate, then it would be difficult to consider that a deviation from such recommendation could be justified on the basis of the determination made by the competent authority that increased imports have caused injury to the domestic industry producing like products. In these circumstances, explanation for departure from the recommendation is necessary. Moreover, if such a competent authority presents a recommendation and reaches findings and reasoned conclusions that its recommendation would be adequate to address the injury caused by increased import and, furthermore, explicitly states that any more restrictive remedy would be inappropriate, then deviation from the recommendation resulting in a more trade restrictive remedy than that has been recommended would suggest that the remedy effectively implemented goes beyond the extent necessary in violation of Article 5.1.[3491]

7.1506 The European Communities and China argue that the reason why a political authority (the US President) does not need to give reasons for the remedy he imposes, is because the justification should be apparent from the determination of the competent authority. To the extent that the political authority does not rely on a determination by the competent authority, but implicitly changes it, or picks and chooses amongst various elements of the findings of the competent authority to create his own determination, he is acting as a competent authority and is bound by the requirements of Article 3.1 of the Agreement on Safeguards. The European Communities explains[3492] that the determinations of the USITC are based on imports of a different range of products than are covered by the measures.[3493] In addition, the Proclamation excluded from the measures 35 pages of detailed

[3487] USITC Report, Vol. 1, p. 358 and footnote 22.
[3488] Ibid., p 363.
[3489] Appellate Body Report, *US – Line Pipe*, para. 236.
[3490] New Zealand's first written submission, para. 4.202.
[3491] European Communities' and China's written replies to Panel question No. 110 at the first substantive meeting.
[3492] European Communities' second written submission, paras. 8 to 26.
[3493] As shown in Exhibit CC-107.

product descriptions and the determinations are based on imports from all sources but the measures do not apply at all to Canada, Mexico, Israel and Jordan. Thus, either the safeguard measures imposed are not justified by the determination or the US President made certain determinations for which he did not provide any explanation.[3494]

7.1507 New Zealand argues that [3495] because what the President did in this case goes substantially beyond the "benchmark" set by the USITC's determinations and its own recommendations as to remedy, there is a prima facie breach of Article 5.1. This is especially so where, as in this case also, the USITC reasoning in justifying less restrictive measures explained why a more restrictive tariff was not necessary within the meaning of Article 5.1, and where (as here) no explanation is provided for the more restrictive remedy in fact imposed.[3496] In Japan's view, the requirement that the President abide by Article 3.1 in order to ensure compliance with Article 5.1 does not apply in all cases, but certainly does when the President's measure is not supported by the USITC's analysis. Japan adds a further distinction whereby if the President's measure exceeds the USITC's recommended measure, then there is no way that it can be said that the measure does not go beyond the extent necessary.[3497] Norway argues that Article 3.1 applies in all cases, as the proposed remedies by the USITC will have to be evaluated and assessed for their effectiveness in relation to the criteria of Article 5.1. This assessment of proportionality of the proposed measures is a "pertinent issue of fact and law" under Article 3.1. When the President decides to apply measures that have not been evaluated and assessed by the USITC, he will have to ensure the fulfilment of the requirements of Article 3.1.[3498]

7.1508 In New Zealand's view, the imposition of a safeguard measure more restrictive than that recommended by a competent authority – as occurred in this case – is likely to be very strong and compelling evidence of a violation of Article 5.1. The determination with respect to increased imports, serious injury and causation provide a "benchmark against which the permissible extent of the measure should be determined".[3499] Because what the President did in this case goes substantially beyond the "benchmark" set by the USITC's determinations and its own recommendations as to remedy, New Zealand submits there is a prima facie breach of Article 5.1.[3500]

7.1509 Japan, Korea, China, Norway and Brazil refer to the Appellate Body in *US – Line Pipe*, which said that "Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient 'justification' for a measure and, should also provide a benchmark against which the permissible extent of the measure should be determined".[3501] [3502] In the instant case, the United States has neither complied with these Articles by the USITC to justify its recommendations nor any explanation by the President why he deviated from these recommendations. This alone renders the measures invalid. Brazil and Korea add that the panel has before it two issues arising out of the relationship of Article 3.1 to Article 5.1. First, is there a reasoned explanation of the USITC's recommendation? Second, to the extent that the President did not follow the USITC recommendation, is there a reasoned explanation of the remedies ultimately imposed? If the President had followed the USITC's recommendation, then the second issue would not arise. In neither case was it demonstrated that the remedy (the USITC recommendation or the actual remedy

[3494] European Communities' written reply to Panel question No. 45 at the second substantive meeting.
[3495] New Zealand's written reply to Panel question No. 45 at the second substantive meeting.
[3496] New Zealand's written reply to Panel question No. 108 at the first substantive meeting.
[3497] Japan's written reply to Panel question No. 45 at the second substantive meeting.
[3498] Norway's written reply to Panel question No. 45 at the second substantive meeting.
[3499] Appellate Body Report, *US – Line Pipe*, para. 236.
[3500] New Zealand's written reply to Panel question No. 45 at the second substantive meeting.
[3501] Appellate Body Report, *US – Line Pipe*, para. 236.
[3502] Japan's, Korea's, and Brazil's written replies to Panel question No. 45 at the second substantive meeting; China's second written submission, para. 303; Norway's first written submission, para. 348.

imposed by the President) remedy was consistent with the underlying USITC injury and causation determinations.[3503] Brazil adds that it is not arguing that the USITC needed to undertake and publish an independent analysis of the extent of the measure. The USITC's failing under Article 5.1 is not that it did not perform an assessment of the measure distinct from the non-attribution analysis required by 4.2(b). Rather, the failing is reflected in the fact that the USITC failed to perform an analysis of any kind. Specifically, by failing to "separate" and "distinguish" the serious injury caused by increased imports in violation of Article 4.2(b), and without any other independent analysis, it failed to meet the requirement of Articles 5.1 and 3.1.[3504]

7.1510 The United States argues that since there is no legal requirement for any authority to present a remedy recommendation, there would be no requirement either to explain the departure from a recommendation made by a competent authority in addition to a determination performed under Articles 2 and 4. The Appellate Body in the *US – Line Pipe* case has clarified that "by separating and distinguishing the injurious effects of factors other than increased imports from those caused by imports, as required by Article 4.2(b), and by including this detailed analysis in the report setting forth the findings and reasoned conclusions, as required by Article 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure".[3505] The fact that the safeguard measures adopted by the President differ from the USITC's recommendations does not establish a prima facie case of inconsistency with Article 5.1. The panel in *US – Line Pipe* found that the President's safeguard measure may differ from the USITC's recommendation without running afoul of Article 5.1.[3506]

7.1511 The United States notes that the European Communities appears to agree that if a Member adopted a remedy recommendation of the competent authorities, the Member could rely upon any explanation made by the competent authorities to establish the remedy's consistency with Article 5.1. The United States agrees that in the case of a recommended measure adopted by a Member, any explanation by the competent authorities, if relied upon by the Member, would be relevant in a subsequent WTO dispute and properly subject to consideration by a panel. In addition, if the Member applied a measure to a lesser extent than recommended by the competent authorities, their explanation would establish consistency with Article 5.1. This was unquestionably the case with regard to tin mill steel, FFTJ, stainless steel rod, and stainless steel wire. For each of those products, the President established a measure at the same level or lower than the recommendation of the USITC, with a shorter duration. If the Member applied a measure to a greater extent than recommended by the competent authorities, the burden would remain upon complainants to establish that such a measure was inconsistent with Article 5.1. Consistent with the Appellate Body's reasoning in *US – Line Pipe*, the Member would have the opportunity to rebut such arguments in any WTO dispute. The United States points out that the Appellate Body has found that the Agreement on Safeguards only requires a contemporaneous explanation of compliance with Article 5.1 in certain limited circumstances that are not applicable to the steel safeguard measures.[3507] Thus, any analysis adopted by a Member to rebut a claimed inconsistency with Article 5.1 would be relevant in a dispute. It would not matter whether

[3503] Korea's and Brazil's written replies to Panel question No. 45 at the second substantive meeting.
[3504] Brazil's second written submission, para. 111.
[3505] Appellate Body Report, *US – Line Pipe*, para. 236.
[3506] United States' written replies to Panel questions Nos. 110 and 128 at the first substantive meeting, citing *US – Line Pipe*, Panel Report, para. 7.94 (footnotes omitted). According to the United States, when the Panel refers to the term "necessary", in this quote, it is referring to the maximum extent "necessary to remedy the serious injury".
[3507] Appellate Body Report, *US – Line Pipe*, para. 233.

the competent authorities or another instrumentality of the Member prepared the analysis, or whether the analysis was prepared before or after application of the measure, or during dispute settlement.[3508]

7.1512 Norway recalls also that on 26 October 2001, the USTR issued a notice to the public, requesting input on the measure to be imposed.[3509] Specifically, the USTR asked for comments on: (a) what form the measure should take (*i.e.*, tariff, quota, tariff-rate quota, etc.); (b) the duration of any action; and (c) any other actions that would facilitate the domestic industry's adjustment to import competition.[3510] Numerous interested parties submitted comments, but the President never issued a report. Nor did he explain how the 30% tariff – applied to a different group of countries – was tailored to mitigate the harm sustained as a result of imports from those countries.[3511]

7.1513 According to the United States, Korea, Japan and Norway err in characterizing this process as an investigation. The USTR merely recognized that in the event of an affirmative determination by the USITC, the United States executive would need to decide whether and to what extent to apply a safeguard measure, and that interested persons would want to present the executive departments with information regarding that decision. It formally requested public commentary to provide a framework for interested persons to provide such information, both in writing an in person.[3512]

7.1514 The United States responds[3513] that it, like any WTO Member, is clearly permitted under the Agreement on Safeguards to bifurcate the administration of its safeguards law between the USITC and the President. As the excerpt from the Appellate Body's decision in *US – Line Pipe* indicates, a WTO Member has the discretion to assign responsibility for making determinations under its safeguards law to as many or as few decision-makers as it sees fit, provided that the "singular act", i.e., the injury determination by the competent authorities, complies with the requirements of the Agreement on Safeguards. Thus, the United States was free to create a process in which the executive decides the nature and extent of the safeguard measure, but does not participate in the injury determination. Furthermore, in the opinion of the United States, all parties agree that the Agreement on Safeguards obligates competent authorities, in this case the USITC, to provide certain findings and explanations related to the investigation and injury determination. The parties disagree, however, on whether the Agreement on Safeguards requires the President to explain how a safeguard measure prevents or remedies injury and facilitates adjustment. According to the United States, it has never asserted that the "bifurcation" of the process allows the President to escape responsibility under the Agreement on Safeguards. The key point is that the Agreement on Safeguards itself divides the process into two stages: (1) the investigation (Article 3) and the determination of serious injury or threat thereof (Article 4); and (2) application of the safeguard measure (Article 5). This is recognized by the Appellate Body which stated that "These two inquiries are separate and distinct. They must not be confused by the treaty interpreter".[3514] Thus, the United States contends that it is fully consistent with the Agreement on Safeguards to treat the determination of the competent authorities as separate from the selection of a safeguard measure consistent with Article 5.1, and to employ different procedures at each stage.

[3508] United States' written replies to Panel questions Nos. 110 and 128 at the first substantive meeting.

[3509] Trade Policy Staff Committee; Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54321 (26 Oct. 2001) (Exhibit CC-59).

[3510] Trade Policy Staff Committee; Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 With Regard to Imports of Certain Steel, 66 Fed. Reg. 54321, 54323 (26 October 2001) (Exhibit CC-59).

[3511] Norway's first written submission, para. 356.

[3512] United States' first written submission at footnote 1368.

[3513] United States' written reply to Panel question No. 128 at the first substantive meeting.

[3514] Appellate Body Report, *US – Line Pipe*, para. 84.

7.1515 For the United States, the bifurcation of the proceedings between the USITC and the President is not pertinent. Even if the USITC administered both stages of the process, the Agreement on Safeguards still would not require an explanation, at the time a safeguard measure was imposed, of how that measure was only to the extent necessary to remedy or prevent injury and to facilitate adjustment. As stated by the Appellate Body in *US – Line Pipe*, "[i]t is clear, therefore, that apart from one exception [certain types of quantitative restrictions that were not used in this case] Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[3515] [3516]

(iii) Relationship with the non-attribution requirement and determinations under Article 4.2(b)

7.1516 The complainants argue that the level of the injury which can be remedied or prevented under Article 5.1 should not correspond to the entirety of the injury suffered by the domestic industry as assessed under Article 4.2(a). Instead, the injurious effect of factors other than increased imports determined in the context of the non-attribution requirement under Article 4.2(b) should be deducted. Therefore, if a remedy is tailored to a finding of serious injury which has not undergone a proper "non-attribution" process, it will be excessive. Hence, in practical terms the non-attribution requirement under Article 4.2(b) serves to determine the portion of the entire injury suffered by the domestic industry which can be remedied in line with Article 5.1. According to the complainants, Article 4.2(b) serves the purposes of Article 5.1 for two reasons. First, it prevents authorities from inferring a causal link between increased imports and serious injury when several factors cause injury at the same time. Second, and more importantly, it is a "benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports" and, therefore, it "informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1".[3517] Failing to meet the requirements of Article 4.2(b) necessarily creates a presumption that the measure is more restrictive than needed and is therefore in violation of Article 5.1. Without an appropriate "benchmark", the USITC could not possibly determine how any measure could be tailored to the harm caused by imports alone. In such a case, without a compelling explanation of why the measure was still no more restrictive than necessary, it must be considered to violate Article 5.1.[3518] Moreover, they add, compliance with the causation or non-attribution requirements of Article 4.2(b) does not conclusively establish that the remedy is not excessive.[3519]

7.1517 Brazil, Japan and Switzerland argue that a violation of Article 4.2(b) necessarily means a violation of Article 5.1. The European Communities, Korea, China, New Zealand and Norway argue that the Appellate Body in *US – Line Pipe* ruled that a prima facie case is made under Article 5.1 as soon as a violation of the non-attribution requirement under Article 4.2(b) has been established[3520], as is the case in the present dispute where errors in the serious injury and causation analysis have been identified. As indicated by the Appellate Body, the burden of proof then turns to the Member applying the safeguard measure to rebut this prima facie case.[3521] More specifically, the Member applying the safeguard measure then bears the burden of proving that its measure does address a portion of the injury suffered by its domestic industry equal or less than that caused by increased

[3515] Appellate Body Report, *US – Line Pipe*, para. 233.
[3516] United States' written reply to Panel question No. 128 at the first substantive meeting.
[3517] Appellate Body Report, *US – Line Pipe*, para. 252.
[3518] Norway's first and second oral statements.
[3519] Brazil's and Japan's written replies to Panel question No. 99 at the first substantive meeting.
[3520] Appellate Body Report, *US – Line Pipe*, para. 261.
[3521] Appellate Body Report, *US – Line Pipe*, para. 262.

imports. In this context, the Member applying the safeguard measure has the burden of assessing the injury attributed to increased imports.[3522]

7.1518 Korea agrees and states that Article 4.2(b) is designed to ensure that the injury caused by other factors not be improperly attributed to imports (Article 4.2(b)), while Article 5.1, first sentence, is aimed at ensuring that the measure be limited to remedying the impact on the domestic industry from imports alone. Article 5.1 does not permit the application of a safeguard measure beyond what is necessary to prevent or remedy the serious injury caused by imports alone.[3523] Article 5.1 does not permit the application of safeguard measures to remedy injury caused by other factors.[3524] For New Zealand, Article 4.2(b) is absolutely integral to compliance with Article 5.1 and, in particular, to meeting the requirement "that the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member".[3525] The Appellate Body emphasized that "safeguard measures should be applied so as to address only the consequences of *imports*".[3526] [3527]

7.1519 The complainants point to the Appellate Body report in *US – Line Pipe* which emphasized that "[B]y separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient "justification" for a measure and should also provide a benchmark against which the permissible extent of the measure should be determined".[3528] For the complainants, the Appellate Body, therefore, has clarified that an authority not only must avoid attributing causation to factors other than increased imports (Article 4.2(b)), but must also ensure that the measure that is applied is limited to the extent necessary to address that particular injury caused by such separated and distinguished imports (Article 5.1), and must justify the measure clearly (Article 3.1).[3529]

7.1520 In the United States' view, the Appellate Body has found that the injury attributed to increased imports forms the benchmark for application of a safeguard measure. This injury is identified through the causal link and non-attribution analyses under Article 4.2(b), and informs the selection of a safeguard measure. While one analysis leads to the other, the Appellate Body has emphasized that the injury assessment under Articles 3 and 4 is "separate and distinct" from the evaluation of the permissible extent for applying a safeguard measure, and that these two inquiries "must not be confused by the treaty interpreter".[3530] Thus, there is no requirement to consider the Article 4.2(a) factors a second time in the application of Article 5.1.[3531] The United States argues that

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[3522] European Communities', Switzerland's, Japan's, Norway's, New Zealand's written replies to Panel question No. 114 at the first substantive meeting.

[3523] Appellate Body Report, *US – Line Pipe*, para. 258.

[3524] Korea's written reply to Panel question No. 99 at the first substantive meeting.

[3525] Appellate Body Report, *US – Line Pipe*, para. 253, citing with approval the Appellate Body Report, *US – Cotton Yarn*.

[3526] Appellate Body Report, *US – Line Pipe*, para. 258 (emphasis in original); New Zealand's written reply to Panel question No. 99 at the first substantive meeting.

[3527] New Zealand's written reply to Panel question No. 114 at the first substantive meeting.

[3528] Norway's first written submission, para. 348.

[3529] Complainants' written replies to Panel question Nos. 113-114 at the first substantive meeting; Norway's first written submission, para. 350.

[3530] Appellate Body Report, *US – Line Pipe*, para. 84.

[3531] United States' written reply to Panel question No. 102 at the first substantive meeting.

non-attribution relates to the identification of the causal link between imports and serious injury to the domestic industry by distinguishing the injurious effects of imports from the injurious effects of other factors. It is not a requirement of Article 5.1 and, therefore, is not a requirement for deciding the proper safeguard measure to apply. The United States submits that the Appellate Body's analysis of Article 5.1 in *US – Line Pipe* compels the conclusion that Article 4.2(b) is to provide "a benchmark" for ensuring that only an appropriate share of the overall injury is attributed to increased imports. Thus, the competent authorities must complete the non-attribution analysis under Article 4.2(b) before the Member's decision as to the permissible extent of a safeguard measure. Non-attribution is part of the process of identifying the injury attributable to increased imports, which in turn sets the "benchmark" for application of the measure. Therefore, under the Appellate Body's reasoning, there is a relationship between the non-attribution analysis under Article 4.2(b) and the selection of the level of a safeguard measure under Article 5.1. The former informs the latter. Since the injury attributed to imports, which incorporates the non-attribution analysis, is the benchmark for the extent of application of a safeguard measure, a second non-attribution analysis is redundant. If the measure falls below that benchmark, there need be no concern that it is being applied to remedy injury caused by factors other than increased imports. For the United States, this is confirmed by the fact that under the Agreement on Safeguards there should be two analyses. A first analysis is used to determine whether increased imposed were causing serious injury to the domestic producers and a second one to determine the appropriate remedy. Non-attribution is part of the first basic inquiry, which the Appellate Body described as being the determination by the competent authorities pursuant to Articles 3 and 4 as to whether increased imports are causing or threaten to cause serious injury.[3532]

7.1521 The United States concludes that the complainants misstate the standard for evaluating the United States' counter-arguments. The Appellate Body recognized that a Member may "rebut" the presumption created by an inconsistency with Article 4.2(b). In so doing, it did not suggest that the Member bore a burden any greater than a defending party normally bears under the DSU – to counter or rebut a prima facie case established by the complaining party.[3533] When a complaining party relies on an inconsistency with Article 4.2(b) to create a prima facie case on inconsistency with Article 5.1, it will have done nothing more than demonstrate uncertainty as to the appropriate level of the safeguard measure. Thus, the rebuttal would need to show only that the measure was commensurate with the injurious effects attributable to increased imports. The United States submits that it has fully rebutted any allegation of inconsistency with Article 4.2(b).[3534]

(f) Quantification

7.1522 The European Communities, Switzerland and Norway argue that Article 5.1 indisputably requires that safeguard measures not exceed the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Assessing the "extent necessary" inevitably requires some form of quantification.[3535] They note that no one is asking the United States for absolute precision – just to make an honest estimate.[3536] Norway is of the opinion that even if the text of the Agreement does not explicitly use the word "quantify", the Appellate Body has in *Korea – Dairy* explicitly stated that it is an obligation under the Agreement to ensure that the safeguard measure applied is "commensurate" with the goals of preventing or remedying serious injury. It is hard, if not impossible, to understand how one could craft a measure that is tailored only to such injury caused by imports without in any

[3532] United States' written reply to Panel question No. 99 at the first substantive meeting.
[3533] Appellate Body Report, *EC – Hormones*, para. 98.
[3534] United States' executive summary of the second written submission, para. 71.
[3535] European Communities' second written submission, para. 506.
[3536] European Communities' second written submission, para. 508.

way making attempts to quantify the relevant injury.[3537] Furthermore, quantification allows other Members to control that the chosen level is in compliance with the requirements of the Agreement on Safeguards. Where there are no indications of what injury the measure is intended to redress, it is impossible to assess if the measure goes beyond the proportionality requirement or not. This is also eminently clear from the requirement of non-attribution, as set forth by the Appellate Body in *US – Line Pipe*.[3538] If one cannot quantify the effects of the different factors that have been attributed to the alleged injury, one cannot ensure that non-attribution actually takes place. The allegations by the United States claiming that there is no requirement to quantify anything is not only wrong, but is simply an excuse to include extraneous factors in their remedy and, thus, overcompensate for whatever injury imports may have caused.[3539]

7.1523 The United States takes issue with the complainants' allegation that injury, non-attribution and other determinations under the Agreement on Safeguards including that of the appropriate level and extent of the remedy, should be "quantified". The United States submits that the Agreement on Safeguards does not require either the Member applying a safeguard measure or its competent authorities to "quantify" the injury attributable to increased imports. In fact, Article 4.2(a) frames the analysis in a way that makes quantification impossible. That provision requires the competent authorities to evaluate a number of specific factors that are measured in different units. No other provision of the Agreement on Safeguards suggests that quantification of "injury" is necessary, or even possible. Indeed, under GATT 1947, it was recognized that "it is impossible to determine in advance with any degree of precision the level of import duty necessary" for a safeguard measure to achieve the goals of Article XIX.[3540] For the United States, Articles 5 and 7, which address the extent and duration of a safeguard measure, do not require the valuation of either serious injury or the extent of application of a safeguard measure. Nor do they eliminate the practical impossibility of such an exercise.[3541]

7.1524 The United States adds that the text provides no support for the notion that "injury", as such, must be quantified. Article 4.1 defines serious injury as "a significant overall impairment in the position of a domestic industry". Article 4.2(a) specifies that, in determining whether injury exists, the competent authorities must evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry". Thus, the text itself treats the two concepts differently. The factors considered by the competent authorities are characterized as "quantifiable", but "serious injury" itself is not. This omission is significant because, where the covered agreements require quantification or valuation of something, they generally state so clearly, and often provide detailed guidelines.[3542] The United States argues that the analytical framework contained in Article 4.2(a) provides further support for this conclusion: it is not possible to "quantify" injury for many reasons. The most obvious is that the different factors in Article 4.2(a) are measured in different units – market share and capacity utilization in percentages, level of sales and production in

[3537] Norway does not exclude there may be a possibility to combine quantification with qualitative assessments, but this requires that the qualitative assessments are precise enough to allow a meaningfull comparison and to establish explicitly that the requirement of proportionality is met; Norway's second written submission, para. 159.

[3538] Appellate Body Report, *US – Line Pipe*, paras. 252-260.

[3539] Norway's second written submission, paras. 159-163; Switzerland's second written submission, paras. 109-118.

[3540] *US – Fur Felt Hats*, para. 35; the Appellate Body cited this report as part of the GATT 1947 *acquis*. Appellate Body Report, *US – Line Pipe*, para. 174.

[3541] United States' first written submission, para. 1032.

[3542] For example, AD Agreement, Article 2; SCM Agreement, Article 14. These detailed requirements for calculation of the dumping margin and amount of the subsidy, respectively, contrast with the treatment of injury in both agreements, which do not require calculation of the amount of the injury.

units, profits and losses in currency (or percentages), and employment in number of workers or hours worked.[3543] The Appellate Body has emphasized that "it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry".[3544] [3545]

7.1525 The United States submits that another problem with quantification of "serious injury" is that the factors most illustrative of the condition of an industry may differ depending on the industry. For example, in an industry that requires highly trained workers to produce a product, reductions in employment may be particularly indicative of injury. Once such workers are dismissed, the industry could have difficulty training replacement workers to permit it to restore production to previous levels. By contrast, in an industry that produces a product incorporating technology that changes frequently, reductions in research and development expenditures may be particularly indicative of injury. Without such expenditures, the industry will be unable to make further developments in its product needed to remain competitive in the marketplace. Any formulaic mathematical "quantification" would not allow for these informed judgments about the relative importance of the factors required to be considered.[3546]

7.1526 Norway notes[3547*] that although the United States tries to argue that the quantification proposed by the complainants is impossible[3548], the United States does provide for some *ex post facto* quantification in the economic modelling referred to by the United States in "Modelling Worksheet I"[3549] and "Remedy Worksheet I"[3550], proving that it is indeed possible to quantify, even for the United States. This modelling, however, was not included in the USITC Report. The United States, therefore, cannot rely on them to justify the measures. Furthermore, the United States does not dispute that a rebuttal against a prima facie case of violation of Article 5.1 arising from deficient non-attribution analysis would encompass some sort of "quantification" of the effect of the remedy in connection with the injury caused by increased imports.[3551]

7.1527 According to Brazil, national authorities have the obligation of demonstrating that the elements necessary to impose safeguard measures, whether qualitative or quantitative, are present. For example, Article 4.2(b) states: "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports…and serious injury". Similarly, Article 4.2(c) talks about a "demonstration of the relevance of the factors examined". Article 3.1, of course, requires competent authorities to set forth "their findings and reasoned conclusions". Thus, there is no question that the burden is on national authorities. Whether or not a quantitative analysis is provided or necessary will vary depending on the circumstances and the availability of data to conduct such an analysis. There are two factors present in the instant case which would seem to require a quantitative analysis to justify the findings and conclusions of the USITC. First, with regard to CCFRS, there were numerous factors other than subject imports that intuitively would seem to have had a more substantial effect individually and cumulatively than subject imports. For example, intuitively one would think that an

[3543] United States' first written submission, para. 1036.
[3544] Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.
[3545] United States' first written submission, para. 1035.
[3546] United States' first written submission, para. 1038.
[3547] Norway's second written submission, para. 163.

[3548] United States' first written submission, para. 1036.
[3549] Exhibit US-57.
[3550] Not exhibited.
[3551] United States' first written submission, para. 1062.

increase in domestic excess capacity of 16 million tons in excess of demand between 1996 and 2000[3552] would have a substantially greater effect in terms of injuring the domestic industry than a 2.5 million ton increase in imports. One would also assume that an increase of 3 million tons in low-cost minimill shipments between 1998 and 2001[3553] would also have a substantially greater effect on the health of the domestic industry than a smaller increase in imports. Thus, Brazil argues that it appears that there must be some demonstration that there is a genuine and substantial link between increased imports, as distinguished and separated from these other factors, and serious injury. Where, intuitively, the facts seem to indicate one conclusion and the authorities reach another conclusion, there must be some demonstration that the conclusion reached was correct. In this case, Brazil is of the opinion that a quantification of the effects of imports and other causes would seem to have been required; otherwise, there is not support for the USITC's conclusion. Second, there is an abundance of data on which to base a quantification of the causes of injury to the domestic industry. In particular, the main problem according to both the industry and the USITC was the low price levels in the latter part of the period of investigation. There was an abundance of information to model the effect of various factors on prices. Indeed, such a model had already been accepted and endorsed by the USITC economic staff in the cold rolled anti-dumping investigation. Such a model could have been constructed by the USITC. In the alternative, models were provided by various interested parties which could have been adapted to the USITC's requirements. In the face of a counterintuitive result, the USITC made no effort to demonstrate a basis for its findings and conclusions.[3554]

7.1528 Brazil asserts that the failure to undertake a proper non-attribution analysis as required by Article 4.2(b) in and of itself establishes a prima facie case. In addition, Brazil believes that a counterintuitive result without a concrete demonstration of how that result was reached also establishes a prima facie case. Finally, as regards whether the remedy is in excess of what is necessary to remedy the injury from increased imports, the imposition of a remedy in excess of that recommended (and supposedly supported by findings and reasoned conclusions) without any explanation of the reason or need for the change in the remedy, would also seem to establish a prima facie case. Whether or not a prima facie case has been established will vary according to the facts and circumstances of each case.[3555]

7.1529 Similarly, in the opinion of Japan, Korea and New Zealand, since the authorities are the ones deciding to impose safeguard measures, they bear the burden of collecting and assessing sufficient factual information to meet all of the requirements for imposing safeguard measures. In situations where extensive data is available, and particularly in those cases where the data is both available and presented to the authorities, the authorities have an obligation to consider that data. In this case, the complainants submit that there existed extensive publicly available data and the parties presented various economic studies utilizing that data. The USITC, therefore, had information and studies at its disposal to quantify the injurious effects, but chose not to do so.[3556]

7.1530 The United States notes that Japan and Brazil posit only one way to "quantify" injury – through the use of economic modelling.[3557] In effect, they would replace the complex and nuanced analysis anticipated by Article 5.1 with a rigid and formulaic mathematical test. Modelling is widely used in theoretical economics, and may play a role in the evaluation of a safeguard measure.

[3552] Brazil's first written submission, Figure 3.
[3553] Brazil's first written submission, Figure 24.
[3554] Brazil's written reply to Panel question No. 114 at the first substantive meeting.
[3555] Brazil's written to Panel question No. 114 at the first substantive meeting.
[3556] Japan's, Korea's and New Zealand's written replies to Panel question No. 114 at the first substantive meeting.
[3557] Japan's first written submission, para. 324, Brazil's first written submission, paras. 212-214.

However, modelling has important limitations that prevent it from quantifying "injury" within the meaning of the Agreement on Safeguards, or from measuring with any precision the effect of increased imports or of a safeguard measure on the individual factors demonstrating injury.[3558]

7.1531 The United States suggests that the most important difference between the Japanese/Brazilian and United States' approaches lies in how models are used. Japan and Brazil argued to the USITC, and now argue to the Panel, that particular models can calculate the effect of imports and other factors on the domestic industry and that the calculated results should inform the competent authorities analysis of causal link and non-attribution. As a general matter, this view ignores the limitations in computer models. A model designed to estimate the impact of one market participant's sales on the prices and quantities of other market participants will probably reflect the effect of other factors with less accuracy. Although one could theoretically design models for all potential causes of injury, they would require different underlying assumptions and qualitative and quantitative inputs, which would make any comparison of the outputs highly suspect. In short, the best computer models available provide a type of "quantification" that would not satisfy the obligation under the Agreement on Safeguards to demonstrate a causal link or to ensure non-attribution. Specifically with regard to the models referenced by Japan and Brazil – which were developed for purposes of the *Steel* proceedings – the USITC staff concluded that they did not provide "statistical evidence that the effect from import competition on domestic price was significantly greater than the effect of the other factors included in their analysis".[3559] Moreover, the models did not assess the magnitude of the effects of imports as opposed to the effects of other factors "in a statistical manner". The models measured the effect of domestic competition either "weakly" or "not ... at all".[3560] Nor did the models purport to consider and weigh all of the factors required to be considered in assessing injury and causation. Accordingly, the USITC gave the models little weight because of their "serious limitations".[3561] [3562]

7.1532 In contrast, the United States argues that it did not use a new computer model to compare different factors as part of the causation analysis. Instead, it used an established computer model for a discrete inquiry related to one factor – imports – in analysing the permissible extent of application of the safeguard measure in terms of the volume, price, and revenue for the product sold by the domestic industry. Specifically, the United States took two scenarios – (1) imports in 2000 remaining at pre-surge levels and (2) application in 2000 of the safeguard measures established by the President – and modelled how prices and volumes of products sold in the United States might have been different. By looking at the volume and price effects of imports in both scenarios and holding all other putative causes of injury constant, the United States claims it had avoided the danger that the model would not accurately compare the volume and price effects of two different causes of injury. Moreover, since it is "impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions"[3563], the United States argues that the uncertainty inherent in computer modelling is no different from any other available analysis. In contrast, when it comes to analysing causation, there is an alternative – the type of qualitative analysis employed by the USITC.[3564]

7.1533 The United States argues that it cannot discern exactly what the proponents of quantification would have the USITC do differently. Only a few of the complainants have raised this issue and, to

[3558] United States' first written submission, para. 1039.
[3559] USITC Memorandum EC-Y-042, p. 42.
[3560] USITC Memorandum EC-Y-042, p. 1.
[3561] USITC Report, p. 59, footnote 260.
[3562] United States' written reply to Panel question No. 116 at the first substantive meeting.
[3563] *US – Fur Felt Hats*, para. 35.
[3564] United States' written reply to Panel question No. 116 at the first substantive meeting.

date, they have not indicated exactly how the USITC should have quantified injury. According to the United States, Norway states repeatedly that quantification is required, but does not indicate how quantification is possible. Brazil also faulted the economic model that the USITC used in its remedy recommendation, but suggests that the USITC should actually have relied upon economic modelling, particularly upon a computer model submitted on behalf of foreign producers, which the USITC rejected.[3565] Japan also faults the USITC for not relying on the foreign producers' computer model.[3566] According to the United States, proponents of quantification have not explained what they mean by this term, or how a competent authority would quantify injury or the effects of imports on all of the indicators of injury that the Agreement on Safeguards requires to be considered. Therefore, the United States claims that it cannot tell how its numeric exercise differed from any suggestions the complainants might have.[3567]

7.1534 The United States notes that the complainants take varying positions on whether quantification is necessary. Most avoid the question by stating that the competent authorities must quantify injury "if necessary", and bear the burden of doing so.[3568] The United States contends that on the contrary, it is a well-established principle in disputes under the DSU that the party asserting the affirmative of a proposition bears the burden of proving it.[3569] The United States claims to have presented extensive evidence that it is not possible to quantify precisely the injury caused by increased imports or the injurious effects of increased imports for use in an analysis separating the injurious effects of imports and other factors. Therefore, it argues that the proponents of quantification bear the burden of establishing both that (i) the Agreement on Safeguards requires quantification and (ii) an accurate quantification of injury or injurious effects caused by increased imports is possible. According to the United States, the complainants have not met either aspect of this burden. The only evidence that the complainants present to demonstrate that quantification is possible consists of computer models submitted to the USITC, which the USITC rejected. Although Japan and Brazil criticize the USITC for "dismissing" economic modelling results "in a single footnote"[3570], they never address the USITC's reasons for placing little weight on the models. The only legal basis the complainants cite for the proposition that quantification is mandatory is the Article 5.1 "no more than the extent necessary" standard. Some complainants believe that a Member can meet this standard only if it quantifies the effects of both increased imports and the safeguard measure.[3571] However, in the opinion of the United States, a qualitative analysis could also suffice to establish that a safeguard measure was commensurate with the injury attributable to increased imports.[3572]

7.1535 For the United States, to the extent that the complainants have suggested that some further analysis is required to precisely and scientifically quantify the exact measure of injury and effect of the measures taken, such a standard would clearly be unworkable and inconsistent with the

[3565] Brazil's first oral statement, para. 35.
[3566] Japan's first written submission, paras. 276-281.
[3567] United States' written reply to Panel question No. 116 at the first substantive meeting.
[3568] European Communities' written reply to Panel question No. 114 at the first substantive meeting; Japan, Norway and Brazil take a similar position in their written replies to Panel question No. 114 at the first substantive meeting. Korea and New Zealand argue that the quantification is always necessary, while China and Switzerland take no position; Korea's, New Zealand's and Switzerland's written replies to Panel question No. 114 at the first substantive meeting.
[3569] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 17.
[3570] Brazil's first written submission, para. 213; Japan's first written submission, paras. 276-278; the European Communities makes a similar point, European Communities' first written submission, para. 278.
[3571] New Zealand's written reply to Panel question No. 114 at the first substantive meeting.
[3572] United States' second written submission, paras. 192-196.

Agreement. It would create a standard that no party could meet in taking a safeguard measure and would thus effectively nullify the Agreement.[3573]

7.1536 In the United States' view, no quantification analysis can meet the requirements of Articles 5.1 or 4.2(b). The limited numerical exercises provided in the United States' first written submission had the limited purpose of providing the Panel with additional evidence that the steel safeguard measures were consistent with Article 5.1. They certainly do not support the notion that either the type of quantification envisaged by some complainants or a numerical exercise like the one(s) used by the United States in this dispute is/are required.[3574]

(g) Exclusion of products

7.1537 The European Communities and Norway argue that to determine whether products investigated can be excluded from the application of a safeguard measure, Article 5 must be interpreted in the light of the principle of parallelism inherent in that provision and in Articles 2 and 4 of the Agreement on Safeguards. Seen in this context, the clause "extent necessary to prevent or remedy serious injury" in Article 5.1 means "extent necessary to prevent or remedy serious injury caused by the imports which have formed the basis of the 'increased imports' and the 'serious injury' and causation determinations", and which must correspond to the imports subject to the measure. If the serious injury and causation have been assessed with reference to a certain range of products, it is that range of products which has been recognized to cause serious injury. The level and type of remedy appropriate to counter that serious injury cannot be re-distributed among a narrower range of products. Otherwise, these claimants suggest, certain imports would be attributed the consequences of injury they have not been determined to cause. On the other hand, if all imports investigated and found to have caused serious injury are covered by a measure, then such measure could be uniformly reduced to some less than is necessary if the importing country so chose.[3575]

7.1538 In the view of Brazil, product exclusions alter the remedy by making it less restrictive. As such, they affect the level of protection afforded by the remedy and should be viewed as such.[3576] Japan considers that product exclusions are specifically aimed at ensuring that the measures are not in excess of what is necessary to provide relief. If a product is not produced in the United States, then it would be excessive to impose relief for that product.[3577] According to Korea, by excluding those products from the remedy, the United States is choosing not to impose relief. Such action is not only permitted but contemplated by the terms of Article 5.1, first sentence.[3578]

7.1539 According to the European Communities, the exclusion of a product (or sub-product) covered by a safeguard measure, because it is requested by the United States industry or for whatever other reason, removes the restriction on that sub-product but does nothing to render more proportionate the application of the safeguard measures to the remaining sub-products. Indeed, the fact that product exclusions have even been requested and obtained by the United States domestic steel industry itself (for example for slabs) would tend to indicate that the original level of the measures was disproportionate.[3579]

[3573] United States' first written submission, para. 1064.
[3574] United States' written reply to Panel question No. 116 at the first substantive meeting.
[3575] European Communities' and Norway's written replies to Panel question No. 100 at the first substantive meeting.
[3576] Brazil's written reply to Panel question No. 100 at the first substantive meeting.
[3577] Japan's written reply to Panel question No. 100 at the first substantive meeting.
[3578] Korea's written reply to Panel question No. 100 at the first substantive meeting.
[3579] European Communities' second written submission, para. 520.

7.1540 The United States responds that the exclusion of particular types of each product from the measures does not establish a prima facie case of inconsistency with Article 5.1. That Article clearly allows a Member to apply a safeguard measure less than the extent necessary to remedy or prevent serious injury and to facilitate adjustment, as long as it complies with the MFN obligation under Article 2.2. This discretion includes the lessened application – or even non-application – of a measure to particular types of a product. The use of "no more than the extent necessary" indicates that Article 5.1 establishes a maximum for the application of a safeguard measure. "No more than" means that the measure may be applied up to, but not beyond, that level. Since Article 5.1 places no constraint on a Member's ability to apply a measure less than necessary, a Member has discretion to do so. Accordingly, a Member remains free to exclude a type of the product or apply the measure at lower levels to that type of the product as long as it complies with the other requirements of the Agreement on Safeguards, including the Article 2.2 requirement to apply the measure regardless of source.[3580]

7.1541 The United States notes that Japan, Korea and Brazil agree that product exclusion is not necessarily inconsistent with Article 5.1. Only New Zealand argues that exclusions are forbidden, on the grounds that parallelism requires the application of any safeguard measure to each and every one of the items included in the product subject to a finding of serious injury.[3581] (The United States refers to this concept as "scope parallelism".) New Zealand recognizes that parallelism, as described in *US – Wheat Gluten* and *US – Line Pipe*, "was, on the facts, restricted to imports by source".[3582] (The United States refers to this as "source parallelism".) However, according to the United States, New Zealand argues that those reports also stand for the "broad principle" of scope parallelism. For the United States, no such principle exists.[3583] The United States argues that New Zealand has not rebutted their analysis and, therefore, has not established a prima facie case that the Agreement on Safeguards requires scope parallelism.[3584]

7.1542 For the United States, the exclusions (or reductions in application) are a factor that the Panel should consider in evaluating whether the steel safeguard measures are consistent with Article 5.1. These adjustments to the steel safeguard measures lessen their effect on the domestic industries, and thus lessen the extent to which they prevent or remedy serious injury.[3585]

(h) Different remedies for slabs and CCFRS

7.1543 The European Communities and China note that the two separate safeguard measures on slabs and CCFRS respectively, as explained by the USITC itself, have different goals and extents.[3586] In particular, the tariff rate quota on slabs aims at taking into account the specific end-use and marketing channel of slabs, namely the fact that "domestic producers typically internally consume nearly all the slabs they produce" and that "commercial sales of slabs have been extremely limited". Accordingly,

[3580] United States' written reply to Panel question No. 100 at the first substantive meeting.
[3581] New Zealand's written reply to Panel question No. 92 at the first substantive meeting.
[3582] New Zealand's written reply to Panel question No. 92 at the first substantive meeting.
[3583] United States' first written submission, paras. 763-766.
[3584] The United States also notes that, as a systemic matter, New Zealand's understanding of the *US – Wheat Gluten* and *US – Line Pipe* reports is troubling. In New Zealand's view, general comments by the Appellate Body in those reports are dispositive as to an issue – scope parallelism – that the parties did not raise and that the Appellate Body did not address. Thus, the Appellate Body did not have the chance to fully consider the implications of scope parallelism and the consistency of that concept with the Agreement on Safeguards. Its statements regarding source parallelism should accordingly be understood as being inapplicable to scope parallelism.
[3585] United States' second written submission, para. 210.
[3586] USITC Report, Vol. I, pp. 362-366.

the tariff rate quota on slabs is "intended to avoid causing harm to domestic steel producers that have legitimate needs to continue to import slabs". In the light of their respective goals and extents, it appears difficult to argue that the safeguard measures for slabs and for the rest of certain carbon and alloy flat can be justified on the basis of the same determination that increased imports of all certain carbon and alloy flat have caused injury to the domestic industry producing all carbon and alloy flat.[3587]

7.1544 For the European Communities, if a competent authority does present a recommendation, further finds that its recommendation would be adequate to address the injury found to be caused by increased import and furthermore explicitly states that any more restrictive remedy would be inappropriate, then it would be difficult to consider that a deviation from such recommendation could be justified on the basis of the determination made by the competent authority that increased imports have caused injury to the domestic industry producing like products. In these circumstances, explanation for departure from the recommendation is necessary.[3588] Moreover, if such competent authority does present a recommendation and reaches findings and reasoned conclusions that its recommendation would be adequate to address the injury caused by increased import and furthermore explicitly states that any more restrictive remedy would be inappropriate, then deviation from the recommendation resulting in a more trade restrictive remedy than that has been recommended would suggest that the remedy effectively implemented goes beyond the extent necessary in violation of Article 5.1.[3589] For Korea, the critical question is whether the measure adopted can be reconciled and is consistent with the underlying determinations of serious injury and causation. In the case of welded pipe, for example, the critical issue is that the USITC recommendation actually provided a detailed explanation of how the threat of injury finding provided a "benchmark" for the remedy recommended.[3590]

7.1545 Japan adds that if these products are the same and compete with each other, why should they be subjected to different remedies with different effects? The burden is on the United States to explain why the remedy applied to slab, which is less restrictive than the tariffs applied to finished flat products, should not be expanded and applied to finished flat products so as to meet the obligations of Article 5.1. In other words, absent some explanation, Japan believes there is a presumption that different remedies within a "like product" violate Article 5.1. Japan submits that different remedies for products within a single like product category, as defined by the competent authority, proves that the products were inappropriately grouped together within that category.[3591]

7.1546 Similarly, Korea and New Zealand argue that by applying a remedy to slab that was less restrictive than that applied to other CCFRS products, the United States was acknowledging that the injury caused by CCFRS products (slab) could be addressed through less restrictive means than the remedy applied to most CCFRS products.[3592]

7.1547 Brazil argues that the fact that the United States granted a separate additional quota for ultra low carbon slab is recognition that there are sub-products within the slab grouping.[3593] Both the

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[3587] Complainants' written replies to Panel question No. 104 at the first substantive meeting.
[3588] European Communities' written reply to Panel question No. 110 at the first substantive meeting.
[3589] European Communities' written reply to Panel question No. 109 at the first substantive meeting.
[3590] Korea's written reply to Panel question No. 109 at the first substantive meeting.
[3591] Japan's written reply to Panel question No. 103 at the first substantive meeting.
[3592] Korea's and New Zealand's written replies to Panel question No. 103 at the first substantive meeting.
[3593] Exclusion of Particular Products from Actions under Section 203 of the Trade Act of 1974 With Regard to Certain Steel Products; Conforming Changes and Technical Corrections to the harmonized Tariff Schedule of the United States, 67 FR 56182 (30 August 2002).

exclusions and the additional slab quota are recognition that certain products within a broader like product category may not be produced in the importing market or might not be produced in sufficient quantities. It points out that the United States has traditionally carved out exclusions from like product definitions in anti-dumping and countervailing duty cases.[3594] The fact that there are different remedies for products within the same USITC product grouping, however, raises a very different question. Specifically, if all of the products within the like product category compete with each other, why is it necessary to have a different remedy for a sub-category of these products? Presumably, if slab is competing directly with plate, hot-rolled, cold-rolled and corrosion resistant flat products, the remedy necessary to eliminate the injury from imports of slab is no different than that necessary to eliminate the injury from imports of these downstream products. If slab is the same like product subject to the same competitive dynamics as the other flat-rolled carbon products, why is it necessary to impose a different remedy on slab? According to Brazil, the need for a different remedy for slab demonstrates that the products within the grouping are not like one another, do not directly compete with one another and should not be grouped together. If products are like one another, then the competitive dynamics between them should, by definition, be the same. Hence, there is no reason why the remedy should not be the same. The fact that the President felt compelled to impose a TRQ for slab and a high tariff for the other products within the flat-rolled grouping demonstrates that there are different competitive dynamics at play between slab and the finished flat products, meaning that they cannot be part of the same like product.[3595]

7.1548 The United States argues that the Agreement on Safeguards also allows a Member to reduce the extent of application of a measure to certain items within the imported product. For a tariff-based safeguard measure, such a reduction could take the form of a lower rate of duty for a particular item, or a zero-rate for a limited quantity of imports of that item. Just as with a complete exclusion, either of these measures would lessen the overall application of the measure. The exclusions endorsed by Japan, Korea, and Brazil contain several examples of quantitative exclusions for particular items.[3596]

7.1549 The complainants misunderstand the basis for the application of a TRQ to slab. The USITC found that slab was part of the certain carbon flat-rolled like product and affected the sale of that product in the United States. Specifically, the USITC noted that "slab prices are solely a function of downstream prices for hot-rolled steel and cold-rolled steel, which would suggest a strong cross-price effect between these types of steel".[3597] The President did not revise or modify these conclusions, or the overall finding that slab imports were injurious. Instead, he found that a TRQ for slab was appropriate based on the various statutory factors that he was required to consider, even if the remedy was less than the maximum remedy permitted under the Agreement on Safeguards.[3598]

7.1550 The treatment of slab does not call into question the USITC's like product definition for certain carbon flat-rolled steel. The President did not find that slab was not "like" other steel products. Rather, the President included slab in the safeguard measure precisely because slab imports are like domestic certain carbon flat-rolled steel, and have an effect on the domestic industry producing that product. He then applied the measure to slab in the form of a TRQ because the long-

[3594] For example, *Carbon and Certain Alloy Steel Wire Rod From Brazil et. al.*, Inv. Nos. 701-TA-417-421, and 731-TA-953-954, 956-959, 961-962, USITC Pub. 3546 (Oct. 2002) at fn. 2 (excluding, among other products, grade 1080 tire cord and tire bead quality wire rod).

[3595] Brazil's written replies to Panel questions Nos. 22 and 103 at the first substantive meeting.

[3596] United States' second written submission, para. 211.

[3597] USITC Report, p. 43.

[3598] United States' second written submission, para. 213.

term remedial effect of applying the safeguard tariff to all slab was outweighed by the short-term disruption such action would cause to the broader United States economy.[3599]

2. Demonstration/justification by the United States of the measures imposed in this case

(a) General

7.1551 The United States argues that an analysis of the ten safeguard measures applied by the United States demonstrates that they are consistent with the standard set out in Article 5.1, as interpreted by the Appellate Body. The USITC Report established that the United States has the right to apply a safeguard measure with regard to each of the ten steel products at issue. The United States claims that it has demonstrated that as a result of unforeseen developments, imports of each product increased in such quantities and under such conditions as to cause or threaten to cause serious injury. The report further demonstrated that, in reaching this determination, the USITC separated and distinguished the injury caused by increased imports from the injury caused by other factors. According to the United States, no complainant has established a prima facie case of inconsistency with these obligations. To the extent that any complainant could be considered to have made a prima facie case on any of these issues, the discussion in the preceding sections has fully rebutted that case.[3600] The United States submits it is evident, through both a qualitative and a quantitative assessment of the effects of imports on the relevant domestic industries and of the measure taken, that the relief provided was only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The injury suffered by the domestic industries at issue in this case was extraordinary by any measure. The nature and extent of this injury was documented throughout the findings of the USITC. This injury involved significant financial losses, numerous bankruptcies, tens of thousands of job losses, as well as lost sales, decreased production, reduced capacity utilization, lost investment opportunities and many other indicators of serious injury. The USITC's findings also document the extraordinary steps required for domestic producers to facilitate adjustment to import competition. In the opinion of the United States, the enormity of the injury documented here plainly necessitated the type and extent of the measures taken by the United States if the industries at issue were to be given any chance to recover from serious injury and adjust going forward.[3601]

7.1552 According to the United States, one potential numerical approach begins with the ordinary meanings of the terms of Article 5.1. A safeguard measure to "remedy" injury caused by increased imports would, in the ordinary meaning of the term, need to "put right, reform, (a state of things); rectify, make good". To "prevent" serious injury would be "to forestall or thwart by previous or precautionary measures". To "facilitate" adjustment would be to promote the adaptation to changed circumstances, namely, competition from increased imports. Each aspect of Article 5.1 – the "injury" being prevented or remedied and the "adjustment" being facilitated – depends on the facts of the case, most particularly the condition of the industry and the injurious effects of imports. Most of the steel determinations noted that the low prices of increased imports were forcing domestic producers to lower their own prices, thus reducing profitability. In these cases, the United States considers that a remedy in the sense of Article 5.1 would both stop the ongoing negative effects of imports and allow the domestic industry to recoup the losses caused by increased imports during the investigation period. Such a remedy would also advance the goal of facilitating adjustment, since producers could

[3599] United States' second written submission, para. 214.
[3600] United States' first written submission, para. 1055.
[3601] United States' first written submission, paras. 1066-1067.

devote increased profits to projects that would make them more competitive with imports when the safeguard measures are removed.[3602]

7.1553 The United States explains that, in some of the steel determinations, the analysis of the USITC noted that the domestic industry's loss of market share played a prominent role. In these cases, the United States considers that a remedy in the sense of Article 5.1 would allow the domestic producers to recover market share. The associated improvements in revenue and profits would also, to some extent, allow them to undertake projects that would make them more competitive with imports when the safeguard measures are removed. In both sets of cases, simply counteracting the current negative effects of imports or promoting a temporary return to the industry's historical condition before imports began to increase would not be sufficient. First, the industries' condition before increased imports manifestly did not permit them to adjust to increased imports. That is why they reached a state of serious injury. Second, the very concept of "remedy" suggests an alleviation of the injury identified during the investigation period, as well as cessation of future injury. An industry cannot adjust successfully if past losses left it in a financially perilous position that a measure could remedy only in the future. Thus, the United States considers that the extent of application of a safeguard measure includes both counteracting current negative effects of imports and alleviating past negative effects to permit the industry's adjustment.[3603]

(b) Numerical analysis

7.1554 The United States explains that the simple numerical analysis described below focuses on conditions during a year in the investigation period to estimate the change in revenue or import volume necessary to remove the current negative effects of imports and to recoup past negative effects. As a surrogate for the "uninjured" condition of the industry, the United States uses a year either before the increase in imports or before the condition of the industry began to decline. This is a conservative approach because the USITC did not identify any time during the investigation period as one in which there was no injury. Indeed, in several cases, the USITC specifically found that imports had negative effects throughout the period. Thus, any part of the period would potentially reflect a level of operating income or revenue already reduced by the effects of increased imports.[3604]

7.1555 The United States recalls that the selection of a comparison year, estimated operating margin, or estimated import volume are not intended to suggest that imports did not have negative effects on the domestic industry and its operating income levels at that time. It does not imply either that there was serious injury in that year, or that there was not serious injury, as the USITC did not make a determination in that regard. The comparison year merely provides a starting point to evaluate the negative effects that imports in subsequent years may have had on the industry's performance. This numerical analysis then estimates the extent to which non-NAFTA import prices would have to increase, or volumes decrease, to attain the desired condition. Accordingly, to perform this numerical analysis for the industries in which the price effects of imports played a prominent role, the United States performs a four-step analysis to estimate the extent to which domestic producers' prices and revenues would have to rise to eliminate the negative effects of increased imports on the industry's operating income. The United States then estimates the degree that import prices would have to

[3602] United States' first written submission, para. 1066.
[3603] United States' first written submission, para. 1068.
[3604] United States' first written submission para. 1069.

increase for the domestic industry to achieve this level of profitability, and the additional tariff that would achieve that price increase.[3605] [3606]

7.1556 The United States explains that the first step of this approach estimates the amount of revenue domestic producers would have needed in each year to raise operating income to its level at a point (the "base year") in the investigation period before the industry's performance began to decline. The approach estimates the degree to which the industry's operating income declined in each year after the base period. In cases in which the USITC found that factors other than imports were also injuring the industry, the approach uses a comparison year in which the USITC observed that one or more non-import factors were affecting the industry. For example, if the USITC found that increased capacity had injurious effects, the United States would attempt to choose a year in which capacity had already risen to its level during the period of serious injury. The approach then estimates the amount that revenue would have had to increase to produce that estimated operating margin in each year in which the USITC identified the industry's performance as deteriorating due to increased imports. In situations in which there is no comparison year that reflected the injurious effect of non-import factors, this analysis either omits the years in which other factors had an effect, or subtracts the amount of profit shortfall the United States estimates would be attributable to that factor.[3607]

7.1557 In the second step, the United States' analysis estimates the degree to which domestic producers' prices would have to increase during the pendency of a safeguard measure. Any price increase would have to return domestic prices at least to a level that would provide operating income equal to a level that does not reflect the price effect of increased imports and then increase prices by a further amount to counteract the negative effects of imports from 1998 to 2000 and to facilitate adjustment. This estimate calculates the further amount of increase by dividing the revenue shortfall estimate in the first step by total revenue during the period of the shortfall, and adding that percentage to the operating income margin for the comparison year.[3608]

7.1558 As a third step, this approach estimates the degree to which import producers' prices would have to increase for domestic producers to achieve the operating income margin described above. The average unit values or USITC pricing comparisons, as appropriate, involved domestic prices from years when the industry did not achieve this level of profitability. To estimate a price that would achieve the target operating income level calculated in the second step, this approach decreases domestic producers' annual unit value or price[3609] by the unit operating income[3610] and then increases the resulting figure to a point where it would produce an operating income margin equal to the target operating income margin. This approach compares this price in each year to the annual unit value or

[3605] For the most part, the United States bases the calculations on unit values, as these captured all of the products under investigation. For some products, the findings of the USITC or data in the USITC Report indicated that the difference in unit values between imports and domestic products reflected different product mixes, as well as the injurious effects of price underselling by non-FTA imports. In those cases, the United States based our calculations on the item-specific pricing comparisons conducted by the USITC.

[3606] United States' first written submission, para. 1070.

[3607] United States' first written submission, para. 1073.

[3608] United States' first written submission, para. 1074.

[3609] Since the USITC performed pricing comparisons on a quarterly basis, the United States weight averages pricing data to produce an annual figure that we could then compare to profitability, which was expressed on an annual basis.

[3610] The United States does this by multiplying the unit value annualized price by the one minus the reported profit margin.

price of imports to calculate how much import prices would have to increase for the domestic industry to achieve the target operating income.[3611]

7.1559 As a fourth step, this approach estimates the additional duty that would achieve the price increase calculated in the third step. As part of its investigation, the USITC performed economic modelling on the United States industries. These models indicated that there would not be full "pass-through" of any increases in tariff rates. That is, an increase of tariffs of X% would result in a less-than-X increase in the prices importers charged in the United States market. Based on these models, the United States estimates a range of tariff increases that would produce the target increase in import prices for the product in question. These estimates of pass-through were in line with those predicted by industry participants.[3612]

7.1560 The United States explains that this approach uses a somewhat different process for the finding of threat of serious injury with regard to welded pipe. For that industry, the concepts of "preventing" and "remedying" serious injury overlap to a significant degree. To "prevent" injury attributable to imports, which the USITC found would imminently result from the negative effects of increased imports during the investigation period, a safeguard measure would have to counteract those current negative effects. Since the determination reflected negative performance that developed late in the period, the revenue shortfall calculation in the first step reflected a shorter period than for the industries subject to determinations of serious injury. Finally for industries in which the market share effects of imports were prominent, this approach analyses compliance with Article 5.1 in terms of import volumes. This approach was used with tin mill and stainless steel wire.[3613]

7.1561 The United States reiterates that while this numerical analysis may be instructive, as recognized by the Working Group in *US – Fur Felt Hats*, it is not a science. These estimates are intended to show that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy serious injury. For the United States, they are conservative estimates, in that the USITC identified a number of negative effects that imports had on the domestic industry – reduced volume, prices, revenue, production, capacity utilization, employment, capital formation and investment – but these estimates have not attempted to address the negative effects of imports on other indicators of injury, such as employment, production, and capacity utilization. These estimates also do not attempt to add to the estimated tariff levels to attain operating income levels that would fully facilitate the adjustment of the industry to increased imports.[3614]

7.1562 The United States indicates that the safeguard measures worksheets for each product show the results of these calculations, but it reiterates that the decision on the nature and level of a safeguard measure, or the defense against a claimed inconsistency with Article 5.1, is a not strictly numerical exercise. Just as "serious injury" as described in the Agreement on Safeguards is not quantifiable, the overall effect of a safeguard measure in preventing or remedying serious injury and facilitating adjustment is not quantifiable, either. The United States reiterates that there are important limitations in the analytical tools that are available to estimate the effect of a remedy. Thus, any numerical analysis is, at best, an approximation that might assist a panel in evaluating whether a measure is commensurate with the injury caused by increased imports and the need for adjustment. The numerical analysis will not delineate with any precision the extent of the injury, or the extent of application of the measure that would remedy only that injury. In short, these estimates are not in any

[3611] United States' first written submission, para. 1075.
[3612] United States' first written submission, para. 1076.
[3613] United States' first written submission, para. 1077.
[3614] United States' first written submission, para. 1079.

manner a quantification of injury, excluding as they do a consideration of most of the factors required to determine serious injury under Article 4.2(a).[3615]

(c) Economic model

7.1563 The United States explains that economic modelling of the price, volume, and revenue effects of increased imports and of the safeguard measures established by the US President on 5 March 2002 also suggests that these measures were in accord with Article 5.1. During its remedy phase, the USITC prepared an economic model, similar to ones it has used over a long period and in a variety of proceedings, to model the theoretical effect of various measures on the relevant U.S. industries. It is a comparative statics model, which estimates how price, quantity, and total revenue associated with sales by domestic producers and various imports sources during a particular period would have been different if there were a change in market conditions. It is important to recognize that the model does not predict future performance and, does not measure injury as such. What it does do is estimate how certain indicators of past performance might have changed if market parameters had changed.[3616]

7.1564 The United States stated that it used this model, inputting variables to model how the quantity, price, and revenue of sales by the domestic industry and various import sources would have changed in 2000 if the safeguard measure established by the US President on 5 March 2002, had been in effect during that period. The results appear in column 2 of the Modeling Results Worksheet for each product.[3617]

7.1565 The United States explained that it then modelled how the quantity, price, and revenue of sales by the domestic industry would have changed if imports in 2000 had been at the same quantity in a year prior to the increase in imports. The results appear in column 1 of each Modelling Results Worksheet. This exercise only models the effect of the change in imports on the price, quantity, and revenue associated with sales of the domestic like product. It does not capture the injury that imports may have been causing at lower levels, before any increase. Subject to all of the limitations inherent with modeling, this model provides a rough estimate of certain effects of the increase in imports, *i.e.*, on the quantity, price, and revenue of sales by the domestic industry. A comparison between the figures in columns 1 and 2 of each worksheet explains how the remedy applied was no more than the effect of the increase in imports on indicators of injury covered by the model – the price, volume, and revenue associated with sales by the domestic industry.[3618]

(d) USITC recommendations compared with justification by the United States in this case

7.1566 The United States notes that it is important to recognize the differences in the use of the model by the USITC in its remedy discussion and in the modelling exercise in the United States' first written submission.[3619] Although the volume, price, revenue, and elasticity inputs to reflect market conditions in 2000 were the same, the USITC modelled a series of remedy options different from remedies subsequently chosen by the President. In contrast, the modelling exercise in the United States' first written submission is based on the estimated price, volume, and revenue effects of the remedies actually applied by the President. It compares these with the estimated price, volume, and revenue effects of the increase in imports. The USITC did not model the price, volume, and revenue

[3615] United States' first written submission, para. 1080.
[3616] United States' first written submission, para. 1081.
[3617] United States' first written submission, para. 1082.
[3618] United States' first written submission, paras. 1083-1084.
[3619] The United States notes that the USITC used the modelling results as one element in its evaluation of the remedy options, and not in its analysis of injury and causation.

effect of the increase in imports. It is also important to recognize that the USITC reached its remedy recommendation by considering a number of factors, of which the results of the model were only one. The USITC also considered information and arguments submitted by the parties, testimony at its remedy hearings, data on the administrative record, and non-modelling economic analysis. Based on this information, the USITC evaluated the remedy in terms of all of the injurious effects of the increased imports – changes in the production, productivity, capacity utilization, profits and losses, and employment, as well as the price, volume, and revenue of each domestic industry, and any other relevant factor. The Memorandum accompanying Proclamation 7529 specifies that the President determined that the steel safeguard measures were appropriate, "after considering all relevant aspects of the investigation, including the factors set forth in section 203(a)(2) of the Trade Act and the supplemental report".[3620] These include the recommendation and report of the USITC, the extent to which workers and firms in the domestic industry are benefiting from adjustment assistance and engaged in worker retraining efforts, the domestic industries' efforts to make a positive adjustment to import competition, the short- and long-term economic and social costs and benefits of any safeguard measure, and national economic interests, among other considerations. The modelling exercise uses a comparison of the price, volume, and revenue effects of the actual measures as compared to the price, volume, and revenue effects of increased imports to confirm that the safeguard measures were not applied beyond the extent necessary. The United States provides this analysis in rebuttal to the complainants' arguments that the USITC findings were inconsistent with Article 4.2(b), and that a finding in their favour on this point would, by itself, create a presumption that the measures are inconsistent with Article 5.1.[3621] [3622]

(e) Justifications for each of the safeguard measures

7.1567 The United States explains how and why it considers that the level of remedy chosen by the President for each safeguard measure is no more restrictive than what was necessary to remedy serious injury and allow for adjustments

(i) Tariff on CCFRS and tariff-rate quota on slabs

7.1568 The United States[3623] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic CCFRS industry and this was the starting assumption of its justification.

7.1569 The USITC identified six factors other than increased imports that potentially caused injury: declining demand, increased capacity, legacy costs, intra-industry competition, management decisions, and purchaser consolidation. It found that legacy costs, management decisions, and purchaser consolidation did not cause injury to the domestic industry during the investigation period. The USITC did not identify declining demand prior to the first half of 2001 as a cause of injury. Demand increased from 1996 through the third quarter of 2000, and demand for all CCFRS products in full year 2000 was higher than in 1996 or 1999. However, the USITC found that declining demand contributed to serious injury at the end of the investigation period.[3624] The USITC noted that capacity increases outstripped growth in apparent domestic consumption, and that production increased at a lower rate, causing capacity utilization rates to fall, which would affect producers' pricing behavior.

[3620] Memorandum of 5 March 2002, 67 Fed. Reg. 10593, 10594 (Exhibit CC-13).
[3621] The Appellate Body has found that any presumption created by an inconsistency with Article 4.2(b) would be rebuttable. Appellate Body Report, *US – Line Pipe*, para. 262.
[3622] United States' written reply to Panel question No. 72 at the second substantive meeting.
[3623] United States' first written submission, paras. 1085-1101.
[3624] USITC Report, p. 63.

However, it did not attribute this effect to imports. It noted that imports consistently undersold the domestic industry – including those producers that added capacity – and continued to lead prices down in 1999 and 2000. From this, the USITC concluded that imports, not increased capacity, were the primary cause of decreasing prices.[3625] The USITC found that competition from minimills had some effect on domestic pricing. The Commissioners concluded that although minimills had lower costs than integrated producers, it was imports that were price leaders and led prices down, underselling the minimills throughout the investigation period. Accordingly, the USITC found that minimills were not primarily responsible for declines in domestic prices.[3626] In this regard, the United States notes that the volume of imports far exceeded the volume of minimill sales in the commercial market, by an order of two-to-one.[3627] The USITC found that the only factors other than increased imports that caused injury to the domestic industry were increased capacity, competition from minimills, and a decline in demand after 2000. This is not to suggest that imports in 1996 and 1997 had no negative effects. However, since the analysis of the USITC focused on changes in industry performance after 1997, and as a conservative estimate of the injury attributable to imports, the numerical analysis for CCFRS was based on the changes from 1998 through the first half of 2001 only, as compared with 1997. The injury attributable to imports from 1998 to 2000 continued into the first half of 2001. Non-FTA unit values fell in the first half of 2001, as compared with the same period in 2000. Beginning in the fourth quarter of 2000, domestic prices collapsed. Import prices fell to a lesser extent, resulting in a reduction, or elimination of the margins of underselling.

7.1570 The United States notes that the numerical analysis follows the general approach outlined previously to evaluate the safeguard measure on CCFRS products, with appropriate modifications to reflect the greater variation among the categories of steel covered by the like product. The estimate in the analysis is based on the unit values, which appear to be broadly reflective of the products available from domestic producers and the import sources. This is a conservative approach since, for most of the period, differences between domestic and non-FTA import unit values were greater [sic] than the margin of underselling. The analysis also considers the effect of anti-dumping and countervailing duty orders on the domestic industry. Most of the orders predate the USITC investigation period. The exceptions are the 1997 and 2000 orders on plate, and the 1999 and 2001 anti-dumping orders on hot-rolled steel. The USITC found that import surges in many of the products occurred after anti-dumping and countervailing duty orders were in place, an observation that applies equally to pre-investigation-period orders and the 1997 plate orders. In addition, the USITC data for the surge and post-surge periods reflect any effect on the industry that these orders may have had. Since the United States bases its estimate of the measure on that data, it considers that it does not need to perform any additional analysis to account for these orders. The 1999 and 2001 anti-dumping duty orders and suspension agreements on hot-rolled steel applied to several countries. However, in light of the fact that the 1999 orders did not prevent the continuation of imports at high and injurious levels, and would not have prevented injury by fairly traded imports, the analysis did not adjust the estimate to account for these orders. With regard to the 2000 anti-dumping orders on plate, it is significant that the offset of dumping under the 1997 dumping orders and suspension agreements affected the volume of imports, but did not prevent a reduction in unit values and continued underselling.[3628] Accordingly, the analysis does not adjust the estimate to reflect the offset of dumping and subsidization under the 2000 orders.

[3625] USITC Report, pp. 63-64.
[3626] USITC Report, p. 65.
[3627] From 1996 to 2000, imports ranged from 18.3 to 25.3 million tons annually, while minimill shipments never exceeded 8.49 million annually.
[3628] USITC Report, pp. FLAT-64 & FLAT-C-3

7.1571 The United States suggests that the numerical analysis also attempts to avoid attributing to increased imports the negative price effects of increased capacity and minimill competition, the two other factors that the USITC found to be causing injury during the 1998-2000 period. These two factors are related because, during the investigation period, almost all new capacity for CCFRS products was minimill capacity. The greatest increase in minimill capacity occurred in 1997, which is the comparison year.[3629] Thus, the comparison year already reflects much of the capacity expansion that the USITC found was having an effect on United States prices. In 1998, the year with the second highest level of increase in minimill capacity during the investigation period, capacity increases were in line with increases in demand, so the analysis makes no adjustment to account for capacity and minimill competition in those years.[3630] Capacity increases in 1999 and 2000 were much smaller than in previous years, and demand stayed at roughly the same level. Imports remained in the market at high levels, and at lower prices than in previous years. Minimill shipments into the commercial market were at higher levels than at the beginning of the investigation period, but still reflected unit values higher than those for imports. To compete with imports, domestic producers cut prices. Accordingly, the United States makes no adjustment for these factors. The United States also makes an adjustment to the estimate to reflect the USITC's finding that the decrease in demand in the first half of 2001 "contributed to the industry's continued deterioration at the end of the period". For purposes of the Article 5.1 analysis, and as a conservative assumption, the United States notes that apparent domestic consumption of hot-rolled steel, cold-rolled steel, and coated steel was at levels comparable to those in 1996 in the first half of 2001. Accordingly, for this period, the United States reflects the decreased level of demand by using 1996 as the base period profit. The USITC's findings with regard to imports from Canada and Mexico require no adjustment to the estimate.

7.1572 The United States then explains that in the first step of the Article 5.1 evaluation, it uses a base year of 1997 for all categories. As a conservative estimate, the estimate reduces the base year operating income margin by half for the first half of 2001, to reflect that the USITC found that declining demand was a factor in causing injury during this period, but was no more important than increased imports. In the second step, the analysis estimates the level to which domestic producers' prices would have to increase during the pendency of a safeguard measure to eliminate the price effects of increased imports and to counteract the negative effects of imports from 1998 to 2000. This involves estimating the unit value needed to raise operating margins by the amounts it describes, and then adding an additional increase that would recoup the shortfall in operating income. In the third step, the process described previously produces an estimate for each category of the degree to which import producers' prices would have to increase for domestic producers to achieve the operating income margin described above. Then the United States weight averages these amounts by net commercial sales revenues. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. During the remedy phase of the investigation, the USITC staff prepared economic models on the United States market for CCFRS. The USITC staff adjusted the standard model to reflect linkages among the different categories of flat steel, and ran several permutations. This linked model indicated that a 30% increase in duties on all certain flat-rolled steel (including slab and Mexico) would result in an increase of between 20.8 and 28.0% in the sale price

[3629] USITC Memorandum INV-Y-215, Tables G04-1, G02-1, G03-1, and G06-1. Minimill capacity to produce plate and hot-rolled steel increased as much in 1997 as in all other years of the investigation period, combined.

[3630] For plate, cold rolled steel, and coated steel the increase in demand in 1998 was either greater than or roughly equal to the increase in capacity in 1998. The USITC indicated that capacity increases in line with demand were not themselves injurious. For hot-rolled steel, capacity increased by more than demand in 1998. However, imports of hot-rolled steel increased by 68% in 1998, while production decreased, indicating that the domestic producers were not engaged in competitive price reductions to gain market share and fill capacity, which the USITC identified as the way that extra minimill capacity would affect prices. USITC Report, pp. 63-65.

of imported CCFRS products (excluding Canada) in the United States.[3631] This suggests that the 30% tariff on CCFRS products is set at a magnitude that satisfies the requirements of Article 5.1.

7.1573 Based on the USITC's analysis, the United States considers that its estimation of the extent of application of the CCFRS measure necessitated modifications to the approach outlined previously. The USITC found that [t]he impact of the 1998 surge in imports on the domestic industry is undeniable". Operating income fell in spite of an increase in demand.[3632] The USITC found further that "[t]he import surge in 1998 altered the competitive strategy of domestic producers" in subsequent years, leading to "repeated price cuts" that "while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry's condition".[3633] Consequently, in 2001, "[t]he domestic industry entered a period of falling demand already in a weakened condition and deteriorated even further".[3634]

7.1574 Accordingly, the United States performs the modelling exercise described previously, but based on data for 1998, 1999, and 2000 [sic], rather than just 2000. More specifically, the United States looks at the following sets of scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1996 levels in 1998, 1999, and 2000 [sic]. The price, volume, and revenue results for scenario (i) are in the same range as the price, volume, and revenue results for scenario (ii) in 1998.

7.1575 The European Communities submits that with respect to the numerical analysis used by the United States, an aggregated analysis has been used for the whole CCFRS product bundle[3635], but details product-by-product tables in Exhibit US-56. This confirms that the United States should have undertaken a separate investigation for each of the 5 products comprised in the CCFRS category instead of relying on an aggregated basis. In addition, as a first step, the United States has chosen 1997 as its "base" year and admits that only one adjustment has been made to take account of decline in demand in 2001. On the contrary, the United States has taken the view that no adjustment was necessary to accommodate legacy costs, management decisions and purchaser consolidation since the USITC has found that these factors had not caused injury to the domestic industry. Moreover, the United States admits that no adjustment has been made to take account of the injurious effect of increased capacity and minimill competition. More specifically, the United States relies on the fact that its "base" year (1997) already corresponds to the greatest capacity increase and that capacity increases in the following year were in line with demand increase. This argument is vitiated because the mere fact that capacity increases allegedly remained in line with demand growth does not guarantee that injurious excess capacity did not exist, especially if the initial excess capacity at the outset required capacity reduction to get in keeping with demand. The European Communities notes that the United States also relies on the assertion that minimill shipments, although increasing, were sold at higher prices than imports. This reasoning ignores the fact that even if minimill prices were higher than import prices, minimill competition had an injurious effect. The negation of the injurious effect of minimill prices is particularly surprising in the light of the US argument that imports prices,

[3631] Memorandum EC-Y-050 (US-65). The public materials do not contain model results covering the safeguard measure established by the President. The United States notes that the exclusion of slab and Mexico in the model of the President's remedy (US-57) shows a substantially lower effect on import prices.
[3632] USITC Report, p. 60.
[3633] USITC Report, p. 61.
[3634] USITC Report, p. 63.
[3635] United States' first written submission, paras. 1091-1099.

although higher than domestic prices, could have caused injury.[3636] If such is the case, the same must also be true for minimill prices higher than import prices.

7.1576 The European Communities adds that, as a result of its numerical approach, the United States seems to submit that an increase of 18.9% in imports prices would be in line with Article 5.1[3637], whereas the USITC modelling indicated that a 30% additional tariff on imports including slabs and Mexico but excluding Canada would result in an increase of between 20.8 and 28.0% in imports prices.[3638] There is no need to further argue that the relevant comparison (if any) would have been with an USITC model run for imports from non-NAFTA sources. It is worth noting that, as a matter of fact, the USITC modelling for a 20% additional tariff results in an increase of between 14.0 and 18.6% in imports prices which would strongly suggest that a tariff increase of maybe more than 20% but surely less than 30% would have reached the targeted 18.9% increase in imports prices.[3639]

7.1577 The European Communities submits[3640] that in addition to these discrepancies[3641], the USITC modelling exercise had been performed with respect to imports of all CCFRS and taking account of imports from Mexico, whereas the only relevant comparison (if any) would have been with an USITC model run for imports from non-NAFTA sources. For the European Communities, the United States itself admits that the exclusion of Mexico from its modelling of the President's remedy shows a "substantially lower effect on import prices".[3642] This might explain the large discrepancies between the results of the USITC modelling exercise and the United States' *ex post* numerical analysis, but makes any comparison between them incoherent. Therefore, the United States does not have any supportive evidence that the USITC modelling suggests that a 30% tariff on CCFRS is "set at a magnitude that satisfies the requirements of Article 5.1".[3643]

7.1578 The United States responds that imports from NAFTA countries were properly considered. The United States adds that some complainants assert that the USITC "explicitly stated that a more restrictive remedy would not be necessary to address the injury it has found to be caused by increased imports".[3644] This, it argues, is incorrect. The USITC actually stated that "[w]e do not agree with the domestic industry, however, that an additional 35, 40, or 50% *ad valorem* tariff is necessary to achieve the desired result, or is otherwise appropriate".[3645] The exclusion of a 30% tariff from this enumeration suggests that the USITC did not find a measure at that level to be excessive.[3646] Further, in any event, the USITC was evaluating four-year measures, while the President applied remedies for

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[3636] United States' first written submission, paras. 548-549 (tin mill products).
[3637] Exhibit US-56.
[3638] United States' first written submission, para. 1099.
[3639] European Communities' second written submission, paras. 422-528.
[3640] European Communities' comments on replies to Panel question No. 54 at the second substantive meeting.
[3641] European Communities' second written submission, para. 527.
[3642] United States' first written submission, footnote 1385. The European Communities also notes that the United States improperly included slabs in the modelling of a remedy which excluded slabs.
[3643] United States' first written submission, para. 1099.
[3644] European Communities' written reply to Panel question No. 108 at the first substantive meeting.
[3645] USITC Report, p. 363.
[3646] Korea asserts that the USITC's explanation of its recommendation for other welded pipe is inconsistent with the measure established by the President. Korea's written reply to Panel question No. 108 at the first substantive meeting. The United States argues it has showed in its first written submission that the USITC's findings were not relevant to a consideration of consistency with Article 5.1. United States' first written submission, paras. 1205 through 1210. These same points fully rebut the arguments make by Korea in response to Panel question No. 108.

only three years.[3647] Therefore, the complainants' analysis of the USITC recommendations does not suggest any inconsistency with Article 5.1.[3648]

(ii) Tariff on tin mill products

7.1579 The United States[3649] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic tin mill steel industry and this is the starting assumption of its justification.

7.1580 The United States recalls that for tin mill, three Commissioners found serious injury. They issued separate views, but agreed on certain key aspects of the injurious condition faced by the domestic industry. Commissioner Miller found serious injury based on a decline in capacity utilization, United States shipments and sales, operating margins, average unit values, capital expenditures and employment during the period of the investigation.[3650] Commissioner Bragg treated tin mill as a component part of a single flat-rolled like product, and found serious injury based on decreasing revenues, operating margins, capacity utilization, wages and employment, and the lack of ability to finance modernization in the last two and half years of the period of investigation.[3651] Commissioner Devaney also treated tin mill as part of a single flat-rolled like product, and found serious injury based on declines in capacity utilization, operating margins, average unit values, and downward trends in employment and capital expenditures in the later portion of the period of investigation.[3652]

7.1581 For the United States, each of these determinations reflects a permissible analysis of the effect of imports on the domestic industry. Under United States law, multiple affirmative determinations by individual Commissioners as to differently defined like products constitute an affirmative determination of the USITC with regard to the largest product group that is subject to enough affirmative determinations to form a majority sufficient to support a determination of the USITC. It is the injury experienced by the producers of tin mill – the product within the intersection of the determinations of Commissioners Miller, Bragg, and Devaney – that forms the basis for deciding the extent of application of the safeguard measure. The performance of these producers is evaluated in light of the findings made by Commissioners Bragg and Devaney as to the larger industry comprising producers of tin mill and flat-rolled products.

7.1582 The United States recalls that the Commissioners rendering affirmative determinations focused on the following indicators of injury. For tin mill, these were:

[3647] The panel in *US – Line Pipe* found that the duration of a measure was a valid factor in considering whether it was applied to a lesser extent than a proposed measure with a longer duration. Panel Report, *US – Line Pipe*, paras. 7.96-7.97.

[3648] United States' second written submission, para. 205.

[3649] United States' first written submission, paras. 1170-1186.

[3650] USITC Report, pp. 72-74 and pp. 307-308.

[3651] USITC Report, pp. 283-282.

[3652] USITC Report, p. 345.

	1998	1999	2000	1st half 2000	1st half 2001
Revenues	2,120	2,033	1,974	1,008	880
Shipments	3,287	3,239	3,163	1,597	1,436
Market share	87.2%	82.3%	84.5%	84.4%	84.5%
Employment	6,322	6,075	5,733	5,884	5,584
Op. income	(78)	(141)	(119)	(25)	(65)
Margin	(3.9)%	(6.9)%	(6.1)%	(2.5)%	(7.4)%
Capital expenditures	120	146	97	29	15

Source: USITC Report, p. FLAT-C-8. Shipments in 1000 short tons; employment in number of workers; revenue, operating income and capital expenditures in US$1 million.

7.1583 The United States recalls that Commissioner Miller found that although the industry was unprofitable before and throughout the period, it suffered a serious downturn in 1999 as imports surged. Despite the increase in demand in 1999, the domestic industry "realized no gain, and in fact a serious loss, in profitability. Imports also showed their greatest increase in United States market share over this period".[3653] Commissioner Bragg stated in her opinion that although the volume of imports of carbon and alloy flat products declined towards the end of the period of the investigation, "they still remained at relatively high levels and continued to negatively impact prices for the domestic product throughout the period. By forcing domestic prices lower, imports deprived domestic producers of revenue. It should be recognized that given the worsening condition of the domestic industry over the period of investigation, the amount (level) of imports sufficient to cause serious [injury] declined correspondingly".[3654] Commissioner Miller analysed three additional potential causes of the serious injury: declining demand, purchaser consolidation, and overcapacity. Commissioner Bragg identified several potential causes of serious injury other than imports, but determined that for all flat products, "any injury sustained by the domestic industry stems solely from increased imports".[3655] Commissioner Devaney found that declining demand, increased capacity, and competition from minimills contributed to the deterioration of the industry encompassing all flat steel products. He found that declining demand had effect only at the end of the investigation period.[3656] Commissioner Miller found that declining overall demand was not causing injury. She noted that this condition began long before the investigation period, and might account for the industry's weak state in 1996, but that demand actually increased in 1999 with no improvement in the condition of the domestic industry.[3657] Commissioner Miller found that purchaser consolidation existed throughout the investigation period, and signalled the "intense price competition that exists for tin mill products, both domestic and imported.[3658] Since this factor existed throughout the investigation period, it may have had negative effects throughout, but it would not be responsible for *changes* in the industry's

[3653] USITC Report, p. 308.
[3654] USITC Report, p. 294.
[3655] USITC Report, p. 295.
[3656] USITC Report, p. 63. In footnote 224 of the USITC Report, p. 55, Commissioner Devaney joined the analysis of the majority for the causation of injury in flat products, stating that the result is the same when the analysis is performed over the entire industry as he has defined it, that is that imports are a substantial cause of serious injury.
[3657] USITC Report, pp. 308-309.
[3658] USITC Report, p. 309.

condition. Commissioner Miller found that there was overcapacity during the investigation period, but noted that the decrease in capacity utilization coincided with the import surge. She also noted that the industry's overall capacity decreased during the investigation period, and that the tin mill industry had taken steps to rationalize capacity.[3659] Although this factor may have had negative effects on the industry during the investigation period, the decline in capacity indicates that it was not responsible for any worsening in the condition of tin mill producers during the investigation period.[3660]

7.1584 The United States submits that the USITC Report details the relationship between increased imports from non-FTA sources and injury to the domestic industry. Commissioners Bragg, Devaney, and Miller found that imports caused serious injury because when an upswing in demand occurred in 1999, the domestic industry was unable to make any gain as imports surged. Non-NAFTA imports surged 51.5% between 1998 and 1999 resulting in the lowest profit margin (-6.9%) for any full year of the period of investigation. Domestic prices and average unit values were also at their lowest in 1999. Although non-NAFTA imports declined in 2000, they still were at higher levels than the 1996-1998 period. Commissioner Bragg in her analysis found that the "impact of opportunities lost during an upswing in the given cycle would not only have an immediate impact on the domestic industry by virtue of suppressed and depressed prices, lost sales, and resulting lost revenues, but would also be expected to have lingering carryover effects on the domestic industry as the cycle turned lower".[3661] Commissioner Miller found that her analysis of tin mill would not change if she had excluded Canada and Mexico.[3662] Commissioner Bragg found that her analysis that the domestic flat-rolled industry suffered serious injury from imports would not change with the exclusion of NAFTA imports.[3663]

7.1585 The United States argues that if one of the Commissioners identified a factor as causing injury, that factor caused injury regardless of the views of the other Commissioners. Accordingly, for purposes of evaluating whether the tin mill safeguard measure complied with Article 5.1, the United States concludes that non-NAFTA imports were responsible for some of the reduction in domestic producers' sales and market share, production, profits, wages, and employment beginning in 1999. The United States submits that this is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. Accordingly, for purposes of the evaluation of consistency with Article 5.1, the United States explains that it treated increased capacity, competition with minimills, and decline in demand in the latter part of the period of investigation as factors causing injury to the domestic tin mill industry.

7.1586 In evaluating the safeguard measure, the United States also considers Commissioner Miller's observation that the United States imposed anti-dumping duties on tin mill from Japan in the first half of 2000. She noted that, even so, imports continued to have a significant presence in the United States.[3664] Accordingly, the United States has not adjusted its estimate to reflect these anti-dumping duty orders.

7.1587 The United States explains that for purposes of the estimate of consistency with Article 5.1, it followed a volume-based approach for the numerical exercise. Commissioner Miller noted the significant volume of imports and the market share increase, both in 1999 and over the entirety of the investigation period.[3665] Accordingly, the United States has analysed this safeguard measure based on

[3659] USITC Report, p. 309.
[3660] United States' first written submission, para. 1177.
[3661] USITC Report, p. 293.
[3662] USITC Report, p. 310, footnotes 28 and 29.
[3663] Second Supplementary Report, p. 14.
[3664] USITC Report, p. 308.
[3665] USITC Report, p. 308.

import volumes. The United States notes that imports increased substantially between 1998 and 2000. As a first step in the analysis, the United States estimates what non-NAFTA import volume would have been if non-NAFTA imports had stayed at their 1998 market share in 1999 through 2001. It then compares the estimated import volumes with the actual import volumes for those periods, and finds that non-NAFTA imports would have been, on average, approximately 23% lower. This reduction represents a reduction in import volume roughly equivalent to the USITC modelling associated with a 30% tariff, suggesting that the 30% tariff on tin mill is set at a magnitude that satisfies the requirements of Article 5.1.[3666] Since this approach is based on the volume of non-NAFTA imports alone, the United States explains that it has concluded that no adjustment to the estimate was necessary. In order to calculate target import levels, the United States has used non-NAFTA market share for 1998, the year immediately preceding the 1999 surge in imports, and then applied it to actual apparent consumption for years 1999-2001. The United States then compares calculated target import levels to the actual import levels for each year.

7.1588 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise appear in Modelling Worksheet I. For the United States, they suggest that it applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1589 Norway[3667], Japan[3668] and Korea[3669] challenge the justification and the safeguard remedy imposed on tin mill. Norway adds that the 30% tariff overshoots the target grossly. As stated by Commissioner Miller[3670], there is intense price competition for tin mill products. The effect of a 30% tariff increase in such circumstances is clearly that imports will be drastically reduced. That is also *grosso modo* the result except for the products for which exclusions have been accorded. Either this was intended, which thus clearly is in breach of Article 5.1, or the United States had no basis for establishing that a 23% reduction amounts to the alleged serious injury caused by increased imports from non-NAFTA countries, which is also in clear breach of Article 5.1.[3671] The European Communities, Norway, Japan, Korea and Brazil also argue that even if one were to argue that the President can avail himself of the justifications presented by the three commissioners who voted in favour of imposing tariffs on tin mill products, it is clear that their suggested measures do not comply with the requirements of Article 5.1 of the Agreement on Safeguards.[3672] These complainants recall[3673] that the only commissioner that specifically addressed a remedy with respect to tin mill products, Commissioner Miller, suggested an additional tariff of 20% , declining over four years.[3674] She explained the choice of this remedy *inter alia* as follows: "The Commission's economic analysis shows that an additional tariff of 20% *ad valorem* will result in a substantial increase in the domestic industry's sales revenues and sales volumes during the first year of relief" and "The significant declines in import volumes expected from the tariff increase will help the domestic industry increase its sales revenues substantially and allow it to make significant adjustments to import competition

[3666] USITC Memorandum EC-Y-046, p. FLAT-26.
[3667] Norway's second written submission, para. 166. Norway's first written submission, paras. 358-369.
[3668] Japan's first written submission, paras. 208-213.
[3669] Korea's first written submission, paras. 206-207.
[3670] United States' first submission, para. 1176.
[3671] Norway's second written submission, para. 166.
[3672] Norway's second oral statement on behalf of all complainants, para. 31.
[3673] Norway's first written submission, para. 367.
[3674] USITC Report, Vol. I, at pp. 20 and 527. (Exhibit CC-6)

during the period.[3675] The United States argues that if looking at the same time at the Commissioners who included tin mill products in the broader category of flat products, Bragg and Devaney suggested a four year tariff starting at 40% and ending at 31%.[3676] These complainants recall that Devaney explained this choice by stating *inter alia* that: "As I have stated previously, the form of remedy that I have chosen seeks to address the ongoing injury that has occurred over a number of years, and not just in the most recent period" and "Accordingly, I believe that the significant declines in import volumes resulting from the tariff will help the industry increase it sales volumes substantially and allow it to make significant adjustments to import competition during the period of relief".[3677] They also recall that Commissioner Bragg gives extensive explanations for her choice of remedy: "I recognize that differences exist between my injury findings and remedy recommendations, thus raising an issue as to whether there is an appropriate level of symmetry between my injury findings and these remedy recommendations. Importantly I find that even the maximum remedy I am authorized by US law to recommend to the President would be insufficient to address the level of serious injury I found to exist for some of my defined domestic industries, as well as the product groupings covered at this stage of the proceedings".[3678] and "Tariffs also provide a revenue benefit directly to the US government, in contrast to quotas which arguably provide a benefit to the foreign producers who receive the quota rents".[3679]

7.1590 The above-mentioned complainants note that neither Commissioner Devaney nor Commissioner Bragg gives an explanation of how exactly they arrived at their suggested percentages, and what the effects will actually be on imports. Assuming that the Commission has performed only one economic analysis, those complainants find it hard to understand how the same figures may justify different suggestions on remedies by the other Commissioners. Furthermore, not even Commissioner Miller appropriately addressed the non-attribution aspects, which clearly should have been done given that the three other Commissioners did not attribute the injury suffered by the domestic injury to imports. In her separate determination of serious injury[3680], she admitted to a number of causes other than imports that are causing injury, but makes an affirmative determination based on the USITC methodology of looking at whether other causes are equal to or greater than imports. However, in her injury determination for tin mill products[3681], there was absolutely no discussion of non-attribution of the injury from these other causes, in clear violation of Article 5.1. It is also noteworthy that she included imports from Canada (but not from Mexico, Israel and Jordan) in her determination – and proposes that Canadian imports be subject to the proposed 20% tariff.[3682]

7.1591 Norway then argues that it is clear that the remedy suggested by Devaney, as explained by him, goes beyond what is permitted under the Agreement on Safeguards. Addressing not only current injury, or injury suffered during the POI, but also alleged "past injuries" – giving a sort of "extra punitive damages", cannot fulfil the requirements of Article 5.1 Furthermore, nowhere in his separate views on remedy is there a discussion of how his suggested remedy will be limited to only address the serious injury attributed to the increased imports affected by the measure. For the complainants, it is equally clear that the remedy suggested by Commissioner Bragg is not limited to the extent necessary to address serious injury attributed to the increased imports affected by the measure. As she explains

[3675] USITC Report, Vol. I, at p. 528. (Exhibit CC-6)
[3676] USITC Report, Vol. I, at p. 20. (Exhibit CC-6)
[3677] USITC Report, Vol. I, at pp. 533 and 534. (Exhibit CC-6)
[3678] USITC Report, Vol. I, at p. 520. (Exhibit CC-6)
[3679] USITC Report, Vol. I, at p. 522. (Exhibit CC-6)
[3680] USITC Report, Vol. I, at pp. 308-309. (Exhibit CC-6)
[3681] USITC Report, Vol. I, at pp. 527-529. (Exhibit CC-6)
[3682] Japan's first written submission, paras. 208-213; Korea's first written submission, paras. 206-207; Norway's second written submission, paras. 166-167.

herself there are asymetries in her treatment of injury and remedy. Furthermore, her criteria for establishing the level of the tariff is not based on the serious injury that she attributes to imports, but on the level necessary to "significantly improve profitability" of domestic producers.[3683] Bragg explains that her exclusions of certain countries from the injury analysis would not change her injury findings, but does not discuss and still not take into account the non-attribution aspects of other factors to the injury in relation to the establishment of the remedy.[3684]

7.1592 The European Communities argues that for tin mill products, the US Presidential Proclamation relied on 3 separate affirmative determinations based on divergent product definitions, where 3 different USITC Commissioners made 3 distinct findings. The United States has decided to take account of all the alternative factors found to have caused injury to the domestic industry, regardless of the views of other Commissioners[3685], but eventually determined that no adjustment was necessary in this respect.[3686] Another difference in the application of the numerical analogy proposed by the United States arises from the fact that the injurious effect of imports of tin mill products does not rest on prices effect, but on losses of market shares. For this reason, the United States has proposed a volume-oriented approach, aiming at maintaining imports market share in 1999 to 2001 at the level reached in 1998, prior to the 1999 imports surge. The United States has noted that non-FTA imports would then have been in average 23% lower, which would purportedly correspond to the effect of a 30% tariff increase as modelled by the USITC.[3687] Even admitting *arguendo* that the United States proposal for a numerical approach based on volume effects could have some relevance, the United States conclusion that a 23% decrease in imports would be "*roughly equivalent*" to the USITC modelling associated with a 30% tariff increase would not be supported by the USITC estimate of import decrease resulting from such tariff (from –50.5 to -29.1%). Indeed, a 20% increase in duty, resulting in a decrease in imports volume of between –30.7 to –16.6% would have appeared more adequate.[3688]

(iii) Tariff on hot-rolled bar

7.1593 The United States[3689] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic hot-rolled bar steel industry and this was the starting assumption of its justification.

7.1594 According to the United States, the USITC identified four factors other than increased imports that potentially caused injury: competition among domestic producers, inefficient domestic producers, changes in demand prior to 2001, and changes in input costs. The USITC found that none of these was a factor causing injury to the domestic industry. The USITC did not attribute any injury to competition among domestic producers. It found that this cause might explain changes in the relative market shares of domestic producers, but not their loss of 2.4 percentage points of market share to imports. The USITC also found Nucor – the source of competition among domestic producers – was not a primary source of pricing declines. Thus, increased imports were the only factor causing injury to the domestic industry in 2000. The USITC made no findings with regard to declining demand in 1998 and 1999. For purposes of this estimate, the United States notes that demand increased in 1998. Based on the USITC's finding of serious injury, for purposes of its

[3683] USITC Report, Vol. I, at p. 521. (Exhibit CC-6)
[3684] Norway's first written submission, paras. 358-369.
[3685] United States' first written submission, para. 1180.
[3686] United States' first written submission, para. 1185.
[3687] United States' first written submission, paras. 1183-1185.
[3688] European Communities' second written submission, paras. 529-532.
[3689] United States' first written submission, paras. 1102-1109.

estimate, the United States treats the injury attributable to imports from 1997 to 2000 as continuing into the first half of 2001. Non-FTA imports undersold domestic products at levels comparable to preceding years[3690], and retained a market share well above 1996 and 1997 levels. The USITC found that the decline in hot-rolled bar consumption in this period led to "further deterioration".

7.1595 The United States then bases its analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the USITC noted: for a product such as hot-rolled bar which covers a broad range of product types and values, pricing data for a more specific product can provide more probative information than average unit sales values.[3691] In the first step, the United States chooses 1997, the year before the year when the condition of the domestic industry began to deteriorate, as the appropriate comparison year, keeping in mind that imports may still have had some negative effect on the industry. It estimated that the revenue shortfall in 1998 and 2000, years in which demand did not decline, was attributable to increased imports. The United States explains that it treated half of the decline in revenue in 1999 as attributable to increased imports, and for the first half of 2001, treats the decline in revenue attributable to imports as equal to the level in 2000. In the second step, the United States calculates the amount by which the 1997 operating income margin would have to rise to recoup the shortfall in operating income described in the preceding paragraph.[3692] In the third step, it bases the pricing analysis on the USITC pricing comparisons on page LONG-87. The United States notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, the United States estimates the additional duty that would be necessary to achieve the target increase. As part of its investigation, the USITC prepared economic models on the United States hot-rolled bar market. These models indicated that a 30% increase in duties would result in an increase of between 19.6 and 24.2% in the sale price of imported hot-rolled bar in the United States.[3693] For the United States, this suggests that the 30% tariff on hot-rolled bar is set at a magnitude that satisfies the requirements of Article 5.1.

7.1596 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1597 The European Communities argues that the United States starts off by recalling that the USITC found that none of the four other factors invoked (competition among domestic producers, inefficient domestic producers, changes in demand and changes in input costs) had injurious effects, but admits that the USITC had made no finding with respect to declining demand in 1998 and 1999.[3694] Then the United States chooses 1997 as its "base" year because the industry's condition began to deteriorate that year (although one would have thought that it would chose the year before the increase in imports – choosing the "base" year as the one prior to the decline in the industry's

[3690] The unit value of imports increased in 2001 as compared to 2000. Since comparisons of comparable items continued to show underselling, this development indicates that the mix of imported products changed.

[3691] USITC Report, p. 93, footnote 554.

[3692] The United States does this by calculating the revenue shortfall in each year in which the USITC identified imports as having an injurious effect, and dividing that by actual revenue for the same period.

[3693] Memorandum EC-046, p. LONG-29 (US-64).

[3694] United States' first written submission, paras. 1102-1104.

performance, does not meet the requirement to address only the injury caused by increased imports). The United States also admits that only one adjustment has been made for 1999. Although the United States does not explicitly acknowledge it, this adjustment seems to reflect the decline in demand in 1999, although the injury caused by this other factor had (improperly) not been assessed in the causation analysis. As a result of its numerical approach, the United States has found that an increase of 22.8% in imports prices would be in line with Article 5.1[3695], whereas the USITC modelling has indicated that a 30% additional tariff on imports excluding Mexico but including Canada would result in an increase of between 19.6 and 24.2% in imports prices.[3696] [3697]

(iv) Tariff on cold-finished bar

7.1598 The United States[3698] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic cold-finished bar industry and this was the starting assumption of its justification.

7.1599 The United States explains that the USITC identified two factors other than increased imports that potentially caused injury: declining domestic demand for cold-finished bar and the effect of a purportedly inefficient domestic producer. The USITC found that the inefficiency of RTI did not cause injury to the domestic industry. The USITC considered the effect of declining demand on the domestic industry. It noted the domestic producers' observation that prices for cold-finished bar historically track demand, and observed that this appeared to be the case in 1999. Accordingly, it found the decline in the domestic industry's financial performance in 1999 to be "to a large extent attributable to declines in demand during that year".[3699] The USITC noted that demand increased in 2000, but that the domestic producers' prices decreased. Accordingly the USITC found that changes in demand did not explain the serious injury to the domestic cold-finished bar industry. These findings indicate that changes in demand were having a positive effect in 2000; therefore, no injury should be attributed to this potential cause in 2000. The USITC noted that demand declined in the first half of 2001, and that the domestic industry's performance further deteriorated.[3700] This finding indicates that some of the injury in the first half of 2001 is attributable to declining demand. These findings demonstrate that the entirety of the reduction in domestic producers' production, shipments, market share, employment, revenue, and operating income in 2000 is properly attributed to increased imports. The USITC's findings further indicate that both increased imports and decreases in demand had an injurious effect in 1999 and the first half of 2001. This is not to suggest that imports in 1996 through 1998 had no negative effects. Since the analysis of the USITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, the United States has decided to base its analysis for cold-finished bar on the changes from 1999 through the first half of 2001 only.

7.1600 The United States argues that it has treated non-import factors as responsible for half of the decline in the domestic industry's operating income in 1999. It has assumed that decreased demand was responsible for any change in performance in the first half of 2001 as compared with the full year 2000. Accordingly, it has estimated that increased imports had the same negative effect in the first half of 2001 that the United States has estimated for 2000.

[3695] See Exhibit US-56.
[3696] United States' first written submission, para. 1108.
[3697] European Communities' second written submission, paras. 533-536.
[3698] United States' first written submission paras. 1110-1119.
[3699] USITC Report, p. 107.
[3700] USITC Report, p. 107.

7.1601 The United States bases its analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the USITC noted: for a product such as hot-rolled bar which covers a broad range of product types and values, pricing data for a more specific product can provide more probative information than average unit sales values.[3701] In the first step, the United States claims that as a conservative estimate it chose 1998, a year in which demand was equivalent to its level in 2000, as the appropriate base year, keeping in mind that imports increased in that year and, thus, may have had some negative effect on the industry. To reflect the impact of non-import factors on 1999, the United States halves the base operating income margin. It estimates the revenue shortfall in 1999 through the first half of 2001, periods in which the USITC indicated that imports caused some of the decline in the industry's performance. In the second step, it estimates the amount by which the 1998 operating income margin would have to rise to recoup the shortfall in operating income.[3702] In the third step, it bases the pricing analysis on the USITC pricing comparisons on page LONG-92.[3703] Finally, it notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' cold-finished bar market. These models indicated that a 30% increase in duties would result in an increase of between 19.6 and 24.2% in the sale price of imported cold-finished bar (excluding bar from Canada) in the United States.[3704] For the United States, this suggests that the 30% tariff on cold-finished bar is set at a magnitude that satisfies the requirements of Article 5.1.

7.1602 The United States notes that these figures are lower than the tariff level of the safeguard measures established by the President and recalls that "it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market".[3705]

7.1603 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1604 The European Communities recalls that the United States has determined that 1998 should be its "base" year and made adjustments to take account of the injurious effect of declining demand in 1999 and 2001, in line with the USITC findings that this other factor caused injury in these years. Also consistent with the USITC findings, no adjustment has been made with respect to the

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[3701] USITC Report, p. 103, footnote 614.

[3702] The United States does this by calculating the revenue shortfall in each year in which the USITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[3703] This table contains confidential information. The United States has reproduced the results of this step, but not the inputs.

[3704] Memorandum EC-046, p. LONG-29 (US-64).

[3705] *US – Fur Felt Hats*, para. 35. The United States argues that in the case of cold-finished bar, it has noted that it was relatively simple and inexpensive to convert a hot-rolled bar into a cold-finished bar. If the tariff level for these two products were different, it would create an incentive for foreign producers to circumvent the safeguard measure by shifting their hot-rolled bar customers to cold-finished bar. This would undermine the remedial effect of the measures on both hot-rolled and cold-finished bar. Accordingly, the United States did not go beyond the extent necessary by applying a 30% tariff to imports of cold-finished bar.

inefficiency of one domestic producer.[3706] As a result of its numerical approach, the United States has found that an increase of 14.4% in imports prices would be in line with Article 5.1[3707] and referred to the USITC modelling indicating that a 30% additional tariff on imports excluding Mexico but including Canada would result in an increase of between 19.6 and 24.2% in imports prices. Admitting *arguendo* that the United States approach could be relevant, a 20% additional tariff, which would have resulted in an increase of between 13.3 and 16.2% in imports prices, would appear more adequate than a 30% additional tariff which patently overshoots the mark. On this specific point, the United States admits that the 30% additional tariff on cold-finished bar was designed to match the duty increase for hot-rolled bar and prevent product shifting from hot to cold-finished bar.[3708] This being said, the purported need to prevent product shifting does not allow the United States to apply a safeguard measure on cold-finished bar beyond the extent necessary to prevent or remedy serious injury caused by increased imports.[3709]

(v) Tariff on rebar

7.1605 The United States[3710] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic rebar industry and this is the starting assumption of its justification. The USITC identified four factors other than increased imports that potentially caused injury: demand changes, changes in input costs, capacity increases, and competition between domestic producers. The USITC found that none of these caused injury to the domestic industry. These findings demonstrate that the entirety of the reduction in domestic producers' performance from 1999 through 2001 was attributable to increased imports. The United States submits that this is not to suggest that imports in 1996 through 1998 had no negative effects. The United States explains that since the USITC's analysis focused on changes in industry performance, and that performance began to decline in 1999, it based its estimate for rebar bar on the changes from 1999 through the first half of 2001 only. The United States also considered the USITC's observation that the United States imposed anti-dumping duties on Turkey in 1996 and on Belarus, China, Indonesia, Korea Latvia, Moldova, Poland, and Ukraine in 2001. The USITC noted in its remedy recommendation that, although the anti-dumping duties reduced imports from these sources, imports from other sources took their place to a significant degree.[3711] In fact, even though the anti-dumping duty orders took effect in January, 2001, non-FTA imports for the first half of 2001 were only slightly lower than in the first half of 2000. Non-FTA unit values, while slightly higher than in the first half of 2000, remained far below domestic unit values.[3712]

7.1606 The United States argues that it bases its analysis of the permissible remedy on the aggregate value data, rather than the underselling data, because the USITC did not find, as it did for hot-rolled bar and cold-finished bar, that rebar encompassed a wide spectrum of products. In the first step, it chooses 1998, the year before the industry's profitability began to decline, as the appropriate base year, keeping in mind that imports increased in that year and, thus, may have had some negative effect on the prices and profitability of the domestic industry. In the second and third steps, it uses data pertaining to 1999 through the first half of 2001 to estimate how much prices would have to increase to recoup the shortfall in revenue attributable to increased imports. The United States claims that as a conservative estimate of the effect of the 2001 anti-dumping duty orders, it assumes that they are

[3706] United States' first written submission, paras. 1110-1115.
[3707] Exhibit US-56.
[3708] United States' first written submission, footnote 1399.
[3709] European Communities' second written submission, 537-540.
[3710] United States' first written submission, paras. 1120-1127.
[3711] USITC Report, p. 375, footnote 112.
[3712] USITC Report, p. LONG-C-5.

responsible for all of the 6.8% increase in average unit values in the first half of 2001 as compared with the first half of 2000. Then it deducts this amount from the estimated increase in import prices calculated in the first through third steps. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' rebar bar market. These models indicated that a 15% increase in duties would result in an increase of between 8.2% and 10.9% in the sale price of imported rebar (excluding rebar from Mexico and Canada) in the United States.[3713] For the United States, this suggests that the 15% tariff on rebar is set at a magnitude that satisfies the requirements of Article 5.1.

7.1607 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1608 The European Communities recalls that the United States has chosen 1998, "a year before the industry's profitability began to decline" as its "base" year.[3714] One adjustment had been made to take account of the effect of anti-dumping orders on imports prices in 2001. On the contrary, with reference to the USITC findings, no adjustment has been made concerning demand changes, input costs, capacity increase and competition among domestic producers. As a result of its numerical approach, the United States has found that an increase of 29.1% in imports prices would be in line with Article 5.1[3715] and referred to the USITC modelling indicating that a 15% additional tariff on imports excluding Mexico and Canada would result in an increase of between 8.2% and 10.9% in imports prices.[3716] [3717]

(vi) Tariff on welded pipe

7.1609 The United States[3718] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused the threat of serious injury to the domestic welded pipe industry and this is the starting assumption of its justification. The USITC identified two factors other than increased imports that potentially caused the industry's weakened condition: increased capacity on an overall basis and cost increases at one significant producer ("Producer X") that were unrelated to increased imports. The USITC found that the increase in capacity did not contribute in more than a minor way to the condition of the industry in 2000 or the first half of 2001. It found that the 1.5 million ton increase was only "modestly higher" than the increase in apparent domestic consumption and, therefore, not "excessive".[3719] The USITC found that the main reason for Producer X's declining performance was a drop in the unit value of sales beginning in 1999, and that the drop was largely a result of increased imports.[3720] In other words, this development was not an alternative "cause" of

[3713] Memorandum EC-046, p. LONG-27 (US-64).
[3714] United States' first written submission, para. 1124.
[3715] Exhibit US-56.
[3716] United States' first written submission, para. 1126.
[3717] European Communities' second written submission, paras. 541-542.
[3718] United States' first written submission, paras. 1128-1138.
[3719] USITC Report, p. 165.
[3720] USITC Report, p. 165.

injury, but a symptom of the injury caused by increased imports. Thus, any injury to the industry as a result of Producer X's performance was properly attributed to increased imports.

7.1610 For the United States, these findings of the USITC demonstrate that most of the reduction in domestic producers' production, capacity utilization, shipments, number of workers, and profitability in 2000 is properly attributed to increased imports. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. The USITC specifically found that "imports have had a negative effect on the domestic industry over the period we have examined".[3721] The United States notes that the USITC did find that the increase in capacity had a negative effect on the industry in 2000, albeit a "minor" amount. The data suggest that the amount is quite minor. Total domestic capacity grew by approximately 350,000 tons from 1999 to 2000, an increase of only 4.4%. The industry experienced an even higher increase in capacity, of approximately 488,000 tons, from 1998 to 1999 (an increase of 6.5%). During that period, profits fell by only 0.2 percentage points.[3722] As an extremely conservative estimate, while recognizing the imports were causing injury to the domestic industry in 1998, 1999, 2000, and 2001, the United States treats the *decrease* in the industry's performance from 1999 to 2000 as attributable to increases in capacity.

7.1611 The United States claims that it bases its estimate of the permissible extent of application on the aggregate unit value data. The USITC did not determine, as it did for hot-rolled bar and cold-finished bar, that a difference in product mix between domestic producers and importers might affect the unit value data. Moreover, the unit value data is public, and the pricing data confidential. In its estimate regarding consistency with Article 5.1, the United States also considered two issues addressed by the USITC: existing anti-dumping duty orders and a likely increase in demand for large diameter line pipe. The USITC found that existing anti-dumping duty orders covered a limited number of products and countries. Although the orders had been in place since at least 1989, they did not prevent the overall increase in imports, or even prevent increases in imports from the covered countries.[3723] Moreover, the data gathered by the USITC reflects any effect on the industry that the orders may have had. Since the United States bases its estimate regarding the measure on that data, it did not need to adjust the estimate to account for the effect of the anti-dumping duty orders. As for the likely increase in demand for large diameter line pipe, the USITC found as a general matter that "rising demand tends to ameliorate the effect of a given volume of imports". However, the United States argues, the Commissioners also found that increasing [sic] demand for standard pipe was offsetting the increase in demand for large diameter line pipe.[3724] These findings by the USITC indicate that there was no overall increase in demand for welded pipe and, therefore, no basis to conclude that increased demand would lessen the future effect of increased imports. Therefore, the United States explains that it did not attempt to incorporate this factor into its analysis.

7.1612 The United States argues that, for the first step, in light of its conservative estimate that the decrease in the domestic industry's financial performance in 2000 was attributable to increased capacity, it does not attempt to determine a domestic price that would increase operating income margins above their 2000 levels. In the second and third steps, it bases its estimate on data for 1998 through the first half of 2001, the period when imports were increasing. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' welded pipe market. These models indicated that a 15% increase in duties would result in an increase of between 9.3 and 11.5% in the sale price of imported welded pipe (excluding pipe from Canada) in the

[3721] USITC Report, p. 163.
[3722] USITC Report, p. TUBULAR-C-4.
[3723] USITC Report, p. 166.
[3724] USITC Report, p. 166.

United States.[3725] For the United States, this suggests that the 15% tariff on welded pipe is set at a magnitude that satisfies the requirements of Article 5.1.

7.1613 The United States models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1614 As regards welded tubular products, Switzerland maintains that the measure taken goes beyond the extent necessary to prevent or remedy a threat of serious injury. The Presidential proclamation imposed a straight tariff without any further explanation, while the USITC recommended a tariff rate quota. A straight tariff is more trade restrictive than a tariff-rate quota because the straight tariff imposed hits all imports whereas, with a tariff-rate quota, in quota imports can take place at the normal tariff rate and only out of quota imports will be hit by the additional tariff. In the case of welded tubular products the USITC explicitly determined that the current level of imports did not cause serious injury to the domestic industry concerned but that the industry was only approaching a state of serious injury and that "a tariff-rate quota would best address the threat of serious injury". The USITC also said that a straight tariff would affect imports even at those levels it found did not cause injury.[3726] Thus, the USITC recommended a tariff-rate quota in order to maintain access to the United States market for the products concerned and to avoid creating shortfalls during the period of relief. In addition, the USITC recognized that 1996-1998 were years of good health for the United States industry. Therefore, the United States has admitted that the measure, which was based on reducing import levels back to 1997 levels, exceeds the amount of relief necessary to prevent a threat of serious injury. In the case of welded tubular products, the USITC considered that the tariff rate quota it recommended was sufficient to prevent or remedy the threat of serious injury. However, the President of the United States without justifying the necessity of the measure, imposed a straight tariff. Because the remedy is the chosen measure and must be tailored to meet the relevant serious injury, that is the serious injury attributed to increased imports Switzerland considers that the United States must explain adequately and justify the extent of the application of the measure prior to imposing a safeguard. The United States did not provide such an adequate explanation and justification before imposing the safeguard measure and thus did not comply with the requirements of the Agreement on Safeguards.[3727]

7.1615 Similarly, Korea[3728] argues that the measure finally imposed by the United States – a straight 15% tariff – had been judged by the USITC to be overly excessive, and not limited to the extent necessary because it was applied to imports of injurious and non-injurious imports alike. The USITC provided a reasoned analysis of its recommended tariff-rate quota in the context of its threat of injury finding:

> "Given that we have found threat of serious injury, the intent of our recommended remedy is to prevent imports from rising to a level that would cause serious injury. *A straight tariff would affect all welded pipe imports, even those at levels we have found*

[3725] Memorandum EC-046, p. TUBULAR-21 (US-64).
[3726] USITC Report, Vol. I, p. 383.
[3727] Switzerland's second written submission, paras. 115-118.
[3728] Korea's first written submission, paras. 208-213.

> *did not cause serious injury*. In light of the diversity of welded pipe imports, we seek to avoid creating supply shortfalls during the period of relief."[3729]

7.1616 Korea notes that the USITC finding of only "threat" (not serious injury) establishes the level or extent of relief necessary since only that the threat of injury from imports needs to be "prevented".[3730] In fact, the USITC rejected the suggestion of Joint Respondents to use a base period of 1998-2000 or 2001 (for imports other than line pipe for which no remedy should be imposed) for purposes of establishing the in quota figure and recommended, instead, the higher level of imports from 2000 as the base.[3731] The USITC reasoned as follows:

> "We estimate that the recommended tariff-rate quota on welded pipe products will initially leave the market share, sales revenue, and profitability of the domestic industry unchanged. If import volumes increase beyond 2000 levels, then the tariff-rate quote will begin to take effect, stabilizing prices without preventing the entry of products at current levels. The tariff-rate quota should limit import growth, thereby preventing or restricting the negative impact of such growth on industry profitability.
>
> At the same time, our proposal would maintain substantial competition in the US market for welded pipe products and pose little likelihood of supply problems for domestic consumers. First, our proposed remedy for welded pipe products would still permit the same quantity of imports as in 2000 at the current low rate of duty. This amount exceeds the amount that entered in any previous year of the period of investigation."[3732]

7.1617 Korea recalls that the USITC was careful to recommend a form of remedy that did not restrict imports at levels found non-injurious and which responded at the same time to some of the concerns inherent in its like product determination and causation analysis.[3733] Thus, the USITC was careful to recommend action that "does not exceed the amount necessary to *prevent* serious injury"[3734] and recognized that demand for pipe in large-scale pipeline projects required a flexible remedy.[3735] The President disregarded the USITC's remedy recommendation and without explanation imposed a 15% tariff on all imports of welded tube products. The only reference to this choice of remedy versus the tariff-rate quota proposed by the USITC is found in a Presidential Press Release and in a Report Submitted to the United States Congress which merely asserts that it is a higher level of relief.[3736]

[3729] USITC Report, Vol. I, p. 383 (emphasis added) (Exhibit CC-6); USITC Report, Vol. I: *Views of Vice Commissioner Deanna Tanner Okun on Remedy*, p. 483 (to the same effect that there was only a threat of injury found) (Exhibit CC-6); USITC Report, Vol. I: *Views of Vice Chairman Deanna Tanner Okun on Remedy*, p. 482 (Exhibit CC-6) ("Given my finding of threat…I do not view increased tariffs as an appropriate form of remedy….").

[3730] Korea's first written submission, paras. 209-210.

[3731] USITC Report, Vol. I: *View of Vice Chairman Deanna Tanner Okun on Remedy*, p. 482, footnote 266 (Exhibit CC-6).

[3732] USITC Report, Vol. I, p. 386 (Exhibit CC-6).

[3733] Korea's first written submission, paras. 211-212.

[3734] USITC Report, Vol. I, pp. 385-386 (emphasis added) (Exhibit CC-6).

[3735] USITC Report, Vol. I, *Views of Chairman Deanna Tanner Okun on Remedy*, p. 482 (Exhibit CC-6).

[3736] *Components of the Presidential Decision at Certain Tubular Products* and *Report Submitted to the United States Congress at Certain Tubular Products*. (Exhibit CC-88) ("A tariff of 15%…will provide a higher level of relief than the tariff-rate quota recommended by a majority of the USITC Commissioners.")

7.1618 Korea submits that the most fundamental flaw in the President's remedy is that it does exactly what the USITC had avoided in its remedy recommendation – it imposes duties on imports that did not cause serious injury.[3737] The USITC clearly stated that "[a] *straight tariff would affect all welded pipe imports, even those at levels we have found did not cause serious injury*".[3738] Since the final remedy of the United States affects all welded pipe imports, the measure, on its face, exceeds the level necessary to prevent serious injury and is, therefore, in violation of the United States commitments under the Agreement on Safeguards.[3739] Given such facts, Korea argues that the United States failed to provide a justification on how its measure was limited to the necessary extent. The findings of threat/serious injury are the proper "benchmark" by which the remedy must be assessed, as the Appellate Body has said.[3740] Moreover, Article 5.1 (last sentence) states that "Members should choose measures most suitable for the achievement of these objectives." The identified "objectives" relate to, *inter alia*, whether serious injury needs to be *remedied* or whether a threat of serious injury needs to be *prevented* (Article 5.1, first sentence). So, for example, if serious injury were found, then current import levels were injurious. This would support a remedy that should apply to those import levels and a straight tariff would be appropriate. The correct remedy, therefore, depends on the particular findings by the authorities regarding the scope, nature, etc., of the increased imports, serious injury or threat of serious injury, and causation as the Appellate Body instructed in *US – Line Pipe*.[3741]

7.1619 The European Communities notes that despite the USITC findings that increased capacity had not contributed to the injury in more than a minor way, the United States has decided to treat the decrease in the industry's performance in 2000 as attributable to increase in capacity.[3742] According to the European Communities, the United States, therefore, has not attempted to determine a domestic price that would have increased income margin above 2000 levels. As a result of its numerical approach, the United States has found that an increase of 16.2% in imports prices would be in line with Article 5.1[3743] and referred to the USITC modelling indicating that a 15% additional tariff on imports excluding Canada but including Mexico would result in an increase of between 9.3 and 11.5% in imports prices.[3744] [3745] China concludes that targeting the imports that remain below such level, and have neither caused nor are threatening to cause serious injury, would imply a failure to meet the requirements of Article 5.1, as clarified by the Appellate Body in *US – Line Pipe*, that *"safeguard measures may be applied only to the extent that they address serious injury attributed to increase imports"*. Therefore, the USITC made a clear finding related to the permissible extent of the safeguard measure on welded pipe, and a proper determination that the best way to address a threat of serious injury would be to apply a tariff-rate quota. Accordingly, by deciding to impose a straight tariff that would affect all imports, including those that are not threatening to cause serious injury, the United States adopted a measure that goes beyond the extent necessary to address the threat of serious injury that the USITC found to be caused by increased imports.[3746]

7.1620 The United States responds to Korea's argument that if other welded pipe imports were held to 1997 levels, the estimated price for domestic products would be 4.3% to 6.7% higher, while the

[3737] Korea's first written submission, para. 213.
[3738] USITC Report, Vol. I, p. 383 (emphasis added) (Exhibit CC-6). USITC Report, Vol. I: *Views of Vice Chairman Deanna Tanner Okun on Remedy*, p. 438 (Exhibit CC-6) (the recommended remedy is "most likely to address the threat of serious injury").
[3739] Appellate Body Report, *US – Line Pipe*, para. 236.
[3740] Korea's second written submission, paras. 305-308.
[3741] Korea's written reply to Panel question No. 106 at the first substantive meeting.
[3742] United States' first written submission, para. 1132.
[3743] Exhibit US-56.
[3744] United States' first written submission, para. 1126.
[3745] European Communities' second written submission, paras. 543-545.
[3746] China's second written submission, paras. 307-308.

remedy would result in estimated price increases of 8.7% to 11.1%. For the United States, by arguing that Korea's criticism fails to recognize that the other welded pipe remedy addressed a threat of serious injury, and that the analysis based on data for 2000 would not establish what was necessary to stop the evolution of the existing injurious effects of increased imports into the full manifestation of that threat as serious injury.[3747]

(vii) Tariff on FFTJ

7.1621 The United States[3748] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic FFTJ industry and this is the starting assumption of its justification. The USITC identified five factors other than increased imports that potentially caused injury: the business cycle for the oil and gas industry, increases in capacity and intra-industry competition, the inefficiency of domestic producers' outdated facilities, shortage of qualified workers, and purchaser consolidation. The USITC found that the business cycle in the oil and gas industry in 2000 and the first half of 2001; capacity and intra-industry competition; and inefficiencies in domestic producers' facilities or shortages of workers were not factors causing serious injury. The USITC found that purchaser consolidation would put "some" pressure on domestic producers' prices, but would not explain the reduction in domestic production, shipments, employment and other non-price indicators that occurred.[3749] Thus, the USITC did not attribute any of the decrease in non-price factors to purchaser consolidation, and only "some" of the decrease in domestic prices.

7.1622 The United States points to the fact that the findings of the USITC indicate that most of the reduction in domestic producers' production, capacity utilization, shipments, market share, number of workers, wages, and profitability from 1999 through the first half of 2001 is properly attributed to increased non-FTA imports. For the United States, this is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. Since the analysis of the USITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, the United States bases its analysis for FFTJ on the changes from 1999 through the first half of 2001 only. The USITC did not attribute any injury to four of the five other potential causes of injury. It attributed some of the decrease in FFTJ prices, but none of the other decreases in industry performance, to purchaser consolidation. The USITC attributed domestic producers' loss of market share, decreased prices, and decreased profitability to increased imports, and to no other cause.

7.1623 The United States bases its analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the USITC noted that "[w]e are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix".[3750] In the first step, the United States explains that as a conservative estimate it chose 1998, the year following the first significant increase in imports, as the appropriate base year, keeping in mind that imports increased somewhat in that year, and thus may have had some negative effect on the industry. The USITC found that purchaser consolidation had negative effects on the industry. The United States explains that as a conservative estimate it treated one-half of the reduction in operating income in each year as attributable to purchaser consolidation. It estimates the revenue shortfall in 1999 through the first half of 2001, periods in which the USITC indicated that imports caused some of the decline in the industry's performance. In the second step, the United States estimates the amount by which the 1998 operating income margin would have to rise to recoup the shortfall in operating income estimated in

[3747] United States' written reply to Panel question No. 50 at the second substantive meeting.
[3748] United States' first written submission, paras. 1139-1147.
[3749] USITC Report, p. 178.
[3750] USITC Report, p. 176, footnote 1087.

step 1.[3751] In the third step, it bases the pricing analysis on the USITC pricing comparisons on page TUBULAR-59 of the USITC Report. The United States notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' FFTJ market. These models indicated that a 15% increase in duties would result in an increase of between 10.5 and 12.5% in the sale price of imported FFTJ in the United States.[3752] For the United States, this suggests that the 13% tariff on FFTJ is set at a magnitude that satisfies the requirements of Article 5.1.

7.1624 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1625 The European Communities notes that the starting point is again the USITC findings that among five other factors (business cycle for oil and gas industry, increase in capacity, intra-industry competition, inefficiency of domestic producers, shortage of qualified workers and purchasers' consolidation), only the latter played a role on the decrease of domestic prices.[3753] As a first step in its numerical analysis, the United States has chosen 1998, the year following the first significant increase in imports as the "base" year and made one adjustment to take account of purchasers' consolidation.[3754] As a result of its numerical approach, the United States has found that an increase of 30.2% in imports prices would be in line with Article 5.1[3755] and referred to the USITC modelling indicating that a 15% additional tariff on imports excluding Canada but including Mexico would result in an increase of between 10.5 and 12.5% in imports prices.[3756] [3757]

(viii) Tariff on stainless steel bar

7.1626 For the United States[3758], the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic stainless steel bar industry and this is the starting assumption of its justification.

7.1627 The United States first notes that the financial data on the stainless steel bar industry were confidential in the USITC Report but notes that they were publicly available data in the prehearing report.[3759] The United States explains that it used these public data in making its estimate regarding

[3751] The United States states that it does this by estimating the revenue shortfall in each year in which the USITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[3752] Memorandum EC-046, p. TUBULAR-23 (US-64).

[3753] United States' first written submission, paras. 1141-1142.

[3754] United States' first written submission, para. 1144.

[3755] Exhibit US-56.

[3756] United States' first written submission, para. 1146.

[3757] European Communities' second written submission, paras. 546-547.

[3758] United States' first written submission, paras. 1148-1159.

[3759] The United States submits that the USITC made data on the financial performance of the stainless steel bar industry publicly available in its prehearing report. Subsequent to issuance of that report, an additional small producer submitted data. Thus, public revelation of aggregate data available at the time of the USITC

compliance with Article 5.1, since no other public data are available. The United States notes that these data are generally reflective of the trends in indicators in the industry. This data is presented in the following table:

	1998	**1999**	**2000**	**1st half 2000**	**1st half 2001**
Production	175,171	164,376	179,090	94,890	81,750
Capacity utilization	57.8%	52.1%	55.8%	59.5%	49.6%
Shipments	169,515	158,861	173,582	92,878	84,186
Market share	60.5%	59.8%	53.5%	52.7%	54.9%
Employment	2,125	1,854	1,941	1,901	1,793
Op. income	20,885*	4,580*	2,266*	8,746*	(1,389)*
Margin	3.7%*	0.9%*	0.4%*	2.8%*	(0.5%)*
Capital exp.	81,120*	55,581*	25,250*	23,169*	12,794*
Inventory	21,130	21,302	19,392	19,435	14,894

Source: USITC Report, p. STAINLESS-C-4 and USITC prehearing report, p. STAINLESS-C-4 (US-61). Production, shipments and inventory in short tons; employment in number of workers; operating income and capital expenditure in US$1 million.

* Indicates data made public in the USITC prehearing report.

7.1628 The United States argues that the USITC identified two factors other than increased imports that potentially caused injury: a downturn in demand for stainless steel bar and increase in energy costs in late 2000 and the first half of 2001 and poor operations by domestic producers AL Tech/Empire and Republic. The USITC found that poor operations by domestic producers AL Tech/Empire and Republic, and the downturn in demand for stainless steel bar and increased energy costs prior to late 2000 were not factors that caused injury to the domestic industry. According to the United States, these findings indicate that the injury to the domestic industry in 1999, as reflected in the reduction in domestic producers' production, shipments, market share, employment, revenue, and operating income in 1999, is properly attributed to increased imports. For the United States, this is not to suggest that imports before 1999 had no negative effects. Since the analysis of the USITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, the United States bases its analysis for stainless steel bar only on the changes in 1999 and after. The USITC found that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001, albeit one less important than the injury caused by increased imports. The USITC further indicated that the domestic industry could have increased prices to cover increased costs in the absence of increased imports. As a conservative estimate, it treated half of the decline in the industry's performance in 2000 and the first half of 2001 as attributable to increased imports. For the United States, non-FTA imports continued in the first half 2001 at unit values far below those of the domestic producers. Although their volume and market share declined, non-FTA imports maintained a market share two percentage points higher than at any time prior to 2000 and five times higher than FTA imports.

Report would allow anyone to calculate that producer's proprietary data by subtracting out the data from the preliminary report. Accordingly, the USITC redacted all financial data on this industry from the final public version of the USITC Report.

7.1629 The United States explains that in its estimate regarding consistency with Article 5.1, it also considers existing anti-dumping duty orders. The USITC considered two groups of anti-dumping duty orders – orders imposed on imports of stainless steel bar from Brazil, India, Japan, and Spain in 1995 and orders imposed on stainless steel angles from Japan, Korea, and Spain in May 2001. The USITC found that the 1995 orders did not limit subject countries from exporting substantial, and even increased, quantities to the United States. Moreover, the data gathered by the USITC reflects any effect on the industry that the orders may have had. Since the United States bases its estimate on that data, it was of the view that it did not need to adjust the estimate to account for the effect of the 1995 orders. The United States recalls that the USITC found that it was too early to assess the effect of the 2001 orders. The United States notes, however, that these covered angles alone, which represented at most between 8 and 18% of the non-FTA imports covered by the stainless steel bar safeguard measure, and a small number of countries.[3760] The United States explains that as a conservative estimate for purposes of this calculation, it has diluted the amount of increase necessary to remedy serious injury to reflect that a trade remedy whose effects may not currently be felt already applies to these products.

7.1630 The United States explains that in its estimate regarding consistency with Article 5.1, it followed the basic steps of the methodology previously outlined, with adaptations appropriate to the facts of this domestic industry. It bases the estimate on the unit values, as there is no suggestion in the USITC Report that differences in the unit values reflect different product mixes. Drawing on the USITC's analysis, the United States uses 1998 as the comparison year. It treats the full difference in operating profits in 1999 versus 1998 and one-half of the difference in operating profits in 2000 and the first half of 2001 as compared with 1998, as attributable to increased imports. In the second and third steps, it uses data for the period of 1999 through the first half of 2001.

7.1631 The United States notes the USITC's findings[3761] with regard to imports from Canada and Mexico and concludes that no adjustment to the estimate was necessary. As a fourth step, the United States estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' stainless steel bar market. These models indicated that a 20% increase in duties would result in an increase of between 10.2% and 14.7% in the sale price of imported stainless steel bar (excluding Mexican products) in the United States.[3762] For the United States, this suggests that the 20% tariff on stainless steel bar is set at a magnitude that satisfies the requirements of Article 5.1.

[3760] Public USITC data on total imports of stainless steel angles (from all sources, both fairly and unfairly traded) in the 1998-2000 investigation period show the following figures, which are compared in the following table to total non-FTA imports of stainless steel bar from the USITC Report:

	1998		1999		2000	
	Volume	Value	Volume	Value	Volume	Value
Angles imports	9,802	20,931	16,399	27,163	17,148	32,152
Bar imports	97,552	248,724	92,341	204,223	131,184	302,546
Angles share	10.0%	8.4%	17,8%	13.3%	13.1%	10.6%

Source: USITC Report; Stainless Steel Angles From Japan, Korea and Spain, Inv. No. 731-TA-888-890 (Final) USITC Pub. 3421, p. IV-2 (May 2001) (US-62).

[3761] United States' first written submission, para 1157.

[3762] Memorandum EC-046, p. STAINLESS-42 (US-64).

7.1632 Then the United States modelled two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1633 The European Communities notes that the United States has chosen 1998 as the "base" year for its numerical analysis and made adjustments to take account of the injury caused by a downturn in demand and an increase in energy costs in 2000 and 2001, but refuses further adjustment with respect to poor operation by two domestic producers, in line with the USITC findings. The United States has also taken into account anti-dumping orders decided in 2001.[3763] As a result of its numerical approach, the United States has found that an increase of 35.1% in imports prices would be in line with Article 5.1[3764] and referred to the USITC modelling indicating that a 20% additional tariff on imports excluding Mexico but including Canada would result in an increase of between 10.2 and 14.7% in imports prices.[3765]

(ix) Tariff on stainless steel rod

7.1634 The United States[3766] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic stainless steel rod industry and this is the starting assumption of its justification.

7.1635 The United States first notes that most of the data are confidential, since the industry had a small number of producers. For purposes of explaining its estimate relating to compliance with Article 5.1, the United States has obtained ranged data for producers representing a large portion of the domestic industry. These data are within a range either 10% greater or less than the actual data. This data is presented in the following table:

[3763] United States' first written submission, paras. 1148-1156.
[3764] Exhibit US-56.
[3765] United States' first written submission, para. 1158.
[3766] United States' first written submission, paras. 1160-1169.

	1996	1997	1998	1999	2000	1st half 2000	1st half 2001
Production	120,000	120,000	113,000	107,000	96,000	55,000	39,000
Shipments	118,000	119,000	111,000	107,000	96,000	54,000	40,000
Employment	1,000	1,000	900	900	800	800	700
Wages	50,000	52,000	46,000	44,000	43,000	23,000	18,000
Op. income	5,100	4,400	5,100	(1,300)	(4,800)	1,800	(5,200)
Margin	5.0%	4.0%	6.0%	-0.2%	-7.0%	4.0%	-18.0%
Inventory	1,600	1,000	2,300	400	900	1,900	-

Source: Stainless Steel Rod (US-63). Production, shipments and inventory in short tons; employment in numbers of workers; wages and operating income in US$1 million; productivity in tons/1000 hours.

7.1636 The United States submits that the USITC identified two factors other than increased imports that potentially caused injury: downturn in demand and increased energy costs in late 2000 and the first half of 2001 and poor operations by domestic producer AL Tech/Empire. The USITC found that the poor operations by AL Tech/Empire was not a factor that caused injury to the domestic industry. The USITC found that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001, albeit one less important than the injury caused by increased imports. The USITC further indicated that the domestic industry could have increased prices to cover increased costs in the absence of increased imports. The findings of the USITC indicate that the much of the poor industry performance is attributable to increased imports. It also indicated that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001. The United States explains that it based its analysis of the permissible remedy on aggregate unit value data because the pricing series data for domestic industry is confidential.

7.1637 The United States argues that in its estimate regarding consistency with Article 5.1, it considered existing anti-dumping duty orders. The USITC noted that anti-dumping and countervailing duty orders were imposed in 1993, 1994, and 1998 against imports of stainless steel rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan.[3767] The USITC found that the orders appeared not to have limited the ability of foreign producers in these countries to increase exports to the United States in 1999 and 2000. The data gathered by the USITC reflects any effect on the industry that the orders may have had. Since the United States bases its estimate on that data, the United States does not need to adjust the estimate to account for the effect of the 1995 orders.

7.1638 The United States explains that it followed the basic steps of the same methodology previously outlined, with adaptations appropriate to the facts of this domestic industry. To estimate the extent of the permissible remedy, it began with the fact that in 1996 the condition of the domestic industry had not yet begun to deteriorate. Therefore, 1996 would be an appropriate comparison year, keeping in mind that imports may still have been having some negative effect on the industry. As noted above, the USITC Report indicates that the injury, as reflected in the decrease in the domestic industry's performance from 1997 to 1999, was due to increased imports. Therefore, it was

[3767] USITC Report, p. 219.

reasonable to treat any amount by which operating income in each of these years is below operating profits in 1996 has having been caused by increased imports. As a conservative estimate, it treats half of the decline in the industry's performance in 2000 and the first half of 2001 as attributable to this factor. In the second and third steps, the United States uses public data for 1997 through the first half of 2001, using publicly available unit values from page STAINLESS-12 of the USITC Report. The United States notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, the United States estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' stainless steel rod market. For the United States, these models suggest that the 15% tariff on stainless steel rod (excluding rod from Canada and Mexico) is set at a magnitude that satisfies the requirements of Article 5.1.[3768]

7.1639 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1640 The European Communities notes that the United States has determined 1996, a year when the industry's condition hat not yet began to deteriorate, as the adequate "base" year for its numerical analysis and made adjustments to take account of the injury caused by a downturn in demand and an increase in energy costs in 2000 and 2001, but refused further adjustment with respect to poor operation by two domestic producers, in line with the USITC findings.[3769] As a result of its numerical approach, the United States has found that an increase of 39.0% in imports prices would be in line with Article 5.1[3770] and referred to the USITC modelling to conclude that a 15% additional tariff on imports excluding Mexico and Canada would suggest that a 15% increase in duty would be set at a magnitude that satisfies the requirements of Article 5.1.[3771] However, it is not possible to check the latter assumption, since the results of the modelling exercise had been kept confidential and no non-confidential summary has been provided. Finally, the European Communities argues that the so-called numerical analysis proposed by the United States does not demonstrate anything.[3772]

(x) Tariff on stainless steel wire

7.1641 The United States[3773] recalls that for stainless steel wire, two Commissioners found a threat of serious injury and one Commissioner found serious injury, and this is the starting assumption of its justification. They issued separate views, but agreed on certain key aspects of the injurious condition faced by the domestic industry. Chairman Koplan found a threat of serious injury based on a decline in sales and market share, increasing inventories, and a downward trend in production, profits, wages, productivity, and employment, indicating that the domestic producers could not generate adequate capital for modernization. Commissioner Bragg treated stainless steel wire as part of a single like

[3768] Memorandum EC-046, p. STAINLESS-41 (US-64) (the results of the modelling exercise are confidential).
[3769] United States' first written submission, paras. 1160-1163.
[3770] Exhibit US-56.
[3771] United States' first written submission, para. 1168.
[3772] European Communities' second written submission, paras. 554-556.
[3773] United States' first written submission, paras. 1187-1203.

product with stainless steel wire rope (terming the combination "stainless steel wire products"), and found a threat of serious injury based on decreasing domestic sales and market share in the first half of 2001, increases in inventories throughout period of investigation, and lower trends in production, profits, wages, productivity, and employment in the first half of 2001.[3774] Public data indicated that the volume of stainless steel wire rope imported into the United States was much smaller than the volume of stainless steel wire, suggesting [sic].[3775] Commissioner Devaney also treated stainless steel wire as part of a single like product with stainless steel wire rope, but found serious injury based on falling operating income levels and a decline in most indicators in the first half of 2001.[3776]

7.1642 The United States submits that each of these determinations reflects a permissible analysis of the effect of imports on the domestic industry. Under United States law, multiple affirmative determinations by individual Commissioners as to differently defined like products constitute an affirmative determination of the USITC with regard to the largest product group that is subject to enough affirmative determinations to form a majority of the USITC. It is the injury experienced by the producers of stainless steel wire – the product within the intersection of the determinations of Commissioners Koplan, Bragg, and Devaney – that forms the basis for deciding the extent of application of the safeguard measure. The performance of these producers is evaluated in light of the findings made by Commissioners Bragg and Devaney as to the larger industry comprising producers of stainless steel wire and stainless steel rope. For similar reasons, the overall determination of the USITC is treated as a threat of material injury and refer to the Appellate Body statement in *US – Line Pipe*. In the terms adopted by the Appellate Body, treating the affirmative determination of the USITC as threat of serious injury recognizes that all three Commissioners found the industry had at least passed the lower threshold of a threat. It is the degree of injury that is common to all three determinations. The Commissioners rendering affirmative determinations focused on the same indicators of injury. For stainless steel wire, these were:

	1999	**2000**	**1st half 2000**	**1st half 2001**
Production	103,484	106,547	56,698	43,347
Shipments	102,211	104,752	55,966	43,933
Market share	80.5%	77.0%	77.7%	72,7%
Employment	1,022	1,017	1,021	935
Wages	31	31	16	14
Productivity	48	50	51	46
Op. income*	7,401	5,854	7,808	(4,428)
Margin*	2.0%	2.3%	5.5%	(4.0%)
Inventory	66,688	71,313	50,589	46,271

Source: USITC Report, p. STAINLESS-C-7 and USITC Prehearing Report, p. STAINLESS-C-7. Production, shipments and inventory in short tons; employment in numbers of workers; wages and operating income in US$1 million; productivity in tons/1000 hours.

* Indicates data made public in the USITC prehearing report.

[3774] USITC Report, pp. 288-289.
[3775] USITC Report, pp. STAINLESS-14 & STAINLESS-16.
[3776] USITC Report, p. 345.

7.1643 The USITC found that "increased imports at underselling prices have played a key role in bringing about this negative trend", ending "at a point near serious injury".[3777] One or more of the Commissioners identified three other potential causes of the threat of serious injury: declining demand, raw material costs, and appreciation of the dollar. The United States recalls that Chairman Koplan and Commissioner Bragg found that some portion of the industry's declining performance in the first half of 2001 is attributable to the decline in demand for stainless steel wire. Chairman Koplan found that the decline in demand alone did not explain the injury experienced by the domestic producers, whose production and shipments declined more than apparent domestic consumption in the first half of 2001. Commissioner Bragg found that the imminent impact of imports outweighed these other factors.[3778] Commissioners Koplan and Bragg found that the industry's raw material costs had and would continue to have an impact on the domestic industry, but one outweighed by increased imports.[3779] Commissioner Bragg found that the appreciation of the dollar had and would continue to have an impact of the domestic industry, but one outweighed by increased imports.[3780]

7.1644 The United States argues that, in its view, the USITC Report details the relationship between increased imports from non-FTA sources and injury to the domestic industry. Commissioners Koplan and Bragg found that imports caused the threat of serious injury because when domestic consumption fell in the first half of 2001, after four years of steady increases, imports increased, resulting in a sharp decrease in sales and market share.[3781] As a result, domestic producers could not raise prices to cover increased costs, and their operating income plummeted.[3782] Commissioners Koplan, Bragg, and Devaney all found that underselling by imported products played a role in causing serious injury.[3783]

7.1645 The United States explains that, as a conservative approach, if one of the Commissioners identified another factor as causing injury, it considered that that factor caused injury regardless of the views of the other Commissioners. Accordingly, for purposes of demonstrating that the safeguard measures complied with Article 5.1, the United States interprets the findings of the Commissioners as demonstrating that non-FTA imports were responsible for some of the reduction in domestic producers' sales and market share, increasing inventories, production, profits, wages, productivity, and employment in the first half of 2001. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. As Chairman Koplan found, "between 1996 and 2000, even though domestic consumption increased, the domestic industry kept prices of the domestic product in line with costs and earned only low profits because of the presence of substitutable stainless steel wire imports".[3784] Commissioner Bragg found that increased imports prevented domestic producers from taking advantage of an upswing in the business cycle during the 1996 to 2000 period.[3785] The United States assumes that the injury was to some extent attributable to the decline in demand, increasing raw material costs, and currency appreciation, but that none of the injury is attributable to NAFTA imports. The United States considers that the entirety of the decrease in the industry's financial performance was due to these factors.

7.1646 Then the United States explains that it has performed a different analysis for stainless steel wire because the Commissioners' causation analyses focused on the volume of imports and their

[3777] USITC Report, p. 164.
[3778] USITC Report, pp. 259 and 302. Commissioner Bragg treated this factor under the rubric of the "general downturn in the economy".
[3779] USITC Report, pp. 259 and 302.
[3780] USITC Report, p. 302.
[3781] USITC Report, pp. 259 and 302.
[3782] USITC Report, p. 259.
[3783] USITC Report, pp. 259, 294, and 346.
[3784] USITC Report, p. 259.
[3785] USITC Report, p. 302.

market share. In addition, the underselling data cited by Commissioner Koplan was confidential, and the average unit value data did not show similar patterns, making it unusable as a surrogate. Accordingly, the United States analyses this safeguard measure based on import volumes. It noted that imports increased substantially between 1999 and 2000. As a first step in the analysis, the United States calculates what non-NAFTA import volume would have been if non-NAFTA imports had stayed at their 1999 market share in 2000 and 2001. It then compares the calculated import volumes with the actual import volumes for those periods, and found that non-NAFTA imports would have been, on average, approximately 20% lower. This reduction represents a reduction in import volume lower than the USITC modelling associated with a 10% tariff, indicating that the safeguard measure was applied less than the extent necessary.[3786] Since, for the United States, this approach was based on the volume of non-NAFTA imports alone, it concludes that no adjustment to the estimate was necessary. In a similar vein, no adjustment was necessary to reflect the United States' conservative estimate that the decrease in the domestic industry's financial performance in 2000 was attributable to the decline in demand or increasing raw material costs. In addition, the United States argues that since its calculation did not make use of import prices, no adjustment was necessary to reflect its estimate that currency appreciation was a cause of injury to the domestic industry.

7.1647 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1648 The European Communities argues[3787] that the United States' arguments on Stainless Steel Wire, like its arguments for other products, amount to a reconstruction of the USITC Report unsupported by the facts on the record. Turning first to the issue of non-attribution, the European Communities explains that Commissioner Koplan had not considered the issue of rising costs, and had not ensured that the injurious effect of rising costs was not attributed to increased imports.[3788] The United States expends five paragraphs trying to explain how Commissioner Koplan analysed costs, distinguished and separated their effects, and ensured that they were not attributed to increased imports.[3789] This is five paragraphs more than the USITC. Commissioner Koplan's opinion rested on developments in interim 2001 which led him to consider that increased imports posed a threat of serious injury. He identified three factors "which contributed" to the domestic industry's decline.[3790] The first two were imports and declining demand. Thirdly, "unit costs of goods sold increased by *** percent" (all financial data for Stainless Steel Wire is confidential).[3791] He noted that "the falling prices and rising costs led to a *** percentage point loss [sic] in the operating income to sales ratio between interim 2000 and interim 2001".[3792] The European Communities points out that that is all the discussion of rising costs in interim 2001 that the USITC Report contains. Five paragraphs in the United States first written submission cannot make up for this total lack of reasoned and adequate explanation. As the financial data is confidential, there is no reasoned and adequate explanation of how the facts support the findings, especially in the absence of a non-confidential indexed version of

[3786] USITC Memorandum EC-Y-046, p. STAINLESS-40.
[3787] European Communities' second written submission, paras. 432-435.
[3788] European Communities' first written submission, para. 579.
[3789] United States' first written submission, paras. 736-740.
[3790] USITC Report, Vol. I, p. 259.
[3791] USITC Report, Vol. I, p. 259.
[3792] USITC Report, Vol. I, p. 259.

the data. There is no examination of the relevance or cause of increased costs, no separation and distinction, and thus no non-attribution. With respect to the correlation of trends, the European Communities notes in its first written submission that three other Commissioners had found that despite consistent underselling there was no correlation between pricing of imports and domestic products.[3793] Commissioner Koplan did not deal with this issue. Moreover, Commissioner Koplan did not discuss underselling at all in his discussion of interim 2001 developments and, thus, did not explain in a reasoned and adequate manner, how there was a correlation between pricing for imports and domestic pricing sufficient to establish a causal link. The USITC Report does not provide a reasoned and adequate explanation of whether NAFTA imports were causing injury and how any such injury caused was not attributed to non-excluded imports. Chairman Koplan simply concluded that imports from neither Mexico or Canada were in the top five suppliers during the period of investigation. He did not even attempt to analyse whether such imports caused any injury and does not, therefore, ensure that any such injury is not attributed to non-excluded imports.

2. General criticisms of the numerical analysis and economic model[3794]

7.1649 Korea criticises the United States' *ex post* justification of its measure which, it says, more than confirms the reverse-engineered nature of the *ex-post* methodologies.[3795] Korea argues that only the most significant errors are identified (*e.g.*, mathematical mistakes are not noted), but these errors completely undermine the legitimacy of the United States' methodologies (the "simplified numerical analysis"[3796] and "simplified economic modelling" using the COMPAS Model[3797]) for purposes of complying with Article 5.1 of the Agreement on Safeguards.[3798]

7.1650 In support of its allegations, Korea submits Exhibit 14[3799] that contains further details of its criticism of the United States' methodology[3800] as having the effect of overestimating the tariff required to restore the domestic industry to profitability. Korea submits that these methodological errors are: (i) the arbitrary and unsubstantiated addition of percentage increases to the percent increase in revenues the United States believes are necessary to restore domestic producers to profitability; (ii) the arbitrary and unsubstantiated subtraction of actual operating income margins

[3793] European Communities' first written submission, paras. 580-581.

[3794] The following section includes discussions from Korea's Exhibit 14, Korea's, United States' and the European Communities' first and second written submissions, Korea's replies to Panel questions Nos. 48, 54 and 56 at the second substantive meeting as well as additional comments on those questions, all of which deal with the United States' methodology for its justification pursuant to Article 5.1.

[3795] Korea's second written submission, para. 247 and "Critique of US Justification of Its Safeguard Measures on Certain Steel Products" (Korea Exhibit 14, "K-14").

[3796] Found in "Safeguard Measures Worksheets" at United States' first written submission, Exhibit US 56.

[3797] Found in "Modelling Results Worksheets" at United States' first written submission, Exhibit US 57.

[3798] Korea asserts that the United States' defense of the accuracy of its model is weak at best. Given that the *Felt Hats* working party (*Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951) on which the United States seeks to rely was decided more than 50 years ago, Korea questions whether it is very relevant to the issue of the required accuracy or usefulness of economic models. In any event, the United States seems to be arguing that the inherent imprecision in the "numeric exercise" and "rough estimate" is fine for purposes of defending its measure even if such analysis might be problematic for a proper non-attribution evaluation. (*US Responses to Questions from Panel*, paras. 154-156) Korea does not agree.

[3799] Supported by all complainants, Norway's second oral statement on behalf of all complainants, para. 34.

[3800] US Exhibit 56 "Safeguard Measure Worksheets" and US Exhibit 57 "Modelling Results Worksheets"

from domestic average unit values (AUVs) before adjusting domestic AUVs upwards to reach targeted commercial sales; and (iii) the assumption that domestic and imported steel products are perfect substitutes for each other, and therefore that imported AUVs must rise to equally match domestic AUVs.[3801]

7.1651 By way of illustration, Korea submits that the end result for flat products is that the United States should have concluded that imported AUVs needed to increase by 10.1% to remedy injury, rather than by the 18.9% increase suggested. This would mean that a 30% tariff that generates a 20.8% to 28.0% increase in the AUV of imports is, in fact, excessive. In fact, the USITC's estimates of the various effects of different tariff rates suggests that a tariff of about 11% to 12% would produce non-NAFTA import price increases closer to 10.1%.[3802] The United States' methodology with respect to other welded pipe is completely indecipherable. There is no justification for the targeted operating margin selected, nor can one be divined from the US discussion in the text.[3803]

7.1652 By way of general comment, Korea submits that the numerical approach used by the United States is nothing more than a snapshot of what would happen the day the tariffs are imposed.[3804] It holds constant everything that would vary two days after the tariffs are imposed (domestic quantity sold, SG&A, COGS). For example, when one imposes a tariff, import prices increase and quantity declines. Domestic prices increase and quantity sold increases (and therefore SG&A and COGS would also increase). So technically, to achieve the target total revenue needed to reach a particular "profit" margin, the average unit value of domestic product sold may not need to increase as much as the snap-shot approach would dictate. Domestic producers can hit the desired target revenue by selling more product at a slightly lower AUV than the snap-shot would dictate.

7.1653 Korea also submits that the numerical analysis and model also ignore the fact that tariffs have two effects on imports – prices and quantities – not just on prices.[3805] The numerical analysis and model ignore this effect and, therefore, overstate the increase in prices that must be achieved through tariff levels. When imports become more expensive, the United States industry can not only raise prices to generate revenue, but it can increase the quantity of sales to generate revenue. This is particularly beneficial to a capital-intensive industry with excess capacity since increased volumes also reduce unit costs. The United States model ignores both effects.

7.1654 With respect to capture of volume-related cost decreases, the United States notes that Korea argues that the numerical exercise does not capture cost savings that would occur when a safeguard measure resulted in increased sales volume, allowing domestic producers to spread fixed costs over a larger volume.[3806] The criticism is misplaced. As the United States notes in the first written submission, the price-based exercise did not attempt to capture the injurious effects of increased imports on domestic producers' sales volume or any factor other than price.[3807] Thus, the adjustment to reflect the cumulated injurious effects of imports did not include injurious effects associated exclusively with the volume effects, or any other non-price effects, of imports. Since the price-based exercise omitted the injurious effects of import volume, the United States considered it appropriate to

[3801] Exhibit K-14, p.1.
[3802] Exhibit K-14, p.1.
[3803] Exhibit K-14, p.2.
[3804] Exhibit K-14, p.2.
[3805] Korea's written reply to Panel question No. 50 at the second substantive meeting.
[3806] Exhibit K-14, p. 3.
[3807] United States' first written submission, para. 1079. Such factors would include productivity, production, capacity utilization, employment, etc.

omit the possible beneficial effects of reduced import volume that might accompany a safeguard measure.

7.1655 With respect to the second step of the numerical analysis, Korea notes that the United States calculates the percent difference in targeted revenues from Step 1 over actual revenues.[3808] This should be all that is needed to the estimate the domestic AUVs required to reach the target operating margin deemed to represent an industry not injured by imports. However, the United States then further increases the percentage by which operating margin must increase "to counteract the negative effects of imports from 1998 to 2000 and to facilitate adjustment".[3809] The United States arbitrarily picks the target operating margin rate as a measure of what it would take to do this (no rationale is offered why the target operating margin is the appropriate rate that "counteracts" and "facilitates"). Restoring revenues to the level that would yield an operating income margin "equal to a level that does not reflect the price effect of increased imports"[3810], (to a level that "remedies" injury) should be sufficient. However, the United States adds in the target operating margin again, with no explanation why this rate will accomplish the task. Korea submits that this is arbitrary. It results in overestimating the target AUV, and hence the "required" tariff. Korea submits that, in fact, this step is completely unnecessary. It would be sufficient to calculate the targeted revenues needed to achieve the targeted operating margin in the First Step, and then proceed to the Third Step (but with corrections).

7.1656 The United States responds that with regard to additions to target profit to reflect industry's existing injured condition, the United States reiterates that the ordinary meaning of "remedy" means to "rectify" or "make good"[3811], a concept that clearly encompasses addressing the accumulated effects of increased imports. The complainants have not actually disagreed with its analysis of the ordinary meaning of "remedy" and its implications, including the observation that imports have cumulative injurious effects.[3812] The additions to the target profit in the second step of its numerical exercise reflect the cumulative injurious effect of increased imports. Omitting such an addition would ignore those effects, something that the Agreement on Safeguards does not require.

7.1657 With respect to the third step of the numerical analysis, Korea submits that the methodology employed is convoluted and arbitrary as well, and factually contradicts the USITC's finding that imported and domestic products are imperfect substitutes for each other.[3813] First, it is not clear why it was necessary to decrease domestic AUVs by the actual operating margins for each year, and then increase them by the (overstated) percentage calculated in Step Two. Again, the resulting domestic AUVs are overstated. Second, the United States assumes import AUVs need to rise to exactly equal the target domestic AUVs to enable domestic producers to charge prices that generate those AUVs. This assumes imported products and domestically-produced products are perfect substitutes for each other, e.g., that imported plate must be priced at the same level as domestic plate at all times in all cases. The USITC in fact assumed that imported and domestically-produced steel products were not

[3808] Exhibit K-14, p.3.
[3809] United States' first written submission, para. 1074.
[3810] United States' first written submission, para. 1074.
[3811] United States' second written submission, paras. 180-184.
[3812] The United States argues that the European Communities has not addressed the substance of the hypothetical in paragraph 128 of the United States' oral statement regarding the accumulated polluting effects of a factory, other than to suggest that it treated imports as equivalent to pollution, when the United States' point was that the pollution was analogous to injurious effects. Thus, the United States concludes that the European Communities does not disagree with our observation that imports may have a cumulative negative effect, and that it does not disagree that these cumulative effects may be addressed by a safeguard measure.
[3813] Exhibit K-14, p.3.

perfect substitutes.[3814] Imperfect substitutes (even moderate substitutes) mean that imports can be priced lower than comparable domestic products, and domestic producers can still "make the sale". The impact of this assumption is that the percent change in import prices required to yield the target domestic AUVs is overstated.

7.1658 Korea argues that the problem of a "one-year" base period approach is inherent to the model.[3815] The model attributes all injury occurring in subsequent years as injury from imports regardless of what effects the other factors may have had in the subsequent years. The model assumes that, *ceteris paribus*, any injury after the base year is attributable to imports because it is assumed that all other factors in the market remain constant. But in Korea's opinion, *ceteris paribus* does not apply. It recommends looking simply at the developments in mini-mills versus integrated mills.[3816] It also recommends looking at the growth in capacity in pipe and tube, where the ITC recognized that injury did not exist even as late as mid-2001. For Korea, the point is that once it is demonstrated that the assumption of *ceteris paribus* is not the case – *i.e.*, other factors do not remain constant – the flaw in the United States' argument is equally obvious. All of the changes in US industry's economic and financial state are assumed by the United States' model to be attributed to imports. Korea argues that that is precisely the problem.[3817] The more isolated and fewer the data points, the less relevant the analysis becomes as a predictor of future events. The further in the past that benchmark is, the less relevant it also potentially becomes since intervening events may well affect its validity as a predictor of future behavior in the market. For example, events that gave rise to industry profitability for flat-rolled in 1997 (which had nothing to do with imports) may or may not replicate in the future (*e.g.*, high demand and favorable exchange rates gave rise to profitability in 1997). To go forward saying that 1997 is an appropriate ruler for the future, all stars would have to realign in same way for that to be a relevant benchmark for the future. Korea concludes that it is impossible to hold everything constant and the United States' model does not attempt to do so.[3818] Moreover, for example, AUVs for each flat-rolled product and welded pipe were of questionable value due to product mix issues as specifically noted by the USITC[3819] and discussed at length in Korea's Written Rebuttal.[3820] Yet, in the numerical analysis, the United States not only uses AUVs, but it also averages the AUVs for all flat products. The product mix issues multiply exponentially. There were very distinct import trends for each flat-rolled product over the period and very different prices for each flat-rolled product. No one-year "product mix" for "flat-rolled" makes any sense. The variation is too great to make an average meaningful.

7.1659 With respect to the fourth step of the numerical analysis, Korea notes that the United States compares the increase in imported AUVs required to put the industry in a state of non-injury to the import price increases the USITC estimate would result from the tariff rate imposed.[3821] For flat

[3814] The USITC concluded: "Based on data discussed in the final injury staff report, staff believes that, while there are some differences in US-produced and imported flat products, overall there is a moderate to high degree of substitution between certain US-produced and imported flat steel products". (USITC Memorandum EC-Y-046, 21 November 2001, p. FLAT-9 (Exhibit CC-10) The substitution elasticities used for flat products ranged from 2 to 7. The low end of that range represents moderate substitutability; the higher end of that range represents high substitutability, but "perfect" substitutability would be a number in the double-digits.

[3815] Korea's written reply to Panel question No. 50 at the second substantive meeting.

[3816] Korea's second written submission, paras. 169-176

[3817] Korea's written reply to Panel question No. 72 at the second substantive meeting.

[3818] Korea's written reply to Panel question No. 55 at the second substantive meeting.

[3819] USITC Report, Vol. I, p. 61, footnote 279 (flat-rolled); p. 163, footnote 1006 (welded pipe) (Exhibit CC-6).

[3820] Korea's second written submission , paras. 251 and 264; Korea's Exhibit 14.

[3821] Exhibit K-14. p.4.

products, the USITC used linked COMPAS models[3822] (which, Korea submits, is appropriate), which found that a 30% tariff on imports of all flat imports but tin would increase non-NAFTA import prices by 20.8% to 28.0%.[3823] Apparently, this is "close enough" to the 18.9% average import price the US numerical analysis generated.[3824]

7.1660 With respect to the use of average unit values, the United States reiterates that for the most part, it based the calculations on unit values, as these captured all of the products under investigation. For some products, the findings of the USITC or data in the USITC Report indicated that the difference in unit values between imports and domestic products reflected different product mixes, as well as the injurious effects of price underselling by non-FTA imports. In those cases, the United States argues that it based its calculations on the item-specific pricing comparisons conducted by the USITC.[3825] The United States argues that it sees nothing in Korea's argumentation that suggests any infirmity in the choice of AUVs or item-specific pricing data for particular products.

7.1661 With respect to Korea's criticism of the decrease in domestic AUVs by the actual operating margins for each year, and then their subsequent increase by the percentage calculated in Step Two[3826], the United States argues that this step was necessary for an accurate calculation. Had the United States not "backed out" the actual operating margin before adding the target profit margin, the estimate of the price increase necessary to achieve the target profit margin would have been higher. This, in turn, would have inaccurately inflated the estimate of the increase in import prices necessary to remedy the injurious price effects of increased imports.

7.1662 Korea submits[3827] that using the United States' numerical approach and keeping its grossly incorrect assumption about perfect substitutes, but correcting the other flaws noted above, yields the following result: Import prices for flat products would need to increase by no more than 10.1%, and the President's 30% tariff which results in a 20.8% to 28.0% price increase is excessive. In fact, the USITC's estimates of the various effects of different tariff rates suggests that a tariff of about 11-12% would produce non-NAFTA import price increases closer to 10.1%.[3828] Korea argues that it is not possible to correct the other welded pipe estimated import AUV increase (as done above for flat-rolled) of 16.2%[3829] because the proper target operating margin is unclear.

7.1663 Korea notes[3830] that the USITC found that each flat-rolled product was not a perfect substitute. They found moderate to high substitutability.[3831] Yet, the model assumes that imports and domestic production are "perfect substitutes". The effect of this error is to overstate the amount by which import AUVs needed to be increased because it assumes that import prices must equal United States prices for United States producers to "get the sale". Since imports are not perfectly substitutable, import prices do not need to be raised to the same level as those of domestic products so a lower tariff is needed. Hence, the United States tariff is not limited to the "permissible extent". The United States defense that perfect substitutability is essentially the same as "moderate to high" is indefensible from an economic point of view – which the United States knows full well. The United

[3822] USITC Memorandum "Available Information on Economic Models" (unnumbered; undated). (Exhibit CC-10)
[3823] USITC Memorandum EC-Y-050, 5 December 2001, Table 3. (Exhibit CC-10)
[3824] "Safeguard Measures Worksheets". (Exhibit US 56).
[3825] United States' first written submission, para. 1072, footnote 1375.
[3826] Exhibit K-14, p. 3.
[3827] Exhibit K-14, p.4.
[3828] USITC Memorandum EC-Y-050 5 December 2001, Table 1. (Exhibit CC-10)
[3829] "Safeguard Measures Worksheets". (Exhibit US 56).
[3830] Korea's written reply to Panel question No. 50 at the second substantive meeting.
[3831] USITC Report, Vol. I, p. 58; USITC Report, Vol. II, p. FLAT-54. (Exhibit CC-6)

States then suggested before the Panel that the imported product might be superior in quality. However, the USITC Report does not support that conclusion.[3832] Moreover, the USITC's substitution elasticity measure is relative to the United States product. In other words, it measures customer preference for the domestic product based on a variety of factors including quality, delivery times, etc.[3833] Quality is but one of a number of factors considered by the USITC in its measure of substitution elasticity – and the overall substitutability was "moderate to high" compared to the United States product.[3834]

7.1664 With respect to the treatment of domestic and imported products as perfect substitutes, the United States argues that, in the price-based exercise, the United States estimated that imports would have to sell at the same average unit value as domestic products for domestic products to achieve the target operating income levels. The complainants view this element of the calculation as presupposing perfect substitutability between imported and domestic products, when the USITC found a moderate to high degree of substitution.[3835] Assuming that domestic products would sell at a given level if imported products also sold at that level is consistent with a finding of moderate to high substitutability. To the extent that domestic and imported products could sell for different price levels, the United States notes that many purchasers felt that imported products were of higher quality than domestic products.[3836] This would suggest the existence of a price premium, such that domestic products could achieve a given average price level only if imported products were sold at a higher price level. Thus, if Korea were correct, the assumption that domestic and imported products needed to sell at the same level would be conservative.

7.1665 The European Communities argues that neither the USITC model, nor the *ex post* numerical analysis, properly deal with NAFTA imports, and thus neither allows the United States to satisfy its obligation under Article 5.1 to ensure that the measures remedies the injury allegedly caused by non-excluded imports. The USITC included imports from NAFTA countries where they were found to contribute importantly to injury, while the *ex post* numerical analysis excluded imports from NAFTA countries entirely. However, the United States was under an obligation to ensure that the injury caused by NAFTA imports was not attributed to non-excluded imports. When it comes to assessing the applicable remedy, the United States was required to determine the extent of the injury caused by NAFTA imports, and ensure that the measure did not transfer the burden of remedying such injury to non-excluded imports. In other words, the remedy analysis should have ensured that the domestic industry was *not relieved* of the injury caused by FTA imports. For the European Communities, it is not enough that the USITC concluded that NAFTA imports did not contribute importantly to serious injury. The concept of contributing importantly does not assess whether NAFTA imports caused injury. There is thus a discrepancy between both analyses and the required analysis.[3837]

[3832] USITC Report, Vol. II, Table FLAT-60. (Exhibit CC-6)

[3833] USITC Report, Vol. II, pp. FLAT-58-60, footnote 42. (Exhibit CC-6)

[3834] Korea's written reply to Panel question No. 50 at the second substantive meeting.

[3835] Exhibit K-14, pp. 3-4.

[3836] As a general rule, suggests the United States, the majority of purchasers viewed United States and non-NAFTA products as comparable. However, a significant number of them expressed a preference, generally finding non-NAFTA products to be superior by a two-to-one margin. USITC Report, pp. FLAT-58, LONG-81, TUBULAR-49, STAINLESS-69. The precise figures are: flat-rolled steel, 129 comparable, 64 non-NAFTA superior, 33 United States superior; long steel, 136 comparable, 44 non-NAFTA superior, 22 United States superior; tubular steel, 85 comparable, 28 non-NAFTA superior, 22 United States superior; stainless and tool steel, 87 comparable, 26 non-NAFTA superior, 10 United States superior. These evaluations of product quality would suggest that, on average, non-NAFTA products would command a price premium over domestic products.

[3837] European Communities' second written submission, para. 7.

7.1666 The European Communities also argues that the United States also stresses the numerous considerations which played a role in the President's decision (efforts engaged by workers and firms, economic and social costs and benefits of any safeguard, national economic interests).[3838] However nowhere has the United States elaborated on these other considerations.[3839]

7.1667 For Korea, an economic analysis, just like any other form of proof, is only sufficient to the extent that it is specific as to the facts, addresses the key issues in dispute, and takes into account the proper variables.[3840] For the same reason, mere assertions are not proof. Mere assertions cannot substitute for a full analysis of the facts and the basis for the conclusions, nor can mere assertions overcome a rebuttable presumption that the failure to satisfy Article 4.2(b) also fails to satisfy Article 5.1 of the Agreement on Safeguards. Yet, the United States suggests that given the inherent imprecision of economic models, its *ex post* analysis of the measure should be subject to lighter scrutiny, such as whether it is in the "ballpark". That is simply incorrect. For the same reasons, general theories about what might have occurred and what might have been addressed by the measure, are not a sufficient justification for the actual measure. It must be shown that the measure *is* limited to the permissible extent – not that it might be.

7.1668 According to Korea, what is missing from the United States' economic model is any attempt to tie the amount and nature of relief to the specific injury found.[3841] Why, for example, should the United States assume that the "accumulated effects" which must be remedied, if at all, for flat-rolled and the "accumulated effects" which must be remedied, if at all, for pipe and tube are the same? The United States does not even identify what precise accumulated effects it is targeting for each product (as opposed to giving some examples) but it doubles the operating margin for both welded pipe and flat-rolled. It is obvious that the effects would vary by industry and, in particular, the effects would vary (at least in degree) between an industry that was only threatened with injury versus one that was suffering serious injury, but the United States simply doubles the profit margin for both. Mere assertions that the United States took a "conservative" approach by merely doubling the profit margin rather than triple it or quadruple it does not answer the question of whether even *that* relief was necessary.

7.1669 For Korea, this "accumulated effects" analysis also suffers from the same problem as the "direct effect" they identify – imports were not the only cause of injury even by the USITC's own admission.[3842] Therefore, these "accumulated effects" might be from a number of causes other than imports, but the US analysis, by its own explanation, does not limit the relief to those effects produced by imports. Finally, the US analysis also ignores the fact that tariffs also have accumulated effects over the period of the measure. The more years during which the measure is to be in effect, the greater the effect on the industry.

7.1670 Finally, Korea disputes the United States' argument, made at paragraph 130 of its oral statement at the second substantive meeting, that the numerical analysis addressed only the "increase" in imports and not increased imports as a whole. Its model only measures changes in *profits* (profit shortfalls) so it is not correct that the model addresses only the *increase* in imports.[3843]

[3838] United States' written reply to Panel question No. 88 at the first substantive meeting.
[3839] European Communities' second written submission, para. 12.
[3840] Korea's additional comments on Panel question No. 54 at the second substantive meeting.
[3841] Korea's additional comments on Panel question No. 54 at the second substantive meeting.
[3842] Korea's additional comments on Panel question No. 54 at the second substantive meeting.
[3843] Korea's written reply to Panel question No. 47 at the second substantive meeting.

7.1671 By way of a general response, the United States observes again that any numerical analysis – be it the price- or volume-based exercise or economic modelling – can only indicate the order of magnitude of a safeguard measure, and cannot set a precise level.[3844] Most of Korea's comments are directed at the precision of the United States' numerical exercises, and do not detract from the United States' observation that the exercises demonstrate the consistency of the steel safeguard measures with Article 5.1.

7.1672 Finally, Korea submits that the USITC's COMPAS results do not confirm the results from the United States *ex post* analysis and model. The results are completely distinct. For flat-rolled, the COMPAS shows that a 30% tariff would produce a 20.8% to 28% increase in non-NAFTA import unit values ("prices")[3845] while the *ex post* model shows that import unit values ("prices") would increase 18.9%.[3846]

7.1673 In response, the United States submits that the price-based exercise and modelling exercise presented by the United states "produce the same results" only in that both of these exercises confirm that the steel safeguard measures were applied less than the extent necessary to prevent or remedy serious injury and to facilitate adjustment. However, this does not suggest that these exercises (or the modelling performed by the USITC staff) yield the same numerical results. [3847]

7.1674 The United States submits that, for example, the figures cited by Korea are not based on the same economic model. The 18.9% increase in import prices was calculated according to the price-based exercise described in the United States' first written submission.[3848] This figure represents the estimated degree to which import prices would have to increase for domestic producers to achieve the target operating income margin identified in our submission. Thus, it is a goal rather than an estimated effect. The other figures cited by Korea – the 20.8% to 28.0% range of projected increases in import prices – was the result produced by the multi-market or linked COMPAS model for a 30% tariff on CCFRS.[3849] Thus, it is an estimated effect rather than a goal. These are clearly two different methods of analysis. The United States compared the two results solely for the purpose of showing that a tariff of 30% would achieve import price increases in the range required to achieve the targeted operating income margin. Comparison for any other reason, such as that suggested by Korea, is both improper and meaningless. Korea's argument regarding the COMPAS results generated by the USITC staff and price-based exercise in the US first written submission is unclear. It could be interpreted in a variety of ways, each of which is incorrect. If Korea is arguing that the COMPAS results generated by the USITC staff are different from the modelling results referenced in the price-based exercise, it is plainly incorrect. The price-based exercise compared an estimated import price that would achieve target operating margins with the estimated price effect of a 30% tariff, as reported in the USITC staff's COMPAS modelling.[3850] For each product, including CCFRS, there is no difference as the exercise correctly reflected the results of the USITC staff's COMPAS modelling.[3851]

[3844] United States' first written submission, para. 1062.

[3845] USITC Memorandum EC-Y-050, 5 December 2001, Table 3. (Exhibit CC-10)

[3846] Exhibit K-14; Korea's written reply to and additional comments on its reply to Panel question No. 48 at the second substantive meeting.

[3847] United States' additional comments on replies to Panel question No. 48, 54 and 56 at the second substantive meeting, paras. 1-9.

[3848] United States' first written submission, paras. 1065-1080; Exhibits US-56 and US-57.

[3849] Memorandum EC-Y-050 (Exhibit US-65). According to Korea, since the USITC staff ran the model before the USITC issued its report, it treated only Canada as excluded from the measure.

[3850] United States' first written submission, para. 1072.

[3851] In this regard, the United States notes, the price-based exercise differed from the modelling exercise. The price-based exercise referenced the COMPAS results produced by the USITC staff, which reflect

7.1675 The United States notes that if Korea is arguing that the estimated amount that import prices would have to increase to eliminate downward pressure on US producers' prices (18.9% for CCFRS)[3852] was a projection of the actual amount that prices would increase, it has misunderstood. The 18.9% figure is clearly labeled "Needed Unit value increase for non-NAFTA imports".[3853] It represents the hoped-for increase in import prices, and not an estimate of what will actually happen. In short, the written description of the price-based exercise and the spreadsheets in Exhibit US-56 applying that exercise do not suggest a finding that "a 30% tariff yields an 18% increase in imports prices".[3854] If Korea's point is that the needed unit value increase of 18.9% is slightly below the low end of the range of estimated effects of a 30% tariff, the United States explained that "numerical estimates are necessarily limited in their ability to precisely quantify and isolate the full effect of imports and the appropriateness of remedial measures. . . . Numerical estimates may be useful to test whether a measure is set at an order of magnitude consistent with Article 5.1".[3855] The price-based exercise demonstrates that this is the case for the safeguard measure on CCFRS, as well as the other steel safeguard measures.

3. Criticisms with reference to specific products

7.1676 With respect to CCFRS, Korea argues that, in relation to the first step, there is no apparent reason one can detect for selecting 7.5% as a target operating margin for 2001.[3856] In fact, it appears it should be –3.9%, the 1996 operating margin. Correcting the methodology by eliminating step two, increasing domestic prices in step three by the percent needed to reach the target revenue (target minus actual divided by target) and calculating the percent difference between the resulting domestic AUVs and actual non-NAFTA import AUVs (this assumes perfect competition) results in the following import AUV price increase requirements:

Slab	33.6%
Plate	7.8%
Hot Rolled	17.4%
Cold Rolled	10.1%
Coated	5.4%
Average weighted by NCS	10.1%

7.1677 With regard to this comment, the United States points out that the 7.5% figure was a clerical error. The United States notes that it revised the calculation using -3.9% as the target margin for interim 2001.[3857] The correction does not change the results for certain carbon flat-rolled steel as a whole.[3858]

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tariff levels adopted by the President, but not the exclusion of both Canada and Mexico from all products. In contrast, the modelling exercise used the same inputs as the USITC did for elasticities and for full-year 2000 data, but modelled the tariff levels and country exclusions adopted by the President. The modelling exercise also involved modelling of the change in imports during the investigation period, which the USITC did not do. United States' written reply to Panel question No. 48 at the second substantive meeting. Korea argues that these differences in the use of the model would obviously change its numerical outputs.

[3852] Exhibit US-56, table labelled "Weighted based on Net Commercial Sales for FLAT Products".
[3853] Exhibit US-56, table labelled "Weighted based on Net Commercial Sales for FLAT Products".
[3854] Korea's written reply to Panel question No. 48 at the second substantive meeting.
[3855] United States' first written submission, para. 1062.
[3856] Exhibit K-14, pp. 4-5.
[3857] Exhibit US-96 contains a corrected version of the affected pages from Exhibit US-56.
[3858] United States' written reply to Panel question No. 48 at the second substantive meeting.

7.1678 Korea responds to the United States' argument that the results of the USITC model and its *ex post* analysis differ because the *ex post* analysis is based on the actual remedy taken by the President. Specifically, Korea notes that a key difference between the United States' *ex post* economic analysis and the remedy taken by the President is that the *ex post* analysis included slab, which the President excluded from the measure on flat-rolled. Therefore, the United States has not established the basic relevance of the model to the actual Presidential remedy. Korea adds that another difference between the USITC model and the US *ex post* analysis is that the United States doubled profit margins, apparently to account for "the cumulative injurious effect of increased imports." Stated simply, the USITC model does not assume an arbitrary doubling of profit margins.[3859]

7.1679 With respect to certain welded pipe, Korea notes that the tariffs were imposed on other welded pipe as a result of a finding of threat of injury.[3860] However, the United States suggests that the domestic industry producing other welded pipe experienced injury caused by imports in 2000 and before.[3861] It then concentrates is numerical analysis on 2000 for Step 1; but for Steps 2 and 3, it uses data for 1998 through the first half of 2001, "the period when imports were increasing".[3862] Given that this was a finding of threat, these increasing imports were not causing injury.[3863]

7.1680 Korea argues that the methodology for other welded pipe is completely unclear.[3864] The numerical analysis focuses only on 2001, but it is impossible to correct the flaws noted above because the target operating margin appears to have no basis. That margin, 5.7%[3865], comes from no data in the USITC staff report, nor can it be derived from various averaging options. The end result was an increase in non-NAFTA import AUVs of 16.2%.[3866] The US results[3867] show price increases sought of 4.3% to 6.7% if other welded imports are held to 1997 levels (although there does not appear to be any injury-related reason to do so), and 8.7% to 11.1% resulting from the President's remedy. The United States also notes that the USITC's models in the remedy phase of the investigation suggested that the 15% tariff imposed would increase non-NAFTA imported AUVs by 9.3% to 11.5%.[3868] That same USITC model suggested that a 15% tariff would decrease non-NAFTA imports by 22% to 34% below 2000 levels.

7.1681 Finally, with respect to the modelling results for other welded pipe, Korea notes that if other welded pipe imports were held to 1997 levels, the estimated price for domestic products would be 4.3 to 6.7% higher, while the remedy would result in estimated price increases of 8.7 to 11.1%. With regard to this comment, according to the United States, Korea's criticism fails to recognize that the other welded pipe remedy addressed a threat of serious injury, and that the analysis based on data for 2000 would not establish what was necessary to stop the evolution of the existing injurious effects of increased imports into the full manifestation of that threat as serious injury.[3869]

[3859] Korea's additional comments on Panel question No. 48 at the second substantive meeting.

[3860] Exhibit K-14, p.5.

[3861] United States' first written submission, para. 1131; United States' written reply to Panel question No. 27 at the first substantive meeting.

[3862] United States' first written submission, para. 1136.

[3863] USITC Report, Vol. I, p. 159: "We consider the industry's overall condition to be weak. Although it has not yet reached the point of serious injury, such injury appears imminent.... The years 1996 to 1998 were a period of generally good health". (Exhibit CC-6)

[3864] Exhibit K-14, p.6.

[3865] "Safeguard Measure Worksheets". (Exhibit US 56)

[3866] "Safeguard Measure Worksheets". (Exhibit US 56)

[3867] "Modelling Results Worksheets". (Exhibit US 57)

[3868] United States' first written submission, para. 1137.

[3869] United States' written reply to Panel question No. 54 at the second substantive meeting.

7.1682 Korea adds[3870] that the justification by the United States of the 5.7% profit margin for welded pipe should, at the very least, be consistent with representations made by the United States regarding the methodological approach the United States claims to have adopted (*e.g.*, the use of the one-year base period[3871], when the United States actually used an average of two periods for welded pipe – without explaining why two years was necessary rather than one[3872]). However, of greater concern is the fact that the United States now disavows its explanations of the source of the profit figures for welded pipe (1998-2001) as a "typographical error".[3873] Unfortunately, the errors are further compounded by its new explanations. The United States asserts that the tables in Exhibit US-56 "show that we based the target profit margin on 1999 and 2000 data, and did not use data for 1998".[3874] First, Korea claims to see nothing in that Exhibit which identifies the source of the profit figures. The value appearing in that Exhibit actually seems to be the simple average of 1999 and 2001 (not 2000). It is still not clear from this latest description what the United States intended to use. Second, the United States now states: "We omitted data for 2000 from the calculation because the USITC found that excess capacity had a 'minor' effect on the industry's performance in 2000".[3875] However, this most recent explanation of how it selected the proper target profit years also conflicts with its earlier explanations as to essential elements of its reasoning. Tthe United States asserts that it did not "determine a domestic price that would increase operating income margins above their 2000 levels".[3876] The United States says that this limitation on the profit level was necessary because profits declined in 2000 due to capacity increases (as opposed to imports).[3877] However, the figure of 5.7%, which it actually used as the target profit margin, is above the profit level of 4.3% for 2000.[3878] So, contrary to the US explanation, the measure did seek to increase profits to a level that exceeded 2000 profit levels. The United States recognizes on the one hand that even in the absence of imports, the industry would not have reached the 2000 level of profitability given the capacity increases, but then proceeds to use a profit target which exceeds 2000 levels. There is no consistency between the logic and the actual figures used. No more compelling is the US attempt to justify the use of 1997 import levels as a benchmark for the proper remedy for welded pipe.[3879] As noted by the USITC, the industry was not seriously injured by imports even in 2001 and continued to be profitable even in 2001. ("Our remedy is intended to halt deterioration of revenues, market share and profitability".[3880]) In fact, the USITC found that no improvements in profitability were initially necessary.[3881] Given the threat of injury finding, using 1997 as the proper level of imports makes no sense. Astonishingly, the US *ex post* analysis explicitly shows that the remedy imposed by the President was actually more

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[3870] Korea' s additional comments on the replies to Panel question No. 54 at the second substantive meeting.

[3871] United States' written reply to Panel question No. 54 at the second substantive meeting.

[3872] United States' written reply to Panel question No. 50 at the second substantive meeting.

[3873] United States' written reply to Panel question No. 50 at the second substantive meeting, footnote 141.

[3874] United States' written reply to Panel question No. 50 at the second substantive meeting, footnote 141. (emphasis added).

[3875] United States' written reply to Panel question No. 50 at the second substantive meeting. But, see footnote 141.

[3876] United States' first written submission, para. 1136.

[3877] United States' first written submission, para. 1136; United States' written reply to Panel question No. 50 at the second substantive meeting.

[3878] USITC Report, Vol. II, Table TUBULAR-18, p. TUBULAR-22 (Exhibit CC-6).

[3879] United States' written reply to Panel question No. 50 at the second substantive meeting.

[3880] USITC Report, Vol. I: Determinations and Views of The Commissioners, p. 386 (emphasis added) (Exhibit CC-6).

[3881] "We estimate that the recommended tariff-rate quota on welded pipe products will initially leave the market share, sales revenue, and profitability of the domestic industry unchanged." USITC Report, Vol. I, p. 386 (Exhibit CC-6).

restrictive and had a greater effect on import (prices and quantities) than holding imports at 1997 levels.[3882]

7.1683 With regard to this comment, the United States indicates that the target margin of 5.7% does not appear in the USITC Report. This figure is the average of profit margins for 1999 and interim 2001. The United States omitted data for 2000 from the calculation because the USITC found that excess capacity had a "minor" effect on the industry's performance in 2000.[3883] The United States adds that it did not use the 2000 operating margin as a benchmark. Instead, the United States used the average of operating income margins in 1999 (8.1%) and the first half of 2001 (3.2%) to derive a target margin of 5.65.[3884] The United States maintains that a simple average is a conservative estimate. The 1999 margin represented 12 months of data and the 2001 margin six months. A weighted average would have resulted in a target margin of 6.5%.[3885]

7.1684 Korea argues that the methodologies used by the United States assume facts and methods of analysis which are either not supported by the USITC's injury analysis or are directly contrary to the requirements of the Agreement on Safeguards.[3886] Korea refers to the errors in relation to the basic premises of the "numerical analyses". Korea submits that the numerical analyses for welded pipe and flat-rolled are entirely based on an estimate of the extent to which non-NAFTA import prices should increase to attain the "desired condition".[3887] Korea submits that a price analysis is not the appropriate analysis for welded pipe since the USITC's focus was on the effect of future increases in import volumes. Korea further submits that the import and domestic "prices" used in the numerical analyses are not reliable. The United States' numerical analyses for flat-rolled and welded pipe rely on import AUV data, but the USITC specifically found that AUV data was not reliable for either flat-rolled or welded pipe due to changes in product mix year-to-year.[3888] The United States does not justify its use of AUVs or why they were considered reliable. Further, the United States' numerical analysis merely "weight-averaged" (by the net commercial sales of each product) the targeted AUVs for flat-rolled to do its remedy calculation even though the USITC in its injury analysis never considered a "flat-rolled" AUV but always considered prices by product and AUVs by product (for cold-rolled, hot-rolled, etc.).

7.1685 Korea submits that the numerical analyses assume a base year for profitability either before the increase in imports or before the condition of the industry began to decline.[3889] This is treated as a surrogate for the condition of the industry prior to serious injury. On its face, such an analysis is inappropriate for welded pipe since the industry was never seriously injured so the concept of a "surrogate" prior to serious injury or prior to import increases is meaningless. Article 5.1 is clear that

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[3882] US Exhibit 57, Modelling Worksheet E, discussed in United States' written reply to Panel question No. 50 at the second substantive meeting.

[3883] United States' first written submission, paras. 1132 and 1136. Paragraph 1136 contains a typographical error indicating that we used data for 1998 through the first half of 2001. According to the United States, the tables in Exhibit US-56 show that the it based the target profit margin on 1999 and 2000 data, and did not use data for 1998.

[3884] The United States explains that since the spreadsheets in Exhibit US-56 presented operating income figures with one decimal place, this is rounded to 5.7% on the printout. The electronic version of the spreadsheet contains reflects the full 5.65% figure.

[3885] United States' additional comments on its written reply to Panel question No. 54 at the second substantive meeting.

[3886] Korea's second written submission, paras. 248-251.

[3887] United States' first written submission, para. 1071.

[3888] USITC Report, Vol. I, p. 61, n. 279 and p. 163, n. 1006 (Exhibit CC-6).

[3889] Korea's second written submission, para. 252.

"prevent(ing) serious injury" is the basis for the permissible extent of the measure when threat of injury is found. As of 2001, the industry still was not seriously injured.[3890]

7.1686 Korea adds[3891] that the numerical analyses improperly treat all the negative effects throughout the period of investigation as attributable to imports, and failed to consider positive economic forecasts in some instances: (i) for flat-rolled, the United States admits that it made no adjustment to reflect the injury caused by increased capacity or mini-mill competition[3892], anti-dumping and countervailing orders[3893], or legacy costs of integrated producers; (ii) for welded pipe, the numerical analysis did not adjust for the effects of existing AD orders[3894], the particular circumstances of one significant US producer[3895], or the effects of excess capacity over the entire period[3896]; and (iii) for welded pipe, the analysis fails to account for the USITC's conclusion that LDLP demand was likely to increase.[3897]

7.1687 Korea argues that for flat-rolled, as detailed in the preceding section, the United States has incorporated a number of concepts into its numerical analyses which are not properly substantiated, or worse, are directly contradicted by the USITC record.[3898] These deficiencies alone render the numerical analyses for flat-rolled useless for purposes of the justification of the permissible extent (Article 5.1 of the Agreement on Safeguards). Therefore, the United States has not demonstrated to the Panel its compliance with the requirements that the measure be limited to the permissible extent. As the Appellate Body stated in *Korea – Dairy*, such a requirement applies regardless of the form of the measure imposed.[3899] Moreover, as demonstrated in Korea Exhibit 14, after correcting the numerical analyses of the United States, the correct calculation demonstrates that only a 10.1% increase in import prices would have been necessary to achieve what the United States claims as the targeted operating margin for the US industry in their numerical analysis. However, according to the USITC Economic Model (the results of which the United States embraced in its first written submission)[3900], the 30% tariff the President imposed was expected to increase import prices by 20.8% to 28%.[3901] Therefore, the tariff imposed raises import prices by much more than is necessary to reach the targeted operating margin.

7.1688 In the case of tin mill, Korea submits that there is no "finding" as such of serious injury to tin mill products so there is no basis upon which any measure on tin mill products could be imposed. Only one Commissioner found tin mill products to be seriously injured.[3902] All the other

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[3890] USITC Report, Vol. I, p. 159 (Exhibit CC-6).

[3891] Korea's second written submission, para. 253.

[3892] United States' first written submission, para. 1093.

[3893] United States' first written submission, para. 1092. In terms of anti-dumping and countervailing orders, the United States defends its failure to adjust its estimate in its numerical analysis for the 1997 and 2000 orders on plate and the 1999 order on hot-rolled, but gives no defense of its failure to account for the 2001 hot-rolled orders.

[3894] United States' first written submission, para. 1134.

[3895] United States' first written submission, para. 1130.

[3896] United States' first written submission, paras. 1128-1129.

[3897] United States' first written submission, para. 1135; USITC Report, Vol. I, p. 166 (Exhibit CC-6).

[3898] Korea's second written submission, paras. 254-257.

[3899] Appellate Body Report, *Korea – Dairy*, para. 96.

[3900] United States' first written submission, para. 1099, n. 1385, referring to the model in USITC Memorandum EC-Y-050 (Exhibit US 65).

[3901] United States' first written submission, para. 1099.

[3902] Korea's second written submission, para. 258.

Commissioners disagreed either as to the like product or whether there was serious injury. There certainly is no "benchmark" provided as to the proper extent of the measure so the numerical analysis based on tin mill are meaningless. The numeric analysis used in this case for tin mill measures the volume reductions (as opposed to price increases) in imports needed to achieve the benchmark profitability. It is based on tin mill imports considered alone but only one Commissioner who found serious injury based her analysis on tin mill imports alone.

7.1689 For other welded pipe, Korea states that the United States imposed a remedy of 15% tariff on all imports.[3903] In contrast, the USITC had recommended a TRQ with a 20% tariff only on imports exceeding 2.6 million short tons (Koplan and Miller including Canada and Mexico) and 1.4 million short tons (Okun and Hillman, excluding Canada and Mexico)[3904] This quota was equal to import levels in 2000 because the USITC found that current levels of imports were not injurious.[3905] Korea submits that the United States seeks to substitute the USITC's specific finding regarding threat of injury and the proper remedy for threat of injury, with an *ex post* record and a substitute analysis of the timing and scope of present injury.[3906] [3907] As noted, this approach clearly deviates from the holding of the Appellate Body in *US – Line Pipe* because such an *ex post* approach is fundamentally inconsistent with and irreconcilable with the USITC's finding that imports were *not* causing serious injury at any time in the period.[3908]

7.1690 Korea states that the United States made a number of erroneous assumptions: (i) the US construct presented to the Panel is based on the new objective of correcting "declines" in industry factors during a period when the industry was not seriously injured by imports. However, the USITC specifically found that it would only be additional declines that needed to be prevented.[3909] According to the new US analysis, a safeguard measure can now be imposed to remedy "negative effects".[3910] However, Article 5.1 of the Agreement on Safeguards provides that the measure selected shall be the "most suitable" for "preventing serious injury"[3911] – not to remedy any "negative effects". It was only when the industry's overall condition transformed into an imminent threat of serious injury that such increased imports became actionable and the USITC's measure correctly addressed the need to was to prevent further increases and prevent serious injury. Secondly, the United States is wrong that the USITC did not find problems of product mix which called into question the use of AUV data.[3912] In fact, the wide disparities in products created a severe problem with such data. The USITC itself observed: "We are cautious of placing undue weight on AUV information, as it is influenced by issues of product mix".[3913] Korea challenges the United States assertions that it can substitute a new analysis of AUVs as the basis for its remedy instead of using the pricing data which the USITC actually used in its injury analysis. Thirdly, and more fundamentally, the United States cannot just

[3903] Korea's second written submission, paras. 259-260.

[3904] USITC Report, Vol. I, p. 384 (Exhibit CC-6).

[3905] USITC Report, Vol. I, p. 386 ("Our proposed remedy for welded pipe would still permit the same quantity of imports as in 2000 at the current low rate of duty.") (Exhibit CC-6)

[3906] United States' first written submission, para. 1077.

[3907] Korea's second written submission, paras. 261-273.

[3908] USITC Report, Vol. I, p. 159 (Exhibit CC-6).

[3909] USITC Report, Vol. I, p. 386 (Exhibit CC-6).

[3910] United States' first written submission, para. 1132.

[3911] "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury ... Members should choose measures most suitable for the achievement of these objectives." Article 5.1 of the Agreement on Safeguards.

[3912] United States' first written submission, para. 1133.

[3913] USITC Report, Vol. I, p. 163, n. 1006 (Exhibit CC-6).

string together piecemeal data and reach conclusions directly at odds with the underlying threat of injury determination. Korea gives three examples in this regard: (i) The United States maintains that the President's safeguard measure on welded pipe was intended to raise prices, not to affect volumes of imports.[3914] However, price levels for welded pipe were not found to be injurious by the USITC (unlike for flat-rolled).[3915] The United States' *ex post* numeric analysis confirms that the remedy was intended exclusively to achieve increasing prices. The United States has apparently adopted an *ex post* methodology for defending its measures which is "one size fits all" irrespective of the threat/serious injury finding. However, the USITC specifically relied on increasing volumes as threatening injury[3916] and those increasing volumes had to be prevented.[3917] Therefore, the US measure does not find its benchmark in the threat of injury determination. Moreover, it is not the measure "commensurate with the goals of preventing...serious injury"[3918]; (ii) Despite the claims by the United States that it was not seeking a volume reduction in imports, the USITC economic analysis which the United States cites as consistent with its *ex post* analysis[3919] demonstrates that if the 15% tariff had been imposed in 2000, it would have resulted in a 34 to 21.8% reduction in imports. Moreover, the United States confirms that the USITC's economic analysis of a 15% tariff demonstrates that based on the year 2000 imports, if the tariff had been imposed in 2000, imports would be reduced by 34 to 21.8%.[3920] Yet, the United States does not seek to reconcile this result with its statement in the previous question that it is not seeking volume reductions.[3921] Nor is any reconciliation apparent.[3922] In its analysis of welded pipe, the United States asserts that it is basing the target revenue for the industry on the levels of operating income margins in 2000. However, the operating profit levels for welded pipe in 2000 were 4.3% and the United States uses a targeted base operating income margin of 5.7% in its worksheet. The United States never explains this discrepancy. (The United States then incorporates a completely unexplained additional profit margin increase, to yield a 7.6% operating income margin as the target, which exceeds the 4.3% in 2000, which the USITC found non-injurious.); and (iii) The United States seeks to substantiate its own *ex post* reasoning in the COMPAS analysis on the grounds that it achieves revenue levels by reducing imports to 1997 levels.[3923] But, such reductions in imports cannot be justified. In fact, the USITC recognized that 1996-1998 were years of "good health".[3924] Even 1999 was a year of "mixed performance" – profitability remained stable.[3925] In fact, the USITC specifically noted that it was only in 2000 and into 2001 that the industry was "... approaching a state of serious injury".[3926] There is absolutely no basis in that determination for trying to set a remedy that achieves 1997 import levels. By its own

[3914] United States' written replies to questions from other Parties, paras. 59-60.

[3915] USITC Report, Vol. I, p. 164 (Exhibit CC-6).

[3916] USITC Report, Vol. I, p. 164 (Exhibit CC-6).

[3917] USITC Report, Vol. I, p. 386; Prices needed to be "stabilized" with the tariff only if current import levels were exceeded, p. 386 (Exhibit CC-6).

[3918] Appellate Body Report, *Korea – Dairy*, para. 96.

[3919] United States' first written submission, para. 1137, n. 1409 (citing to USITC Memorandum EC-046, p. TUBULAR-21).

[3920] Korea appreciates the United States note that the figures cited by Korea were for a 10% tariff. With a 15% tariff, the reduction is even greater.

[3921] The United States instead makes the obvious point that economic analysis is always based on past results.

[3922] The USITC did not project increases in demand or price increases, which might indicate a change in market conditions moderating the effect of the 15% tariff.

[3923] United States' first written submission, para. 1138, "Simplified Economic Model" "COMPAS Results for Certain Welded Pipe" (Exhibit US 57).

[3924] USITC Report, Vol. I, p. 159 (Exhibit CC-6).

[3925] USITC Report, Vol. I, p. 160 (Exhibit CC-6).

[3926] USITC Report, Vol. I, p. 162 (Exhibit CC-6).

admission, a measure based on achieving import levels in 1997 exceeds the amount necessary to prevent threat of serious injury.

7.1691 The United States notes that the arguments summarized in paragraphs 7.1695 and 7.1696 apply equally to the Korean arguments reflected in paragraph 7.1690.

4. Choice of one-year base period

7.1692 Korea, Japan and Norway argue that the chosen year must be evaluated in terms of its representative nature in all respects including supply, demand, and other factors of injury.[3927] Therefore, the United States would need first to establish the representativeness with respect to all these issues to demonstrate that it is representative period. The complainants submit that the United States has demonstrated that no single year of the review period is unaffected by other factors of injury in the case of flat-rolled and other welded pipe.[3928] The European Communities, Korea and Norway add that, generally, it is not sufficient to base the benchmark income margin on figures for one year alone.[3929] [3930]

7.1693 Korea adds that for flat-rolled, 1997 was used as the pre-injury from imports benchmark year for 1998-2000, and 1996 was used for 2001. However, the United States did not ensure that any "other factors" would not also distinguish the two periods such as the fact that mini-mills added significant capacity between 1996 and 2000[3931] which increased price pressure on the market.[3932] Korea argues that the United States simplistically suggests that it can use 1996 as the benchmark for 2001 for flat-rolled because 1996 was also a period of depressed demand so that this other factor of injury has been isolated.[3933] Additionally, the United States' choices of 1996 and 1997 for its analysis as years prior to injury does not account for the effect of legacy costs, which the USITC found was a problem for the industry throughout the period of investigation.[3934] In the case of welded pipe, it is not even clear where the United States got its targeted benchmark[3935] so it is impossible to comment on the validity of that benchmark apart from the fact that there is no basis in the record for the number used. Korea notes that the other welded pipe industry had excess capacity from the very beginning of the period, so there was no year that was unaffected by this other factor of injury. Further, the United

[3927] Appellate Body Report, *US – Lamb*, paras. 138-139.

[3928] Complainants' written replies to Panel question No. 54 at the second substantive meeting.

[3929] European Communities', Korea's and Norway's written replies to Panel question No. 54 at the second substantive meeting.

[3930] The complainants' written replies to Panel question No. 54 at the second substantive meeting.

[3931] Korea's written reply to Panel question No. 54 at the second substantive meeting; Korea's second written submission, para. 169.

[3932] Korea's second written submission, paras. 173-175. Korea points out that the use of the 1996 benchmark as a surrogate for the uninjured condition of industry in 2001 does not relate to *imports* alone. The year 1996 is in fact a year in which mini-mill competition was also substantially lower than at any other point in the period.

[3933] United States' first written submission, para. 1094.

[3934] USITC Report, Vol. I, p. 64 (Exhibit CC-6).

[3935] According to Korea, the United States does not state in its first written submission which year it chose as the benchmark year for welded other pipe. However, in US Exhibit 56, the United States Safeguard Measure Worksheets show in Step 2 that it selects a *base* target operating margin of 5.7% for the welded other industry for 2001 (its additional calculations manipulate this figure, however, to result in a target operating margin of 7.6%.) The 5.7% base target operating margin does not correspond to *any* operating margin experienced by the other welded industry in any year of the period of investigation. The welded pipe industry had a healthy 4.3% operating margin in 2000, a year in which the USITC did not consider the industry to be injured (USITC Report, Vol. I, p. 386 (Exhibit CC-6)), so it is unclear why the United States would not have chosen a base operating margin of 4.3%, and the year 2000 as the benchmark year.

States industry's performance was affected beginning in 1999 by certain cost increases for one United States producer.[3936] Korea also notes that the USITC found only a threat of serious injury because it concluded that as of mid-2001, increased imports were not the cause of serious injury to the United States industry. If the industry was suffering injury, it could well have been the result also of other factors, not imports. (The USITC only concluded that imports played a "key role" in the negative trends.[3937]) The only finding by the USITC was that the industry was not seriously injured by imports as of the first half of 2001. Yet, it is clear that the United States action restrained imports to levels below 2000 and 2001 to improve operating results vis-à-vis an "earlier" benchmark. Therefore, the remedy should have been limited to the threat of serious injury caused by increased imports, and the use of a benchmark prior to 2001 cannot be justified.[3938]

7.1694 Brazil believes that there are two issues relating to the choice of one year basis. First, is the period chosen representative in terms of operations of the domestic industry prior to the serious injury caused by imports? Second, have the income margins been adjusted to reflect the effects on non-import factors on the margin in the representative period? The representative period may be one year or several years. Brazil suggests, however, that the year of peak industry performance is not a representative year and, therefore, 1997 is not representative.[3939]

7.1695 The United States responds that the price-based exercise was based on the year that best reflected the injurious effects of factors other than imports, while minimizing the injurious effects of increased imports. Data from other years would necessarily be a second-best choice, and lower the reliability of the exercise. The United States has described the basis for choosing the comparison year for each product.[3940] Moreover, for many products, the USITC found that imports had injurious effects for much of the investigation period. For example, for CCFRS, the USITC found that imports had injurious effects in 1998, 1999, and 2000 and did not identify injurious effects for 1996 and 1997. Thus, for purposes of confirming the Article 5.1 consistency of the President's safeguard measures, only for 1996 and 1997 was it possible to conclude that data for 1996 or 1997 reflected minimal or no injurious effects, which would make them appropriate for use in deriving a target profit margin. The limited number of years that could provide a reasonable benchmark meant that only one would be acceptable. In many cases, the available periods did not fully reflect the profitability levels that the relevant industry would achieve absent the injurious effects of increased imports. For example, the price-based exercise used 1997 as the target year for CCFRS, even though profit levels in that year did not reflect greatly increased demand in 1998 through 2000, which should have resulted in higher profits, rather than the lower profits and losses that actually occurred. Thus, for CCFRS, 1997 profit margins provide a conservative estimate of the profits the domestic industry should have made in the 1998-2000 period.[3941]

7.1696 Moreover, the United States recalled that Korea criticizes the United States on the grounds that the "choices of 1996 and 1997 . . . as years prior to injury does not account for the effect of legacy costs".[3942] However legacy costs were borne by the domestic industry throughout the entire period investigated. Korea also objects that no control is made for the increase in minimill capacity over the period[3943], but as the United States has already observed, the largest increase in minimill

[3936] Korea's first written submission, para. 161; Korea's second written submission, para. 189.
[3937] USITC Report, Vol. I, p. 164 (Exhibit CC-6).
[3938] Korea's written reply to Panel question No. 54 at the second substantive meeting.
[3939] Brazil's written reply to Panel question No. 54 at the second substantive meeting.
[3940] United States' first written submission, paras. 1089, 1096, 1106, 1115, 1124, 1136, 1144, 1156 and 1166.
[3941] United States' written reply to Panel question No. 54 at the second substantive meeting.
[3942] Korea's written reply to Panel question No. 54 at the second substantive meeting.
[3943] Brazil's written reply to Panel question No. 54 at the second substantive meeting.

capacity was in 1997, the year chosen as the benchmark for the analysis for flat-rolled. Second, Brazil objects to the fact that 1997 was a year of peak industry performance over the period and therefore cannot be representative.[3944] This ignores the fact that the years 1998 through 2000 were years of even higher demand for flat-rolled products than that seen in 1997.[3945] Thus 1997 was a conservative choice to use as a benchmark. It was a peak year in terms of industry performance during the period of investigation only because increased imports had negative effects on domestic prices in later years.

5. The use of AUV

7.1697 On the use of AUV, Brazil, Korea, Japan, Norway argue that the USITC itself has admitted that issues of changing product mix may affect the reliability of AUVs for purposes of analysis.[3946] AUVs are also inherently unreliable because they mask the dynamics of individual sources by collapsing them into a single average. For example, AUVs are totally irrelevant to determining who is exercising downward pressure on price and who is the price leader in the market. A more relevant analysis would be a comparison of the pricing behaviour of those domestic mills that are gaining market share with those domestic mills that are losing market share. This would allow the USITC to determine the price leader among the domestic mills. One could then look at how the domestic mill price leader's prices compare over time with offshore sources and whether the domestic price leader is gaining or losing market share to these offshore sources. In this case, prices for specific pricing products would be relevant, not AUVs, since AUVs do not account for how prices for products with identical or even similar specifications vary depending on the domestic mill source or the foreign source. Again, however, averages of prices for specific pricing products are of limited utility in determining price leadership in that an average does not distinguish between mills that are pricing aggressively and those that are not. The point being that a simple comparison of AUVs tells the authority nothing about who is leading the prices downward in the market. The use of AUVs as probative of pricing behavior in the market is further attenuated by the bundling of multiple products into a single CCFRS category. A comparison of AUVs for CCFRS is meaningless in that the proportions of slab, hot-rolled, cold rolled, plate and coated steel within the import AUV calculation bears absolutely no relationship to the proportions with the domestic AUV calculation. For imports, lower value added slab and hot-rolled product account for the majority of sales, whereas in the domestic market only 0.9% of slab produced is sold and only approximately 1/3 of hot-rolled produced is sold (i.e. higher value added cold rolled and corrosion resistant products make up the majority of sales of domestic product).[3947]

7.1698 Korea adds that the United States now states for the first time that the underselling data is confidential and it could not use it for that reason. No specific products are cited. However, the pricing data for non-NAFTA flat-rolled imports is largely available and is not confidential. The United States used non-NAFTA AUVs for its numerical analysis[3948] so it could have used the actual pricing data for those products. Finally, Korea argues that the United States cannot simply use

[3944] Brazil's written reply to Panel question No. 54 at the second substantive meeting.

[3945] "By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel." USITC Report, *Steel*, Inv. No. TA-201-73, USITC Pub. No. 3479, p. 56, December 2001.

[3946] Views of the Commission – USITC Report, Vol. I, p. 61, n. 279.

[3947] Complainants' written reply to Panel question No. 53 at the second substantive meeting.

[3948] United States' second oral statement, para. 130.

whatever is "available" if it is not reliable. Moreover, the numerical analysis averaged *all* flat-rolled AUVs creating additional distortions.[3949]

7.1699 For Norway, the important question is not whether one uses actual sales in a given base year or "average unit values", but the factors that are included to achieve the AUV, the choice of the base year and – not least – what is not adjusted for in the comparisons (non-attribution). For CCFRS, the AUV comparisons do not adjust for legacy costs, management decisions and capacity increases.[3950] Nor do the comparisons and injury offsets take into account purchaser consolidation[3951], declining demand[3952], dumping and CVD orders[3953] and minimill competition.[3954] Furthermore, the use of 1996 as the base year for profits[3955] instead of an average for the years preceding the increase in 1998 – or the year preceding (1997) is not well explained.[3956]

7.1700 The United States argues that the use of unit values is appropriate when imports and domestic products have comparable product mixes, as was the case for most of the products under consideration by the USITC.[3957] If products do not have comparable product mixes, a preponderance of inexpensive items in one group may create the impression that the group is selling for a lower price than another group with a preponderance of high-priced items, even if individual comparable items are priced identically. Where there are no product mix issues, unit values are useful because they reflect the entirety of the imported and domestic products. However, in some situations, a difference in product mix for imported and domestic products might limit the usefulness of unit values. In those cases, where possible, the United States relies on alternative sources of data, such as item-specific pricing data.[3958]

6. Adjustments for NAFTA imports

7.1701 The United States explains that no adjustment for NAFTA imports was necessary in the modelling exercise, which excluded NAFTA parties and developing country WTO Members accounting for less than 3% of total imports. Thus, in both of the two scenarios used in the modelling exercise – one holding covered imports in 2000 at pre-increase levels and the other subjecting covered imports in 2000 to the safeguard measures – the model results reflects changes in covered imports.[3959] The modelling of the effects of the safeguard measures treats imports from NAFTA countries and excludes developing countries as not subject to safeguard measures. The modelling of the increase in imports involves only the increase from covered sources. Since excluded sources were treated the same in each scenario, they should not affect the comparison of the price, volume, and revenue effects of the increase in imports on the one hand and the safeguard measures on the other.[3960] In addition,

[3949] Korea's written reply to Panel question No. 50 at the second substantive meeting.
[3950] United States' first written submission, paras. 1085 and 1093.
[3951] United States' first written submission, para. 1085.
[3952] United States' first written submission, para. 1086.
[3953] United States' first written submission, para. 1092.
[3954] United States' first written submission, para. 1093.
[3955] United States' first written submission, para. 1094.
[3956] Norway's written reply to Panel question No. 53 at the second substantive meeting.
[3957] The discussion of the numeric exercise in the United States' first written submission indicates the United States' reasons for considering AUVs to be preferable with regard to particular products.
[3958] United States' written reply to Panel question No. 53 at the second substantive meeting.
[3959] According to the United States, the results of this modelling appear in the COMPAS Results tables in Exhibit US-57. The "other included" line reflects changes for these covered imports.
[3960] The United States points out that although NAFTA imports were held constant as an input, the model estimates that if imports had not been at increased levels in 2000 (or if the safeguard measures were in effect during that year) the price and volume of NAFTA imports would have been higher. The changes are at

for most products, the price, volume, and revenue of domestic products and NAFTA imports change by similar amounts. The United States also concludes that no adjustment was necessary for the price- or volume- based exercises. For eight products, the exercise was based on data reflecting prices, either the unit values or the item-specific pricing data. For reasons previously explained, the exercises for tin mill steel and stainless steel wire were based on the market share effects of imports.[3961] For the two products subject to the volume-based exercise, the United States bases the analysis on whether the measure would return non-NAFTA imports to their market share prior to the increase in imports. The inputs into the exercise are the market share of non-NAFTA imports, the volume of non-NAFTA imports, and United States apparent domestic consumption prior to and during the increase in imports.[3962] This exercise focuses on the volume of non-NAFTA imports, and does not seek to guarantee domestic producers a particular volume or market share in comparison with excluded NAFTA products. Therefore, according to the United States, there is no risk that injurious volume effects (or any other injurious effects) of NAFTA imports will be attributed to non-NAFTA imports. Thus, no adjustment was necessary.[3963]

7.1702 For the eight products subject to price-based exercises, the United States also concludes that no adjustment was necessary. These conclusions are based on the USITC findings regarding each product. With respect to certain carbon flat-rolled steel, the USITC found that imports from Canada decreased over the course of the investigation period in both absolute and relative terms, and did not contribute importantly to serious injury. In item-specific comparisons, Mexican products showed mixed underselling.[3964] In addition, the USITC found in the second supplemental response that exclusion of Canadian and Mexican products "does not appreciably change price trends" and that non-NAFTA imports "were generally priced below domestically-produced certain carbon flat-rolled steel" and "led to the decline in domestic prices".[3965] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States submits that it considered that NAFTA imports traded on essentially the same terms as domestic products and, accordingly, did not have effects on domestic pricing that required an adjustment to its price-based exercise. With respect to hot-rolled bar**, t**he USITC found that Canadian imports contributed importantly to serious injury

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roughly the same level as those to domestic products, reflecting that the exclusion of NAFTA imports is not undermining the remedial effect of the safeguard measures.

[3961] United States' first written submission, paras. 1173, 1183, 1197, and 1200-1201. The United States notes in addition that Chairman Koplan found with regard to stainless steel wire that "[t]he increase in imports and the decline in the proportion of the domestic market supplied by domestic producers, at a time of *falling* domestic consumption indicates that imports are an important cause of the threat of serious injury". USITC Report, p. 259. Commissioner Bragg found with regard to stainless steel wire and wire rope that "both domestic sales and market share turned sharply lower in interim 2001", along with unfavorable developments in inventories, production, profits, wages, productivity and employments, demonstrating a threat of serious injury. She did not discuss price. USITC Report, pp. 288-289.

[3962] The United States notes in this regard that restoration of the pre-increase market share is the source for the 23% reduction in imports that the United States calculated for tin mill steel, and which Norway criticized at the Panel meeting. Norway's second oral statement (Article 5.1), para. 34. For 1999, 2000, and the first half of 2001 the United States calculated what the volume of non-NAFTA imports would have been if they had retained their 1998 market share of 10.5 percent. The United States then calculates the difference between that figure and actual imports, and calculated the average reduction over three years. According to the United States, this exercise, which appears in Exhibit US-56, indicates that import volume would have been 23.13% lower if imports had not increased their market share.

[3963] United States' written reply to Panel question No. 53 at the second substantive meeting.

[3964] USITC Report, pp. 66-67.

[3965] Second Supplementary Report, p. 5. According to the United States, NAFTA imports sold for prices lower than comparable domestic items in only 19% of the USITC's comparisons, while non-NAFTA imports sold for less than comparable domestic items in 58% of comparisons. USITC Report, p. FLAT-74, Table FLAT-77. The United States argues that this is a marked difference in the level of underselling.

based on "the sheer volume of the Canadian increase", without mentioning any price effect. The USITC found that Mexico did not contribute importantly to serious injury, as its imports actually decreased over the period of investigation.[3966] Moreover, it found that unit values for non-NAFTA imports fell to a greater degree than those for NAFTA imports, and that item-specific prices for non-NAFTA imports were less than comparable NAFTA imports.[3967] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that whatever the volume effect of NAFTA imports, they did not have an effect on the domestic industry's prices that required an adjustment to the price-based exercise.

7.1703 With respect to cold-finished bar**,** the USITC found that Canadian imports contributed importantly to serious injury based on Canada's "elevated share of the market in 2000" and "large percentage of total cold-finished bar imports". However, it did not indicate that these imports affected domestic prices. The USITC found that Mexico's share of imports was "very small and declining" and did not contribute to serious injury.[3968] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to its price-based exercise. With respect to rebar**,** all parties to the proceeding agreed that the USITC should make a negative injury finding with regard to Canadian and Mexican imports.[3969] The USITC found that the volumes of Canadian rebar were "consistently very small", and that the volume of Mexican rebar declined by 81% over the investigation period. The USITC also noted that there were no comparisons of Canadian imports with comparable products from domestic or other import sources, and that rebar from Mexico was sold at higher prices than comparable items from other import sources.[3970] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to the price-based exercise. With respect to other welded pipe**,** the USITC found that imports from Canada and Mexico, while substantial, did not contribute importantly to the threat of serious injury. The USITC plurality on this issue found that NAFTA imports were decreasing at the very end of the investigation period, while imports from other sources were increasing. The plurality also noted that Canadian standard pipe, a high-volume product, sold for higher prices than comparable pipe from non-NAFTA sources. The plurality found that, although Mexican pipe undersold comparable domestic products early in the investigation period, there were no comparisons for 2000 and interim 2001. Since they had made a threat of serious injury finding, the Commissioners in the plurality directed their focus mainly to the most recent import trends.[3971] For similar reasons, the price-based exercise relied on data for the later part of the investigation period.[3972] In light of the findings of decreasing import volume, overselling for Canadian products, and reduced sales of comparable domestic and Mexican products at the end of the investigation period, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to the price-based exercise.

7.1704 With respect to FFTJ, the USITC found that imports from both Canada and Mexico were substantial and contributed importantly to serious injury. The USITC found that imports from Canada had a large and increasing volume. The unit values for Canadian FFTJ were twice as high as those for

[3966] USITC Report, pp. 100-102.
[3967] Second Supplementary Report, p. 6.
[3968] USITC Report, p. 108.
[3969] USITC Report, pp. 115-116, footnotes 698 and 701.
[3970] USITC, pp. 115-116 and footnote 704.
[3971] USITC Report, pp. 168-170. The USITC made a divided finding with regard to whether Canadian imports were substantial and contributed importantly to serious injury. (The finding regarding Mexico a 4-2 vote.) The views of Vice Chairman Okun and Commissioner Hillman, which are discussed here, represent two of three votes for exclusion of Canadian imports.
[3972] United States' first written submission, paras. 1133-1137.

other imports or the domestic product, but the USITC expressed concern that the discrepancy might reflect different product mix. There was no item-specific pricing information to confirm that Canadian FFTJ sold for higher prices than comparable imported FFTJ.[3973] In light of these findings, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to its price-based exercise to account for Canadian imports. The USITC also found that FFTJ from Mexico undersold comparable domestic products "by substantial and increasing margins".[3974] The price-based exercise indicated that a measure of up to 30% would be commensurate with the injury related to increased imports, while the safeguard measure was a tariff of 13% in the first year. Imports of FFTJ from Mexico never accounted for more than 9% of apparent domestic consumption, and had fallen to 5.8% of domestic consumption in 2000.[3975] Accordingly, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States considers that an adjustment to reflect the injurious effects of imports from Mexico would not change the conclusion that the safeguard measure was applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1705 With respect to stainless steel bar**,** the USITC found that imports from Canada contributed importantly to serious injury, while imports from Mexico did not. Although imports from Canada increased at a lesser rate than other imports from other sources for most of the period, they increased at a higher rate in the first half of 2001.[3976] While imports from Canada sold for less than comparable domestic stainless bar in seven of ten comparisons, they sold at higher prices than comparable non-NAFTA imports.[3977] In fact, non-NAFTA imports sold for less than comparable domestic products in 40 of 43 comparisons.[3978] Imports from Mexico decreased over the course of the investigation period, and accounted for "an extremely small percentage of total imports". There were no pricing comparisons for Mexican imports.[3979] The USITC also found that imports from non-NAFTA sources accounted for all of the domestic industry's market share loss during the 1996-2000 period.[3980] In light of the larger number of instances of underselling by non-NAFTA imports, and the fact that prices for non-NAFTA imports were lower than prices for comparable NAFTA imports, we concluded that there was no need to make an adjustment to its price-based exercise. Finally, with respect to stainless steel rod**,** the USITC found that imports of stainless steel rod from Canada and Mexico did not contribute importantly to serious injury. Imports from Canada and Mexico declined over the investigation period, while "Mexico exported an extremely small volume of stainless rod to the United States in 1999 and did not export any stainless rod to the United States in 1998, 2000, and interim 2001".[3981] In light of these findings, the United States concluded that there was no need to make an adjustment to its price-based exercise.[3982]

7.1706 Korea argues that the injury from NAFTA imports was not isolated as required by Article 4.2(b) and also Article 5.1 of the Agreement on Safeguards, and the selection of a benchmark year did not correct in any way for this deficiency. The United States simply focused on non-NAFTA imports without regard to the injurious effects of NAFTA imports.[3983] Also the United States failed to

[3973] USITC Report, p. 179.
[3974] USITC Report, p. 180.
[3975] USITC Report, p. TUBULAR-C-6.
[3976] USITC Report, p. 213.
[3977] USITC Report, p. 214; Second Supplementary Report, p. 9.
[3978] USITC Report, p. STAINLESS-86, Table STAINLESS-99.
[3979] USITC Report, p. 214 and footnote 1361.
[3980] Second Supplementary Report, p. 9.
[3981] USITC Report, pp. 222-223.
[3982] United States' written reply to Panel question No. 52 at the second substantive meeting.
[3983] Korea's second written submission, paras. 213-216 and 235.

take into account the extent to which such NAFTA imports were likely to increase if all other sources are controlled, and whether such imports would effect or dilute the remedial effects of the measure.[3984]

7. Reduction in the level of the measures over a three-year period

7.1707 The United States notes that it decided to reduce the steel safeguard measures over time because Article 7.4 of the Agreement on Safeguards (and United States law) require progressive liberalization of all safeguard measures of more than one year in duration. The United States did not consider modelling results in choosing the schedule for progressive liberalization. Since the model is based on limited data from a historic time period, its results would, with the passage of time, become less reflective of the price, volume, and revenue effects of increased imports and of the measure itself. In addition, the application of the safeguard measures would itself change the effect of imports in the future, redoubling the difficulty of estimating the effect of a phased liberalization of the measures.[3985]

7.1708 In line with the Working Party's findings in *US – Fur Felt Hats*, the United States recalls that it did not attempt to predict future developments. Rather, the United States chose a level and schedule of progressive liberalization of the steel safeguard measures that would provide the relevant industries sufficient resources to adjust, while bringing the level of each measure down sufficiently that a transition to removal of the measure after the third year would not be too abrupt. The United States applied the safeguard measures for a period that would require a mid-term review, at which time it could evaluate the condition of the domestic industry and the role of imports to decide whether these required action of some sort.[3986]

7.1709 Korea notes that there is no discussion of this point in either the economic or numerical analysis. Moreover, there is no discussion or consideration of the relevant basis for such liberalization required by Article 7.4 "to facilitate adjustment" (cross-referenced in Article 5.1 "to facilitate adjustment") in any documents forming the record of this proceeding. In terms of the President's liberalization schedule for flat-rolled, for example, the tariff declines from 30% to 24% to 18%, while the USITC decline is from 20% to 17% to 14%. For "welded other", the President's measure decreases from a 15% tariff to 12% to a 9% tariff, while obviously the USITC recommended a TRQ. In the USITC remedy memos, there is no modelling of liberalization. The different scenarios take into account lower levels of measures (*e.g.*, a 5% tariff and a 10% tariff) but none use exactly the levels proposed by the USITC majority. Nor is it apparent how the President determined the liberalization schedule and therefore limited the measure to the permissible extent as required by Article 5.1.[3987]

8. Difference between the economic models to be used for non-attribution (Article 4.2(b)) and for the assessment of the measure to be applied (Article 5.1)

7.1710 Korea[3988] and Brazil[3989] argue that there is at least one significant difference in undertaking a modelling exercise for Article 4.2(b) purposes and that required for Article 5.1 purposes. Under Article 4.2(b), one is modelling past events and factors affecting those events. Thus, the outcome is a given and what is being modelled is the relative importance of the various factors which led to the outcome. Under Article 5.1, one is attempting to predict or obtain a future outcome based on past

[3984] Korea's written reply to Panel question No. 52 at the second substantive meeting.
[3985] United States' written reply to Panel question No. 55 at the second substantive meeting.
[3986] United States' written reply to Panel question No. 55 at the second substantive meeting.
[3987] Korea's written reply to Panel question No. 51 at the second substantive meeting.
[3988] Korea's written reply to Panel question No. 44 at the second substantive meeting.
[3989] Brazil's written reply to Panel question No. 36 at the second substantive meeting.

events and the influence of various factors on those events. This means that one has to make certain assumptions about, for example, supply from domestic mills and demand. If these assumptions prove correct, the model will likely provide the desired result. However, if the assumptions prove incorrect (for example, demand is stronger than assumed), the model likely will not provide the desired result. Thus, it is important that the assumptions on which the model is based be reasonable. For example, a model which does not take into account the existence of anti-dumping and countervailing duty orders and their effects on price and volume based on historical experience will not accurately predict the effect of tariffs at various levels on import volume and price.

7.1711 The European Communities[3990] submits that although the objectives of a non-attribution analysis under Article 4.2(b) and the calculation of the extent of a safeguard measure for purposes of Article 5.1 are different, the basic parameters and characteristics of the models used could be the same. For the purposes of Article 4.2(b), the data on imports and the state of the domestic industry will be a given and the model would be used to assess the correlation between increases in imports and the state of the domestic industry compared with that of other factors impacting the domestic industry and therefore to measure the extent to which serious injury suffered by the domestic industry is attributable to increased imports. For the purposes of Article 5.1, the same model could be used to test the effect that a proposed safeguard measure (a given variable) would have on the economic factors considered to constitute serious injury (dependent variables) and whether this effect would correspond to that properly attributed to increased imports. The model would not provide a complete answer to the inquiry required under Article 5.1. According to the European Communities, a WTO Member seeking to apply a safeguard measure would also have to assess, in addition, whether a safeguard measure that goes no further than preventing and remedying serious injury properly attributed to increased imports, will in fact facilitate adjustment and is in fact needed to facilitate adjustment. That is, whether the domestic industry would use the relief granted to adjust and is not able to adjust to increased imports without the assistance of safeguard measures.

9. Conclusions

7.1712 On behalf of the complainants, Norway concludes that given the legal errors committed by the United States in defining the permissible extent of the measure, it seems very unlikely that the USITC statement has any truth to it. This is also inconceivable, given the flaws in its causation analysis as well as its failure to adequately perform a non-attribution analysis. Furthermore, the USITC statement is not supported by any facts – making it a mere allegation of consistency that does not in any way rebut the arguments presented by the complainants. However even assuming, for the sake of argument, that none of the other violations of preceding Articles existed, the measures would still fail to live up to the substantive requirements of Article 5.1 of the Agreement on Safeguards. The United States claims in this respect that it can rebut the complainants' prima facie case of inconsistency with Article 5.1, by showing that the measures were commensurate with the injurious effects attributable to increased imports.[3991] The United States refers to the USITC Report and its presentation of "indicators of injury" and the description of the "interplay among those factors"[3992], but none of this represents a sufficiently detailed analysis of injurious effects attributable to imports. This is clearly not enough to rebut the presumption that the complainants so clearly establish of a prima facie case of violation of Article 5.1. In this respect it should be noted that the President chose

[3990] European Communities' written reply to Panel question No. 44 at the second substantive meeting.

[3991] United States' second written submission, para. 220; Norway argues that when this paragraph is read in conjunction with the United States' written reply to Panel question No. 114 at the first substantive meeting, the United States seems to agree that it has the burden of proving that its measures do not go beyond what is necessary.

[3992] United States' second written submission, para. 221.

measures not proposed or evaluated by the USITC. Finally, even if the Panel were to accept that the United States present only *ex post facto* justifications, this has not been done either, as Korea details in Exhibit 14 and other related documents. The United States' failure to explain and justify its measures is clearly a breach of Articles 3.1, 4.2(b) and 4.2(c) – as well as Article 5.1 of the Agreement on Safeguards.[3993]

7.1713 The United States concludes by stating that, in accordance with Article 5.1, the steel safeguard measures were applied no more than to the extent necessary to prevent or remedy serious injury caused by increased imports. The United States submits that the complainants offer arguments based on misinterpretations of Article 5.1, attempt to layer requirements onto the Agreement on Safeguards that have no grounding in the text, and assert claims that, if accepted, would undermine the fundamental purpose of the Agreement on Safeguards. Furthermore, the complainants have failed to establish a prima facie case that the United States has acted inconsistently with Article 5.1.[3994]

J. ARTICLE 7

7.1714 Norway argues that having established that the US measures go beyond the extent necessary to remedy injury caused by imports, a violation of the requirement in Article 7.1 that the remedy should only be applied for such period of time as may be necessary is an automatic consequence.[3995]

7.1715 The United States responds that an inconsistency with Article 5.1 does not automatically result in an inconsistency with Article 7.1 because the two provisions cover different aspects of a safeguard measure. In particular, Article 5.1 requires that the safeguard measure not be applied beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment. As the panel in *US – Line Pipe* explained, in examining which of two measures is applied to a greater extent, the analysis should "compare[] the application of the measures as a whole" and not "compare[] the application of the separate constituent parts of the measure in isolation".[3996] In performing this analysis, the panel considered the type of measure (TRQ versus quantitative restriction), the level of restriction (amount subject to lower duty rate versus quota) and duration.[3997] The United States submits that, in contrast, Article 7.1 addresses only one constituent part of the measure – the duration – which may be "only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment". A measure might be found inconsistent with Article 5.1 because its level was too high even though the chosen duration was permissible. According to the United States, therefore, an inconsistency with Article 5.1 does not automatically result in an inconsistency with Article 7.1. Norway's arguments regarding Article 5.1, even if accepted by the Panel, do not meet its burden of proof to establish an inconsistency with Article 7.1.[3998]

7.1716 Norway recalls that Article 7.1 is the temporal corollary to the requirement in Article 5.1 on the level of the remedy, and they both come as a package, as the United States seems to admit.[3999] Norway submits that the Panel should, therefore, find that the breach of Article 5.1 also entails a breach of Article 7.1 of the Agreement on Safeguards.[4000]

[3993] Norway's, second oral statement on behalf of the complainants, paras. 29-37.
[3994] United States' second written submission, para. 179.
[3995] Norway's first written submission, paras. 370-371.
[3996] Panel Report, *US – Line Pipe*, para. 7.97.
[3997] Ibid., para. 7.96.
[3998] United States' first written submission, paras. 1212-1214.
[3999] United States' first written submission., para. 1212.
[4000] Norway's second oral statement on behalf of all complainants, paras. 36-37.

K. PARALLELISM

1. Basis and features of the parallelism requirement

7.1717 Japan and Brazil point out that Articles 2.1 and 2.2 establish the basic requirements for imposing safeguards measures. Article 2.1 requires a determination of: (1) increased quantities of the "*product … being imported*"; (2) serious injury or threat thereof to a domestic industry; and (3) a causal link between "such increased imports" and serious injury, or threat thereof, to the domestic industry. Article 2.2 provides that "[s]afeguard measures shall be applied to a *product being imported* irrespective of its source". The Appellate Body held that Articles 2.1 and 2.2, read in concert, create a "parallelism" requirement for safeguard measures.[4001]

7.1718 The European Communities, Japan, Korea, Switzerland, Norway and New Zealand point out that the Appellate Body has emphasized several times the requirement that there must be a parallelism between the scope of a safeguard investigation and the scope of the measures imposed as a result thereof: "the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2".[4002] A gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only "if the competent authorities "establish explicitly" that imports from sources covered by the measure "satisf[y] 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".[4003] [4004]

7.1719 The complainants recall that the Appellate Body found in *US – Wheat Gluten* that the United States' approach of including NAFTA imports in the scope of the investigation but excluding them – under certain conditions – from the scope of safeguard measures violates this principle, unless it is established through reasoned and adequate explanation that non-NAFTA imports alone satisfied the conditions for the application of a safeguard measure. In a subsequent case also involving a United States safeguard measure before the Appellate Body (*US – Line Pipe*), a footnote had been inserted in the relevant USITC Report which purported to conclude that non-NAFTA imports alone satisfy the conditions of the Agreement on Safeguards. However, the Appellate Body considered that the reasoning in this footnote did not amount to "reasoned and adequate explanation".[4005]

7.1720 The European Communities points out that the requirement of parallelism is nothing but an obligation to carry out the full analysis required under Articles 2.1 and 4.2 of the Agreement on Safeguards. If the parallelism requirement is not respected, a safeguard measure is imposed on products that have not been found to be imported in increased quantities or have not been found to cause serious injury. The wrongly included products may be of a different kind than those found to

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[4001] Japan's first written submission, paras. 301-302; Brazil's first written submission, para. 222 (emphasis added).

[4002] Appellate Body Report, *US – Wheat Gluten*, para. 96. This principle was already established in Appellate Body Report, *Argentina – Footwear (EC)*, paras. 111-113 and most recently confirmed in Appellate Body Report, *US – Line Pipe*, paras. 188 and 198.

[4003] Appellate Body Report, *US – Wheat Gluten*, para. 98.

[4004] European Communities' first written submission, paras. 598-599; Japan's first written submission, paras. 302-305; Korea's first written submission, para. 182; Switzerland's first written submission, paras. 324-325; Norway's first written submission, paras. 364-366; New Zealand's first written submission, paras. 4.169 and 4.172.

[4005] European Communities' first written submission, paras. 600, 602; Japan's first written submission, para. 304; Korea's first written submission, para. 181; China's first written submission, paras. 559-562; Switzerland's first written submission, paras. 326-327; Norway's first written submission, paras. 379-380; New Zealand's first written submission, paras. 4.170-4.171; Brazil's first written submission, para. 223.

have been imported in increased quantities and to cause serious injury or to come from different sources than those subject to the determinations.[4006]

7.1721 The United States notes that several complainants conclude from the Appellate Body's reasoning in *US – Line Pipe* that the competent authorities must conduct a separate parallelism evaluation of each of the Article 4.2(a) factors, the establishment of a causal link based on trends in imports and other indicators, and non-attribution.[4007] The United States argues that the sole requirements under Articles 3.1 and 4.2(c) are for the competent authorities to publish "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law," and providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." The Agreement does not require the use of a particular structure or format for the report, or a particular analysis. As the Appellate Body concluded in *US – Line Pipe*: "[W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures.[4008] [4009]

2. Scope of the parallelism requirement

(a) Exclusions of imports from free-trade areas

7.1722 The European Communities argues that the exclusion by the United States of four countries from the safeguard measures (Canada, Mexico, Israel and Jordan) infringes the parallelism principle.[4010] Similarly, Japan and Brazil argue that the safeguard measures in this case violate the principle of "parallelism" in Articles 2.1 and 2.2 because the President excluded NAFTA countries from the measure without an adequate and reasoned investigation of non-NAFTA imports. The USITC's analysis of non-NAFTA imports in its report in this case was far too abbreviated and incomplete to comply with the Agreement on Safeguards. The USITC's follow-up in response to USTR's request for information offered little improvement.[4011] Likewise, New Zealand submits that the United States has failed to respect the parallelism requirement. The United States has excluded certain imports that were included in its investigation among the increased imports causing "serious injury" from the application of a safeguard measure, but it has failed to establish "explicitly" or to provide a "reasoned and adequate explanation" to show that the imports not excluded from the measure meet the conditions for the application of a safeguard. This lack of parallelism relates to, *inter alia*, the exclusion of imports from the United States FTA partners. [4012] [4013] Norway argues that exclusion of imports from FTA partners is not precluded *per se*, but requires that all the necessary determinations be made – and explained in a reasoned and adequate manner – on the basis of the imports that are subject to the measure. One consequence of this is that correct increased imports and causation analyses have to be made *after* the exclusion from the investigation.[4014] Having failed on these counts, Norway submits that the United States violates the parallelism principle.[4015]

[4006] European Communities' first written submission, para. 601.
[4007] Japan's first written submssion , para. 305
[4008] Appellate Body Report, *US – Line Pipe*, para. 158.
[4009] United States' first written submission, paras. 748-749
[4010] European Communities' first written submission, paras. 594-595.
[4011] Japan's first written submission, para. 308; Brazil's first written submission, para. 228.
[4012] The factual background to these exclusions is outlined above in Part II A, paras. 2.11-2.12.
[4013] New Zealand's first written submission, para. 4.174.
[4014] Norway's second written submission, para. 182.
[4015] Norway's first written submission, paras. 396-397; Norway's second written submission, para. 187.

(i) Exclusion of NAFTA imports

7.1723 New Zealand argues that the United States has done here precisely what it did in *US – Wheat Gluten* and *US – Line Pipe*. It conducted its safeguards investigation on the basis of the total quantity of subject imports, but then imposed the measure only on the products of those countries that are not members of the NAFTA.[4016] In both *US – Wheat Gluten* and *US – Line Pipe*, the Appellate Body held that the failure to correlate imports subject to the measure with the imports on which the injury determination was based, violated the parallelism requirement.[4017]

7.1724 New Zealand contends that the United States did not meet the key parallelism requirements in the case of their investigation into steel imports. In its Report, the USITC made affirmative findings that imports from both Mexico and Canada of CCFRS constituted a substantial share of total imports and that imports from Mexico contributed importantly to the serious injury allegedly caused by imports. The important role played by imports from NAFTA sources as part of the USITC's investigation into imports from all sources was quite explicit. [4018] New Zealand submits that the finding in the Second Supplementary Report is just as flawed as the similar finding by the USITC in the *US – Line Pipe* case. In that case, the United States argued that the determination in respect of non-NAFTA imports had been substantiated by the USITC in footnote 168 to its report. In that footnote, the USITC had indicated that it would have reached the same result "had we excluded imports from Canada and Mexico from our analysis".[4019] The USITC noted that non-NAFTA imports increased significantly over the period of investigation and that the level of non-NAFTA imports was higher during the later part of the period of investigation than in the first years.[4020] It also stated that the average unit prices of the non-NAFTA imports placed these imports among the lowest-priced imports.[4021] The Supplementary Report makes an assertion that "increased imports of CCFRS from non-NAFTA countries are a substantial cause of serious injury to the domestic industry". However, this assertion is not supported by any reasoned or adequate analysis. According to New Zealand, the USITC, failed to evaluate the share of the domestic market taken by non-NAFTA imports and failed to evaluate other factors relevant to the situation of the industry concerned. It did not examine the impact of NAFTA imports on the domestic industry if these exports were to be excluded from the measure. The USITC also failed to make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and it failed to demonstrate the causal link between increased imports from non-NAFTA sources and serious injury involving a genuine and substantial relationship of cause and effect. Moreover, there is no acknowledgement in the Second Supplementary Report that the USITC had earlier determined that imports of both Mexico and Canada, considered individually, accounted for a "substantial share" of total imports and that imports from Mexico "contributed importantly" to the serious injury. The failure by the USITC to explain in its Supplementary Report its earlier findings reinforces the conclusion that the United States has failed to provide an adequate and reasoned explanation to support its exclusion of imports from its NAFTA partners from the application of the safeguard measure.[4022]

[4016] Appellate Body Report, *US – Line Pipe*, para 186; Appellate Body Report, *US – Wheat Gluten*, para 98.

[4017] Appellate Body Report, *US – Line Pipe*, para 197; Appellate Body Report, *US – Wheat Gluten*, para 98.

[4018] New Zealand's first written submission, paras. 4.177-179; see also Japan's first written submission, para. 309-311.

[4019] USITC statement quoted in Appellate Body Report, *US – Line Pipe*, para 189.

[4020] Ibid.

[4021] Ibid.

[4022] New Zealand's first written submission, paras. 4.181-4.185.

7.1725 Similarly, China and Switzerland submit that neither the USITC Report (and the supplemental report) nor the Presidential Proclamation indicated whether imports from Canada and Mexico were excluded from the scope of the investigation. China and Switzerland consider that it is established, prima facie, that the United States included these imports in the scope of its investigation for each of the products concerned.[4023] The United States failed to show that imports actually included in the scope of the safeguard measure alone satisfied the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards. The Second Supplementary Report of the USITC is not a sufficient analysis establishing through an adequate and reasoned explanation that all other imports without those of Canada and Mexico (and Jordan and Israel) alone fulfilled the conditions of being imported in such increased quantities so as to cause or threaten to cause serious injury to the domestic industry.[4024]

(ii) Exclusion of imports from Israel and Jordan

7.1726 China, Switzerland, Norway and the European Communties consider that the exclusion of Israel and Jordan from the application of the measures is inconsistent with the United States obligations under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4025] The complainants argue that the USITC Report should have mentioned that imports from Israel and Jordan were "excluded" from the scope of the investigation. Secondly, if such mention is not present, it should be concluded, *a priori*, that these imports were included in the scope of the investigation for each of the products concerned. China submits that in the present case, neither the USITC Report (and the Second Supplementary report) nor the Presidential Proclamation indicated whether imports from Israel and Jordan were excluded from the scope of the investigation. Without any proof to the contrary, China considers that it is established, prima facie, that the United States included these imports in the scope of its investigation.[4026]

7.1727 China notes in this regard that the USITC Second Supplementary Report only indicates on this point that "the Commission indicates, in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners".[4027] Commissioner Bragg states only that "Given that imports from Israel and Jordan, respectively, are either negligible or nonexistent for each of my affirmative determinations, as discussed in my separate views on remedy, I note that the recommended exclusion of imports from Israel and Jordan, respectively, from my injury analyses does not change my analyses or affirmative injury findings"[4028] In light of the precise determinations of the Appellate Body, especially in the *US – Line Pipe* case, China and Norway submit that the United States failed to establish "explicitly" that increased imports from sources other than Israel and Jordan satisfy the conditions as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.[4029] Norway adds that the violation of parallelism does not address whether Jordan and Israel could have been excluded from the measure by virtue of Article 9 of the Agreement on Safeguards.[4030]

[4023] China's first written submission, para. 580; Switzerland's first written submission, para. 346.

[4024] China's first written submission, para. 588.

[4025] European Communities' first written submission, paras. 612; Switzerland's first written submission, para. 33 et seq.; Norway's first written submission, para. 390.

[4026] The complainant's first oral statement on parallelism, para. 729; China's first written submission, paras. 571-572.

[4027] USITC Supplementary Report, 4 February 2002, p. 4.

[4028] USITC Supplementary Report, 4 February 2002, p. 19.

[4029] China's first written submission, paras. 576-578; Norway's first written submission, para. 379; Switzerland's first written submission, paras. 337-345.

[4030] Norway's first written submission, para. 380.

7.1728 New Zealand also argues that the exclusion of imports from Israel and Jordan is inconsistent with the parallelism requirement. Imports from all sources, including Israel and Jordan, were included in the USITC's increased imports determination. However, Section 403 of the Trade and Tariff Act of 1984, 19 U.S.C. & 2112, and Section 221 of the United States-Jordan Free Trade Area Implementation Act authorize the President to exclude imports from Israel and Jordan, respectively, from any safeguard action under Section 201. In line with the recommendations made by the USITC on Remedy[4031] Proclamation No. 7529 clearly states that the safeguard measures applied to CCFRS do not apply to imports originating from, *inter alia*, Israel and Jordan. New Zealand submits that the United States should have provided a reasoned and adequate explanation establishing explicitly that imports from sources other than Israel and Jordan "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". Yet no such reasoned or adequate explanation is provided in the USITC Report. The statements of the USITC[4032] and of Commissioner Bragg[4033] in the Second Supplementary Report do not meet the requirements for justifying an absence of parallelism. Accordingly, the exclusion of Israel and Jordan from the application of the measures is therefore also inconsistent with the United States obligations under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4034] [4035]

7.1729 The United States contends that the USITC's findings regarding the minuscule quantity of imports from Israel and Jordan satisfy the requirement to provide findings and reasoned conclusions that imports from other sources by themselves caused serious injury. The USITC found that imports from Israel were "small and sporadic" and that there were "virtually no imports" from Jordan. The USITC's finding that the exclusion of imports from Israel and Jordan would not change its conclusions met the requirements of Articles 3.1 and 4.2(c).[4036] In fact, since the USITC Reported percentages with a single decimal place, imports from Jordan were less than the rounding error in some of the USITC's statistics. During the entirety of the investigation period, there were no imports from Israel for four of the ten covered products (cold-finished bar, rebar, stainless steel rod, and tin mill). For CCFRS and hot-rolled bar, imports from Israel were never more than 0.01% of total imports. For stainless steel wire, imports from Israel never rose above 0.1% of total imports. For welded pipe, there were essentially no imports after 1998, and imports before that time never amounted to more than 0.4% of total imports. For FFTJ and stainless steel bar, imports after 1997 were never more than 0.3% of total imports. In this situation, the observation that there were "virtually no imports from Jordan" and that imports from Israel were "small and sporadic" provides a succinct – and thoroughly reasonable and adequate – explanation of why exclusion of such imports would not change the determinations of the USITC or of the individual Commissioners. Any further analysis would simply repeat verbatim the conclusions provided elsewhere in the USITC Report. It comports with the Article 3.1 requirement of findings and reasoned conclusions. If a particular factor is so insignificant that it does not change the results of the analysis – which the record shows was the case for imports from Israel and Jordan – a reasoned explanation of that conclusion says just that, and no more. There was nothing more to be said about imports from sources other than Israel and Jordan except what the USITC said – that exclusion would not change the conclusions of the USITC or the

[4031] USITC Report, Vol. 1, p 366 and footnote 69.

[4032] Second Supplementary Report, 4 February 2002, p 4 (Exhibit CC-11).

[4033] Ibid., p 19 (Exhibit CC-11).

[4034] It was noted that, in contrast to the substantial level of imports to the United States from Canada and Mexico, imports to the United States from Israel and Jordan were negligible. It would also appear that the United States could exclude imports from Jordan under Article 9 of the Agreement on Safeguards. Nevertheless, the approach taken by the United States to excluding imports from Jordan and Israel from the application of the safeguard remains inconsistent with its obligations in regard to parallelism.

[4035] New Zealand's first written submission, para. 4.187-4.189.

[4036] USITC Report, p. 366; Second Supplementary Report, p. 4.

individual Commissioners.[4037] Article 3.1 of the Agreement on Safeguards requires that a competent authority set forth findings and reasoned conclusions on all issues of fact and law. The USITC set forth such findings and reasoned conclusions – both for all imports and for non-NAFTA imports. Because exclusion of imports from Israel and Jordan could not have affected the data on which the USITC relied to make its findings and conclusions, it could not have affected the findings and conclusions themselves with respect to either all imports or non-NAFTA imports. In other words, the findings and conclusions the USITC reached were equally applicable if imports from Israel and Jordan were excluded. Additionally, Article 3.1 requires an authority to address all "pertinent" issues in its report. Consequently, the report need not address issues that are not "pertinent", which would be the case if that issue did not affect the underlying data on which the authority relied to make its findings and conclusions.[4038]

(iii) Existence of a de minimis rule?

7.1730 The European Communities and New Zealand argue that in relation to Israel and Jordan, the USITC appears to have applied a *de minimis* exception instead of providing the detailed analysis and evaluations required by Article 4.2 of the Agreement on Safeguards. It considers that these imports were indeed small and sporadic but nowhere substantiated this and nowhere established that the remaining imports would have satisfied the Agreement on Safeguards. The European Communities submits that there is no *de minimis* rule in the Agreement on Safeguards. Where fair trade is restricted, every ton counts.[4039]

7.1731 In response, the United States submits that the reasoning expressed above in relation to Israel and Jordan does not, as the European Communities charges, read a *de minimis* rule into the Agreement on Safeguards. Rather, it comports with the Article 3.1 requirement of findings and reasoned conclusions.[4040]

7.1732 The European Communities and Switzerland respond that the United States has not provided a legal basis for a *de minimis* clause for FTA partners in the Agreement on Safeguards. The United States tries to excuse its failure to comply with the substantive requirements in the Agreement on Safeguards by referring to Article 3.1. The European Communities' claim is, however, not merely one of defective statement of reasons. Failure to provide an adequate explanation to show that a substantive requirement has been met is a violation of the substantive requirement.[4041] The European Communities and Switzerland point out that the USITC Report of October 2001 contains no separate determination whatsoever for Israel and Jordan, whose import data are not even disaggregated from the "all minus NAFTA" data.[4042] Since there is no such thing as a *de minimis* rule for FTA partners in the Agreement on Safeguards[4043], and since the principle of parallelism was enunciated by the Appellate Body in broad and unqualified terms, even if excluded countries were the smallest exporters of a particular product, the United States is not entitled to rebut the prima facie case made be the European Communities by relying on the magnitude of the unlawful exclusion. Also, even assuming that the hypothetical assertion made by the United States was relevant, it was not demonstrated

[4037] United States' first written submission, paras. 754-759.
[4038] United States' written reply to Panel question No. 97 at the first substantive meeting.
[4039] European Communities' first written submission, paras. 616, 621; New Zealand's second written submission, para. 3.147.
[4040] United States' first written submission, paras. 754-759.
[4041] European Communities' second written submission, para. 438; Switzerland's second written submission, para.108.
[4042] European Communities' second written submission, para. 450; Switzerland's second written submission, para.108.
[4043] European Communities' first written submission, paras. 616 and 621.

through a reasoned and adequate explanation before the relevant determinations were made or before the measures were taken. *A fortiori* it cannot be justified *ex post* in dispute settlement.[4044] [4045] The European Communities insists that a *de minimis* exclusion in favour of the United States FTA partners – Israel and Jordan, and also NAFTA countries – is not in the text of the Agreement on Safeguards. This, says the European Communities, must be contrasted with the *de minimis* clause which is in the Agreement on Safeguards – that is, the one set out in Article 9.1 in favour of developing countries. The European Communities also notes that there are several other WTO texts where *de minimis* clauses are clearly set out, such as Article 5.8 of the Anti-Dumping Agreement, Articles 27.10, 27.11 and 27.12 of the SCM Agreement and Article 6.4 of the Agreement on Agriculture. The European Communities argues that if the drafters of the Agreement on Safeguards had wanted to write a *de minimis* clause for FTAs in the Agreement, they perfectly knew how to write it.[4046]

7.1733 The European Communities also contends that it is not possible to claim that there is any determination whatsoever on imports from all sources minus NAFTA, Israel and Jordan amongst those identified by the United States as the determinations under review. As for Jordan, footnote 69 to the USITC remedy recommendations[4047] makes clear that the United States legislation on the basis of which the United States eventually excluded Jordan from the safeguard measures[4048] entered into force about two months after the October determinations were made. This further confirms that the October determinations do not exclude imports from Jordan. It also shows that later findings and decisions based on such legislation cannot be related to the original October 2001 determinations.[4049] Furthermore, even in the Second Supplementary Report, the only references to Jordan and Israel are cross-references to the remedy recommendations pages of the October 2001 USITC Report, supplemented by a generic and unreasoned statement that excluding imports from Israel and Jordan would not change the conclusions of the Commission or individual Commissioners.[4050] However, without a reasoned and adequate supporting explanation, such conclusion should have the same fate as that reviewed by the Appellate Body in *US – Line Pipe*.[4051] Two irrelevant findings in the Second Supplementary Report do not make a relevant one. In other words, the sum of the findings on non-NAFTA imports, and the statements on the individual impact of imports from Israel and Jordan does not amount to a finding that the imports caught by the safeguard measures, alone, underwent a recent sudden sharp and substantial increase consistently with Article 2.1 of the Agreement on Safeguards and, moreover, caused serious injury to the domestic industry. The remedy recommendations are not, even under United States law, increased imports and injury determinations. For some product groups, moreover, imports from Israel are not discussed at all.[4052] Furthermore, there is no breakdown of imports from Israel and Jordan in the Second Supplementary Report either.

7.1734 As regards what the United States means by "small and sporadic" imports which "could not have affected any of the data the USITC used", the European Communities points to the imports of hot-rolled bar from Israel during all the five years of the period of investigation. The European

[4044] For the avoidance of doubt, the European Communities provides in Exhibit CC-108 to this submission some examples of the size of excluded NAFTA imports compared to imports from included countries in the present case.

[4045] European Communities' second written submission, para. 459.

[4046] European Communities' written reply to Panel question No. 60 at the second substantive meeting

[4047] USITC Report, Vol. I, p. 366.

[4048] *United States-Jordan Free Trade Area Implementation Act*, Public Law 107–43—28 September 2001, 19 U.S.C. 2112, available on the internet at the address: "http://thomas.loc.gov/"

[4049] European Communities' second written submission, paras. 4.66-4.68.

[4050] USITC Second Supplementary Report, p. 4; see also United States first written submission, paras. 755-769.

[4051] Appellate Body Report, *US – Line Pipe*, para. 196.

[4052] USITC Report, Vol. I, pp. 399 and 405.

Communities argues that if these imports were legitimately excluded because, to use the United States formula, they are small and sporadic, then the sources of Denmark, New Zealand, Ireland, Singapore, Hong Kong, Cyprus and Monaco should also have been so considered.[4053] The European Communities points out that it was forced to resort to sources outside the USITC Report to compile these data, since no breakdown of import data from Israel and Jordan can be found in the USITC Report. Thus, even if a *de minimis* exclusion for FTA partners was allowed, *quod non*, and even if there was an implied determination, *quod non*, there is certainly no reasoned and adequate explanation therefor in the Report. Although the size of excluded exports from Israel and Jordan might appear small in this case, upholding this type of exclusion paves the way for an uncontrolled and unlimited relaxation of the standards in the Agreement on Safeguards. The European Communities questions what is the limit to *de minimis*? [4054]

7.1735 New Zealand submits that it, in no way, disputes the fact that imports from Jordan and Israel may indeed be considered negligible. The point is that if the United States wished to exclude imports from Israel and Jordan from the application of the safeguard, it could have excluded them at the outset of its investigation to determine imports causing injury. However it did not do so. Accordingly, this means that the United States cannot now seek to avoid its obligation to provide a "reasoned and adequate explanation that establishes explicitly" that imports covered by the measure "satisfy the conditions for the application of a safeguard measure".[4055] A statement that simply notes the negligible nature of certain imports certainly does not meet these conditions.[4056] The reasoned and adequate explanation that the Appellate Body spoke of is an explanation that would "establish explicitly" that imports covered by the measure "satisfy the conditions for the application of a safeguard measure".[4057] The United States seeks to twist this by referring instead to a "reasonable and adequate explanation of the findings by the USITC … that the exclusion of imports from these FTA partners would not change their conclusions".[4058] [4059]

7.1736 The United States repeats that it is not arguing that a *de minimis* rule should be read into the parallelism analysis articulated by the Appellate Body. Instead, the United States has argued that, when imports from certain countries are so minuscule that their exclusion will – quite literally – not change the numeric data examined by a competent authority in its causation analysis, the competent authority has fully complied with its obligation under the Agreement to provide a reasoned and adequate analysis of the issue by explaining that exclusion of these volumes will have no impact at all on its findings in a particular case. As a substantive matter, parallelism requires that imports from sources that were not excluded (the "covered sources"), by themselves, satisfy the requirements of the Agreement on Safeguards. Article 3.1 would require findings and reasoned conclusions for that finding. In the case of imports from sources that are zero, or essentially zero when compared with imports from covered sources, a full and complete explanation would indicate that the findings and reasoned conclusions remain unchanged because the exclusion of imports from such sources does not change the underlying data in any way. That is exactly the explanation that the USITC provided. Thus, the United States does not contend that the Agreement on Safeguards contains a *de minimis* requirement, as it does not. Rather, as a legal matter, the USITC Report complied with Articles 3.1 and 4.2(c) by stating that imports from Israel and Jordan were isolated and sporadic, and did not

[4053] European Communities' second written submission, para. 473.
[4054] European Communities' second written submission, paras. 475-476.
[4055] Appellate Body Report, *US – Line Pipe*, para 188.
[4056] New Zealand's second written submission, paras. 3.145-3.146.
[4057] Ibid.
[4058] United States' first written submission, para 754.
[4059] New Zealand's second written submission, para. 3.147.

change the analysis in any way. Thus, Articles 3.1 and 4.2(c) do not require any further explanation.[4060]

(b) Developing country exclusions

7.1737 The United States contends that there was no obligation to perform a parallelism analysis with regard to excluded developing countries. The exclusion of WTO Members from application of a safeguard measure pursuant to Article 9.1 is an exception to Article 2.2 and, as such, is not subject to parallelism. Parallelism derives from the use of the term "products . . . being imported" in both paragraphs 1 and 2 of Article 2. Article 9.1 provides that "[s]afeguard measures shall not be applied against a product originating in a developing country Member" under certain conditions. Thus, it acts as an exception to the Article 2.2 obligation that "[s]afeguard measures shall be applied to a product being imported irrespective of source". This exception relates exclusively to the application of a safeguard measure, and not to the underlying investigation or determination of serious injury. Thus, a Member may include developing country Members in the investigation and determination of serious injury, but still exclude them from the safeguard measure if the Article 9.1 criteria so require. In *US – Wheat Gluten*, the Appellate Body confirmed that Article 9.1 acts as an exception to parallelism. Since Article 9.1 acts as an exception only to the application of the safeguard measure, the United States argues that it was under no obligation to exclude developing country exports from the analysis of whether imports increased. Indeed, Article 4.2(a) requires the competent authorities to evaluate "the rate and amount of the increase in imports of the product concerned". Absent an exception to this requirement, which Article 9.1 does not provide, the USITC was required to include developing country imports in its analysis of injury.[4061]

(c) Product exclusions

7.1738 The European Communities argues that another failure to respect parallelism arises from the fact that many specific products were excluded from the safeguard measures on the basis of individual requests. The European Communities and China argue that these exclusions have been made without carrying out a proper increased imports and injury determination, i.e. more precisely without determining whether or not serious injury could still be caused by imports of products other than the ones concerned by the exclusions.[4062]

7.1739 More specifically, New Zealand points out that Proclamation No. 7529 provided for the exclusion from the application of the safeguard measure of certain specified products and provided that requests for the exclusion of other products would be considered in the future. Since 5 March 2002, in total 727 products have been excluded from the application of the safeguard measure. All of these products were included in the USITC's investigation and determination that increased imports were causing serious injury to the United States domestic industry. New Zealand argues that in this regard, as with the exclusion of FTA partners, the United States fails to comply with the requirement of parallelism. The United States has at no time established "explicitly", or provided any "reasoned and adequate explanation" to show, that imports of non-excluded products taken alone meet the conditions for the imposition of a safeguard measure. The exclusion of certain imports from the application of the safeguard measure on a product-by-product basis, in the manner followed under the United States "products exclusions" process, when those imports were included in determining whether all of the requirements of the Agreement on Safeguards had been met for the taking of a

[4060] United States' written reply to Panel question No. 60 at the second substantive meeting.
[4061] United States' first written submission, paras. 775-777.
[4062] European Communities' first written submission, paras. 609-611; China's first written submission, para. 618.

safeguard measure, has implications for all aspects of the USITC's determination and undermines the conclusions reached by the USITC on each aspect of that determination. New Zealand submits that it deprives the safeguard measures in this case of any legal basis. As a result, the United States has not acted in conformity with its obligations under the Agreement on Safeguards.[4063]

7.1740 The United States contends that the Agreement on Safeguards does not support the complainants' assertion of a new type of parallelism, which would preclude the exclusion from a safeguard measure of an imported item covered by the determination of serious injury. "Parallelism" as enunciated by the Appellate Body derives from the obligation under Article 2.2 to apply safeguard measures to an imported good "irrespective of its source". Since exclusions based on physical characteristics are neutral as to source, they do not raise parallelism concerns.[4064] The United States argues that other provisions of the Agreement on Safeguards confirm that scope parallelism is not required. Article 5.1, first sentence, allows a Member to apply a safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". The obligation under the first sentence places a limit on the application of a safeguard measure, but does not restrict a Member's discretion to apply a measure to a lesser extent. The admonition to "choose measures most suitable for the achievement of these objectives" indicates further that there are many permissible options for the extent to apply a safeguard measure, and that a Member is free to choose among them. The text of Article 5 indicates, further, that a safeguard measure need not apply equally to all of the items covered by a determination of serious injury. The second sentence of Article 5.1 envisages the application of quantitative restrictions, which place no restriction on imports below the quota level, while prohibiting imports above that level. The Appellate Body has also recognized that a safeguard measure may take the form of a tariff-rate quota.[4065] In that situation, one tariff applies to imports below a specified level, and another tariff to imports above that level. Exclusion of products from the scope of a safeguard measure is no different from the application of a tariff rate quota or quota, in that some imports covered by the determination of serious injury are unaffected by the measure, while others are.[4066]

7.1741 The United States also points out that it undertook the exclusion of particular products from the scope of the safeguard measures at the behest of exporters and exporting Members, including the European Communities.[4067] Exporting Members' desire for exclusions was the subject of consultations under Article 12.3 of the Agreement on Safeguards. European Communities officials made public statements to the effect that satisfactory resolution of exclusion requests was necessary to defuse the dispute regarding application of the steel safeguard measures.[4068] The United States assumed that Members such as the European Communities would not request exclusions if they believed such an action to be inconsistent with the United States' WTO commitments. That the European Communities, having received the treatment it requested, now considers such treatment to be inconsistent with WTO rules, appears to be a change in its position. In any event, if it now has a different view, it would seem to be more logical to seek revocation of the exclusions, rather than performing an additional parallelism inquiry.[4069]

[4063] New Zealand's first written submission, paras. 4.190-4.192.
[4064] United States' first written submission, paras. 760-763.
[4065] Appellate Body Report, *Korea – Dairy*, para. 96.
[4066] United States' first written submission, paras. 764-766.
[4067] "Lamy Waffles on Steel Compensation", Highlights Exclusions, *Inside US Trade* (28 June 2002) (Exhibit US-59).
[4068] Ibid.
[4069] United States' first written submission, paras. 767-768.

7.1742 New Zealand responds that there is no legal basis in the Agreement on Safeguards nor in general international law for a restraint or prohibition on a WTO Member which is harmed by a violation of the WTO Agreements, from seeking to mitigate that harm and then proceeding to a legal challenge. A relevant analogy from domestic law is the position of a party to a contract who seeks to mitigate its loss arising from breach by another party, but does not thereby lose the right to sue for breach. Indeed in some legal traditions, the wronged party is under a duty to mitigate their loss.[4070]

7.1743 The European Communities considers that the principle of parallelism has been enounced in more general terms than the United States suggests. In *US – Wheat Gluten*, the Appellate Body clarified that the imports included in the determinations made under Article 2.1 and 4.2 of the Agreement on Safeguards should correspond to the imports included in the application of the measure, under Article 2.2.[4071] However, the Appellate Body based itself on the phrase "product being imported" – which is in no way linked to the origin notion in Article 2.2. The Appellate Body's conclusion that "a product" must have the same measuring for the purposes of the investigation as when it comes to imposing a measure is not dependent on the origin of the product. The European Communities submits that it should be noted that Article 2.2 does not employ the term "origin" but the broader term "source", which is sufficiently broad to cover situations like the product exclusions at issue in this dispute. Furthermore, by its terms, the obligation in Article 2.2 of the Agreement on Safeguards is not limited to the case when all imports with a certain origin are first included in the investigation and later excluded from a measure. A partial discrimination based on the "source" is as prohibited as a total discrimination.[4072]

7.1744 The European Communities notes that the United States tries to defend its product exclusions by relying on Article 5.1 of the Agreement on Safeguards. To start with, even if the product exclusions may not violate Article 5.1 of the Agreement on Safeguards, this would not make them *ipso facto* consistent with Articles 2 and 4. The European Communities further disagrees that such exclusions comply with Article 5.1 since all the products eventually excluded were counted in making findings under Article 2 and 4 of the Agreement on Safeguards, when the United States' authorities decided the level of remedy necessary to remedy serious injury they had before them the injury allegedly caused by all increased imports. A "lesser extent" decision must be spread over all the products investigated.[4073]

7.1745 The European Communities considers that the there is no logical or legal reason to distinguish cases where, on the one hand, the two import scopes diverge because all imports originating in a certain country are excluded from the measures, and those in which the two import scopes diverge because certain imports are excluded on the basis of the importing/using interest of certain United States companies, or still other criteria. In both cases, the imports included in the determinations made under Articles 2.1 and 4.2 do not correspond to the imports included in the application of the measures, contrary to the Appellate Body's teachings.[4074] The language of Article 2.2 of the Agreement on Safeguards is sufficiently broad to allow the same rationale developed so far by the Appellate Body to what the United States terms as "product exclusions". Indeed, the principle of parallelism is inherent in the whole Agreement on Safeguards: not just in Article 2.2 or Article 2 altogether, but also in Articles 4 and 5. The European Communities points out that in *Argentina – Footwear (EC)*, the case in which the principle was first enounced by the Appellate Body, the

[4070] New Zealand's written response to the Panel question 93 at the first substantive meeting.
[4071] United States' first written submission, para. 761, referring to Appellate Body Report, *US – Wheat Gluten*, para. 96.
[4072] European Communities' second written submission, paras. 488-495.
[4073] European Communities' second written submission, paras. 488-495.
[4074] Appellate Body Report, *US – Line Pipe*, para. 181.

European Communities had not brought a claim under Article 2.2 of the Agreement on Safeguards. Rather, it had relied on the logical continuum set out in Article 2.1 and underlying the entire Agreement. If the Appellate Body had exclusively linked the principle of parallelism to Article 2.2, in finding its violation in *Argentina – Footwear (EC)* it would have made findings *extra petitum*, i.e. beyond the claims made by the complainant, contrary to its own teachings.[4075] It is clear from the wording of Article 9.1 that when the drafters of the Agreement on Safeguards wanted to limit a provision to certain country origin they knew how to do and actually did so. When enouncing the principle of parallelism the Appellate Body had before it clear language in the Agreement on Safeguards referring to country-based scope limitations. Yet it did not so limit the principle of parallelism. It rather referred to parallelism between sources investigated and sources covered by the measures.[4076] [4077]

7.1746 The European Communities further points out that there are other WTO texts where the term "source" is employed in a broader sense than the term "origin" or "country of origin". Thus, for example, the Illustrative List of TRIMS annexed to the Agreement on Trade–Related Investment Measures mentions as a TRIM "the purchase or use by an enterprise of products of domestic *origin or* from any domestic *source*".[4078] Also, in the Anti-Dumping Agreement, the reference to "*sources* found to be dumped" in Article 9.2 is a reference to sources of supply, not to countries of origin. If the Panel were to accept the US-created labels such as "scope parallelism" and "product exclusions", it would enable the United States, next time it takes a safeguard measure, to carefully fashion its "product exclusions" to cover even all products from Canada, or Mexico, or Israel, or Jordan, or all of them together, and then claim that, because it achieved this result through what it terms "product exclusions", it is not subject to the principle of parallelism. It would be too easy indeed to circumvent the principle of parallelism.

7.1747 Similarly, for China, the parallelism requirement contained in Article 2.1 and 4.2 of the Agreement on Safeguards is also relevant to the practice of excluding certain products that were included in the injury determination from the application of the measure. There is nothing in WTO case law to suggest that the requirement of parallelism should be limited to the sources of imports. The basic rationale is the same. A safeguard measure should only be applied to products if the data relating to increased imports of those products meets the relevant threshold of "increased imports", and if the data relating to those products shows that the increased imports are causing serious injury a safeguard measures can be imposed on those same products.[4079] China disagrees with the United States which considers that if the products covered by the injury determination are broader than the products covered by the measure itself, the measure should be viewed as less restrictive and therefore consistent with Article 5.1 of the Agreement on Safeguards, and with the spirit of the WTO overall. In fact, China considers that the proportionality requirement of Article 5.1 does not allow an authority to reduce the scope of application of a measure compared to its scope of investigation, and that the parallelism requirement fully applies to the scope of products. China adds that the only solution legally possible to exclude, from the scope of application of measures, products included in the scope of investigation, would possibly to rely on the notion of "public interest" contained in Article 3.1 of the Agreement on Safeguards. However, this would require reasoned and adequate explanation in

[4075] Appellate Body Report, *India – Patents (US)*, para. 92, where the Appellate Body concluded that "[t]he jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference."

[4076] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 113-114.

[4077] European Communities' written reply to Panel question No. 62 at the second substantive meeting.

[4078] Illustrative List, para. 1(a) (emphasis added).

[4079] China's second written submission, paras. 313-314.

accordance with Article 3.1 but, according to China, this has never been forthcoming from the United States.[4080]

7.1748 In contrast, Japan contends that the parallelism obligation applies only to sources subject to the investigation, not to specific products. Current jurisprudence on parallelism is limited to sources, *i.e.* countries, and not products. The fundamental textual basis for the Appellate Body's interpretation of the parallelism requirement in all of the disputes addressing this issue to date is Article 2.2. In *US – Wheat Gluten*, the Appellate Body held that Articles 2.1 and 2.2, read in concert, create the requirement stating: "[t]o include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the Agreement on Safeguards. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted".[4081] Article 2.2, in setting the general MFN rule for safeguard measures, is first and foremost aimed at addressing the source of imports, and together with Articles 2.1 and 4.2, requires that injury and remedy be based on the same universe of sources. Indeed, in Japan's view, if the products covered by the injury determination are broader than the products covered by the measure itself, the measure is less restrictive than it would be otherwise, which is consistent with the purpose of Article 5.1. It should be noted that Article 5.1 provides the maximum limit of the protection. A WTO Member can lessen the degree of protection, within its discretion, by narrowing the scope of products subject to a safeguard measure. Moreover, Article 3.1 reads "exporters and other interested parties could present evidence and their views…as to whether or not the application of a safeguard measure would be in the public interest". This implies that the Agreement on Safeguards allows Members to exercise discretion to take into consideration a broad range of economic interests other than that of the injured domestic industry. Indeed, during the course of an investigation the competent authority should gather information on such other interests so that it can inform the final decision. In some cases, a portion of the products subject to a safeguard measure could be essential to maintaining the competitiveness or high-quality of products produced by downstream industries in an importing country. If damage to such downstream industries outweighs the benefit enjoyed by the domestic industry producing products which are generally like or directly competitive with the imports, then a small part of the imported products could be excluded from the measure for the sake of the public interest. This is particularly true in this case, as restrictions on steel imports can have extensive negative effects on United States industrial users. It is important to understand that the product exclusions issued by the United States in this particular case apply on an MFN basis. Hence there is no discrimination between countries, either *de jure* or *de facto*. If producers in other countries are able to produce and ship to the specification as set forth in the excluded product definition, they are entitled to reap the benefits of that exclusion. Indeed, this is why some requesters have strenuously objected to any quantity restrictions being placed on their exclusions.[4082] Japan also finds it odd that a country whose exporters have benefited from exclusions would now find fault with this limited method by which the United States has tried to liberalize the measure. Yet, the exclusions in themselves do not absolve the United States from abiding by its obligations under the Agreement. The fact that a limited set of products are not subject to the measure does not change this fundamental fact.[4083]

[4080] China's second written submission, paras. 342-344.

[4081] *See* Appellate Body Report, *US – Wheat Gluten*, para. 96 (emphasis original); *see also* Appellate Body Report, *US – Line Pipe*, para. 180.

[4082] Japan's second written submission, paras. 191-194; Japan's written reply to Panel question No. 92 at the first substantive meeting.

[4083] Japan's written reply to Panel question No. 93 at the first substantive meeting.

7.1749 Similarly, Brazil submits that product exclusions are addressed by Article 5.1,which limits a remedy to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Authorities are at liberty to adjust the scope of the remedy to ensure that it is limited to the extent necessary to prevent or remedy serious injury. Article 2.2 is only relevant in that exclusions must be on an MFN basis.[4084] Korea also does not agree with the position of New Zealand concerning "scope parallelism". In Korea's view, parallelism in Articles 2.1 and 2.2 of the Agreement on Safeguards refer to sources of imports. National authorities always retain the ability not to impose safeguard measures even when conditions for safeguard relief have been met. So long as the exclusion of certain products is done on an MFN basis, the fact that certain products are excluded from a measure is not in itself a violation of parallelism. Indeed, to contend the opposite is tantamount to requiring the United States to impose a measure that is *greater* than it knows to be necessary.[4085] Korea also argues that product exclusions are not addressed by Article 2.2 since that Article deals with the MFN requirement concerning product sources.[4086]

7.1750 New Zealand submits that Article 2.1 provides that a Member can only apply a safeguard measure to "a product", if "such product" meets the conditions relating to increased imports, causation and serious injury. The purpose of parallelism is to ensure that the products subject to the safeguard measure have themselves met the conditions necessary to justify the application of that measure. Where, as a result of exclusions, the products to which the safeguard measures apply no longer meet the conditions of Article 2, then there is no justification under the Agreement for the application of a safeguard measure.[4087] New Zealand recalls that the exclusions process has "resulted in the exclusion of approximately one-quarter of covered steel imports from the safeguards investigation".[4088] Accordingly, the excluded products represent a very substantial portion of the total imports considered by the USITC, which provided the basis for the United States imposition of a safeguard measure. In relying on Article 5.1 in defence, the United States appears to be admitting that certain products – around one quarter of the total – that they had counted in their determination of increased imports causing injury were in fact not in any way responsible for that injury. Indeed, the published criteria for excluding products from the safeguard measure – which focus on whether or not competitor domestic products exist – suggests that these products could not have caused serious injury in the first place. The USTR Federal Register Notice relating to exclusions reads in relevant part:[4089]

> "Each request will be evaluated on a case-by-case basis. USTR will grant only those exclusions that do not undermine the objectives of the safeguard measures. In analysing the requests, USTR will consider whether the product is currently being produced in the United States, whether substitution of the product is possible, whether qualification requirements affect the requestor's ability to use domestic products, inventories, whether the requested product is under development by a United States producer who will imminently be able to produce it in marketable quantities and any other relevant factors."

7.1751 New Zealand appreciates the candour with which the United States, having utilized imports of such products to establish the necessary thresholds for the imposition of a safeguard measure, now admits that such products were apparently all along not causing injury. This would of course also appear to carry the implication that such products should have been excluded from the "like product"

[4084] Brazil's written reply to Panel question No. 59 at the second substantive meeting.
[4085] Korea's written response to Panel question No. 92 at the first substantive meeting.
[4086] Korea's written reply to Panel question No. 62 at the second substantive meeting.
[4087] New Zealand's written reply to Panel question No. 62 at the second substantive meeting.
[4088] United States' first written submission, para 40.
[4089] Federal Register Vol. 67 No 75, 18 April 2002 (Exhibit CC-19).

groupings utilized by the United States; further underlines the flawed nature of the United States causation analysis which proceeded on the basis that these products like all others included in the like product category caused serious injury; and demonstrates the inherently flawed nature of the United States approach to remedy. The United States could have excluded such products from its determination at the outset of its investigation on the basis that they were not like products. However, as with FTA imports, it did not do so and included them in its investigation and subsequent determination. Accordingly, to the extent that the United States may wish after making this determination to exclude such products, just as in the case of FTA exclusions, the United States is obliged to provide a "reasoned and adequate explanation" that establishes "explicitly" that imports of non-excluded products taken alone meet the conditions for the imposition of a safeguard measure. The United States has at no time made any attempt to provide such an explanation.[4090]

7.1752 New Zealand insists that there is no basis in terms of logic or principle for a distinction between "scope" parallelism and "source" parallelism. The Appellate Body's decisions in *US – Wheat Gluten* and *US – Line Pipe* were focussed on exclusions of products by *source*, but the reasoning and language used in those decisions must logically extend also to exclusions of product *types*. The basis of the *Wheat Gluten* decision, as confirmed by *US – Line Pipe*, is that the phrase "product being imported" has the "*same* meaning … in both Articles 2.1 and 2.2".[4091] In support, New Zealand relies on the broad principle enunciated by the Appellate Body which counters any suggestion that the restrictive focus on sources was deliberate: "… the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2".[4092] The Appellate Body also saw the concept as one relating broadly to the issue of parallelism between the "scope" of the investigation and of the measure in *US – Wheat Gluten*, where it rejected the United States' argument based on Article 9.1 of the Agreement on Safeguards as irrelevant. The United States argument that exclusion of products "is no different from a tariff rate quota or quota, in that some imports covered by the determination of serious injury are unaffected by the measure, while others are"[4093] is nonsensical. In the case of a tariff-rate quota or quota, the measure is still imposed on the basis of a determination of increased imports causing injury of the products to which the tariff-rate quota or quota is subsequently applied. The situation flowing from product exclusions is quite different – it results in a situation where safeguard measures are imposed on a certain group of products on the basis of a determination based on an analysis of imports of a much larger group of products. This situation is one in which the legal foundation for the very imposition of the safeguard measure is flawed since the data analysed to substantiate the measures relates to products that do not correlate to the products that are actually subject to the safeguard.[4094]

7.1753 The United States insists that Article 5.1 clearly allows a Member to apply a safeguard measure less than the extent necessary to remedy or prevent serious injury, as long as it complies with the MFN obligation under Article 2.2. Thus, a Member has discretion to exclude particular items entirely from the measure or to grant a limited quantity exclusion with regard to particular items. However, New Zealand argues that the Appellate Body reports stand for the "broad principle" of scope parallelism. The United States submits that no such principle exists. Therefore, either complete exclusion (or reduced application of a safeguard measure) to particular items within the like product is consistent with the Agreement on Safeguards. That does not suggest that exclusion or reduced application is required. complainants essentially accept that exclusions are not mandatory.[4095]

[4090] New Zealand's second written submission, para.3.157-3.160.
[4091] Appellate Body Report, *US – Wheat Gluten*, para 96 (emphasis in original).
[4092] Ibid.
[4093] United States' first written submission, para 766.
[4094] New Zealand's second written submission, paras. 3.161-3.163.
[4095] United States' second written submission, paras. 206-209.

Article 2.2 states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source". This text places a limitation on application of a safeguard measure, namely that it be applied without regard to the source of the product. In this sense, source can have only one meaning – referring to the origin of the product in question.[4096] This limitation is unrelated to the type of the product in question. Thus, it does not affect a Member's discretion to apply the measure at different levels to different types of the product, as long as the measure does not differentiate among types of product based upon their source.[4097]

7.1754 Norway argues that if the decision to exclude a particular product is based on an incorrect definition of the imported product, i.e. on artificial groupings of different products as in the present case, then the whole analysis is flawed and so also the product exclusion. This is particularly so as the overbroad categories will have led to injury findings in respect of a broader category of products. When some products within the category is later excluded their contribution to the "increased imports" and "serious injury" will still be factored into the remedy decision for the remaining products - making the remedy exceed the level permitted by Article 5.1. If a proper definition of the imported product has been performed, then any product exclusion will relate to the "whole" of the product as there are no "sub-products", meaning that the remedy is set at zero. This is permitted.[4098]

7.1755 The United States also notes that the European Communities' position on this question remains self-contradictory. European Communities steel producers continue to request exclusions from the steel safeguard measures. The European Communities itself has never suggested to the administrative authorities considering these requests that they are inconsistent with WTO rules. Nor has the European Communities requested the United States to revoke exclusions previously granted at the request of European Communities steel producers, which would be the fastest way to secure the removal of exclusions that the European Communities professes to find inconsistent with WTO rules.[4099]

7.1756 The European Communities disagrees with the view that the fact that a Member may have expressed a position in respect of product exclusions affects its right to claim their illegality.[4100] That right is nowhere restricted under the Agreement on Safeguards and, in the absence of such a restriction, a WTO Member has broad discretion in deciding whether to bring a claim against another Member under the DSU.[4101] Product exclusions, moreover, are not granted to WTO Members. Even assuming that product exclusions were a benefit accruing to Members, *quod non*, admitting that soliciting such exclusions would take away a Member's right to challenge them as WTO-incompatible

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[4096] The New Shorter Oxford English Dictionary defines "source" as "[t]he derivation of a material thing; a place or thing from which something material is obtained or originates." The New Shorter Oxford English Dictionary, p. 2957. The dictionary gives as an example of this definition "Transylvania was the oldest source of gold in the classical world." Ibid.

[4097] United States' written reply to Panel question No. 62 at the second substantive meeting.

[4098] Norway's written reply to Panel question No. 58 at the second substantive meeting.

[4099] United States' written reply to Panel question No. 62 at the second substantive meeting.

[4100] United States' first written submission, para. 760. The United States refers to the press article in its Exhibit US-59 in support of its contention. The European Communities would observe that Commissioner Lamy's statements reported in the press article were made while clarifying that exclusions "would not solve the underlying problem of the illegality of the United States safeguard, which is litigated in the World Trade Organization" (Ibid., p. 2, *in fine*). The exclusions were discussed in the context of the European Communities' evaluating whether or not to exercise its right, under Article 8.3 of the Agreement on Safeguards, to suspend equivalent concessions to the value of products which were granted safeguard relief in the absence of an absolute increase in imports, after the United States had refused the European Communities requests for tariff cuts as the appropriate form of compensation under Article 8.

[4101] Appellate Body Report, *EC – Bananas III*, para. 135.

would be like asserting that the victim of a usurer cannot denounce him because she asked a delay or reduction in the repayment of usurious interests.[4102]

3. The findings required

(a) General discussion

7.1757 The European Communities, China, Norway and Switzerland submit that in order to comply with the parallelism requirement, competent authorities must establish, through an analysis of the imports that are covered by the safeguard measures, that these are being imported in increased quantities and that they are causing serious injury.[4103] Japan, China, Switzerland and Norway add that if a WTO Member decides to exclude a country from the application of a safeguard measure, it must establish "explicitly" that increased imports from sources covered by the measure satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. Furthermore, the WTO Member must provide a "reasoned and adequate explanation" of how the facts support such a determination.[4104]

7.1758 China adds that the findings of the competent authorities must be based on a sufficient "reasoned and adequate explanation" of how the facts support the determination, in light of the conditions for the application of a safeguard measure set out in Articles 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In other words, it is not sufficient to indicate "explicitly" that the non-NAFTA imports "alone" caused injury in order to comply with the obligation of "parallelism". The following elements should, at least, be contained in the findings of the competent authorities: (i) evaluation of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards (i.e. the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment)[4105]; (ii) evaluation of other factors relevant to the situation of the industry concerned[4106]; relationship between the movements in imports (volume and market share) and the movements in injury factors[4107]; and (iii) a determination whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements.[4108] [4109]

7.1759 Korea recalls that the Appellate Body in *US – Line Pipe* further clarified what a complainant is required to show to make a prima facie case that a safeguard measure has been imposed in violation of such requirement. The Appellate Body said that it was enough to make a prima facie case of the absence of parallelism to demonstrate that the USITC considered imports from all sources in its investigation and that that exports from Canada and Mexico were excluded from the safeguard measure at issue.[4110] Then, it is up to the imposing party to show that the competent authorities have established explicitly, through a reasoned and adequate explanation, that imports from non-excluded

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[4102] European Communities' second written submission, paras. 488-495.
[4103] European Communities' first written submission, para. 603.
[4104] Japan's second written submission, para. 184; China's first written submission, para. 563; Switzerland's first written submission, para. 328; Norway's first written submission, paras. 367 and 371.
[4105] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.
[4106] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.
[4107] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[4108] *See* Appellate Body Report *US – Wheat Gluten*, para. 69.
[4109] China's first written submission, paras. 587 and 589.
[4110] Appellate Body Report, *US – Line Pipe*, para. 187.

sources alone were correctly found to support affirmative determinations under Articles 2 and 4 of the Agreement on Safeguards.[4111] [4112]

7.1760 The United States contends that the text of the Agreement on Safeguards, as interpreted by panels and the Appellate Body, does not require separate findings specific to non-NAFTA imports for all the Article 4.2 factors. The sole requirements under Articles 3.1 and 4.2(c) are for the competent authorities to publish "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law", and providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". The Agreement does not require the use of a particular structure or format for the report, or a particular analysis. As the Appellate Body concluded in *US – Line Pipe*: "we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself … ".[4113] [4114]

7.1761 In response, Japan asks how else – without separate findings specific to non-NAFTA imports for all Article 4.2 factors – would a Member ever know that the imports subject to the safeguard measure are, in fact, the ones causing serious injury if no causation evaluation is completed for these imports by the competent authority. Japan submits that the United States expects the complainants to simply accept that the examination of the various factors having an impact on the domestic industry would have produced the same results had the USITC considered them in comparison with non-NAFTA imports. Even more appalling, according to Japan, is the United States' reasoning for its repeated failure to comply with the parallelism requirement. It boldly believes that it only needs to state explicitly the conclusion that non-NAFTA imports alone caused or threatened to cause serious injury, and does not need to provide an explanation for such findings including the results of each step of the analytical process leading to that conclusion.[4115] [4116]

7.1762 China argues that, far from being redundant, separate findings specific to non-NAFTA imports for all the Article 4.2 factors – as an other factor of injury – was the only way for the United States to comply with the WTO requirements, i.e. with the need to show that non-NAFTA imports were able, alone, to cause serious injury to the United States industry.[4117]

7.1763 Japan adds that "[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous".[4118] As the Appellate Body found in *US – Wheat Gluten* and *US – Line Pipe*, a mere recitation of the facts without a detailed analysis of whether the non-NAFTA imports alone cause serious injury is insufficient to limit the application of the measure to any subset of total imports.[4119]

7.1764 The United States points out that the complainants return repeatedly to the argument that the USITC's analysis of non-NAFTA imports does not meet the Appellate Body's requirement in *US –*

[4111] Appellate Body Report, *US – Line Pipe*, paras. 187-188 and 198.
[4112] Korea's second written submission, paras. 207-208.
[4113] Appellate Body Report, *US – Line Pipe*, para. 158.
[4114] United States' first written submission, paras. 749-750.
[4115] United States' first written submission, paras. 752-753; United States' written replies to the questions from the Parties, para. 18 (in response to a question posed by the European Communities).
[4116] Japan's second written submission, paras. 185-190.
[4117] China's second written submission, para. 318.
[4118] Appellate Body Report, *US – Line Pipe*, para. 194.
[4119] Japan's first written submission, para. 304.

Line Pipe to provide "a reasoned and adequate explanation that establishes explicitly" that non-FTA imports caused serious injury.[4120] This focus improperly elevates the Appellate Body's description of an obligation above the words of the text. Articles 3 and 4 do not require an "explicit" finding, and the Appellate Body has never related such a requirement to the text of the Agreement on Safeguards. Nor is "explicitness" necessary to provide the findings and reasoned conclusions required under Article 3.1, or the "detailed analysis" required under Article 4.2(c). Appellate Body reports do not make an "explicit" explanation a separate requirement. The term first appeared in the context of parallelism in *US – Wheat Gluten*, in the finding that the USITC's analysis of imports from Canada did not provide an "explicit determination relating to increased imports, *excluding imports from Canada*".[4121] The Appellate Body then used the same term in *US – Line Pipe* to describe its finding that the USITC's more detailed analysis in that case still did not establish explicitly that increased imports from non-NAFTA sources alone caused serious injury.[4122] In both cases, it used the term in connection with the absence of a "clear and unambiguous" statement that increased imports from non-NAFTA sources alone caused serious injury. It then inquired as to whether the explanations of the statements that the USITC did make provided a "reasoned and adequate explanation", but did not require that the explanation be "explicit". Thus, the Appellate Body's use of the term "explicit" is best understood as referring to the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury, and does not require an "explicit" recitation of the results of each step of the analytical process leading to that conclusion.[4123] [4124]

7.1765 New Zealand does not agree that the Appellate Body guidance can be "best understood" in this way. For this would reduce the requirement for a "reasoned and adequate explanation" to a simple requirement for a conclusion by way of mere assertion that even if FTA imports had not been included, the result would have been the same. This is of course precisely the basis on which the United States seeks to justify itself in relation to NAFTA imports. It is also precisely the basis on which the Appellate Body in *Korea – Line Pipe* rejected footnote 168 of the USITC Report as a "reasoned and adequate explanation of how the facts support [the] determination".[4125] It should be recalled that the Appellate Body noted in that case that the explanation must "leave nothing merely implied or suggested; it must be clear and unambiguous".[4126] Further, as the Appellate Body found in that case as well as in *US – Wheat Gluten*, a mere recitation of the facts without a detailed analysis of whether the non-NAFTA imports alone cause serious injury is insufficient to apply the measure to less than total imports.[4127]

7.1766 Similarly, the European Communities argues that the United States engages in a series of rather extraordinary propositions many of which fly in the face of the Appellate Body's reports addressing the principle of parallelism.[4128] It is true that the Agreement on Safeguards does not contain the words "explicit findings", it does not even contain the word parallelism altogether. Yet,

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[4120] China's first written submission, paras. 588-89; Japan's first written submission, para. 316; New Zealand's first written submission, paras. 4.178-179; Switzerland's first written submission, paras. 355-357.

[4121] Appellate Body Report, *US – Wheat Gluten*, para. 98 (emphasis in original).

[4122] Appellate Body Report, *US – Line Pipe*, para. 194.

[4123] The Appellate Body has found with regard to a finding of causation that "[t]hese steps are not legal 'tests' mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities." Appellate Body Report, *US – Lamb*, para. 178.

[4124] United States' first written submission, paras. 752-753.

[4125] Appellate Body Report, *US – Line Pipe*, para 195.

[4126] Ibid., para. 194.

[4127] New Zealand's second written submission, para. 3.151.

[4128] European Communities' second written submission, para. 452.

the "parallelism" requirement is clearly discernible from the text, and the Appellate Body has clarified that such legal principle does exist and that it entails that there must be an explicit finding and a reasoned explanation that imports covered by a measure, these alone, satisfy the requirements of Articles 2 and 4 of the Agreement on Safeguards. The absence of expressed findings and/or reasoned explanations was precisely the flaw that the Appellate Body found in the measures at issue in *US – Line Pipe*.[4129] The United States also insists that the Appellate Body did not require that the underlying justification for conclusions relating to non-excluded imports be explicit. The European Communities submits, however, that it fails to show how an explanation which is not even spelled out may really be adequate in the light of the Appellate Body's clear indications and its conclusion that the sum of findings on all imports and findings on Canada and Mexico does not yield a finding on "all imports minus NAFTA".[4130] In fact, there is not even an implicit finding.[4131]

7.1767 Switzerland also argues that the United States plays with words and in any case did not even provide an adequate and reasoned explanation establishing that non-FTA imports caused serious injury. The Appellate Body[4132] said that the United States had to demonstrate that the USITC provided a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources satisfied the conditions for the application of a safeguard measure.[4133]

(b) Findings made by the USITC in this case

(i) Imports from free-trade areas

7.1768 The European Communities argues that there is no consideration in the main USITC Report of the need to ensure parallelism between the findings of increased imports, serious injury and the measures to be imposed. There is however a belated, but inadequate, attempt to take into account the principle of parallelism in the Second Supplementary Report.[4134]

7.1769 According to the European Communities, the explanation in the Second Supplementary Report relates to the exclusion of Canada and Mexico from the scope of the safeguard measure in relation to six of the ten products (i.e. all excluding tin mill products, rebar, stainless steel rod and stainless steel wire). With respect to imports from Israel and Jordan, the USITC merely "indicates, in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or individual Commissioners".[4135] [4136]

7.1770 The European Communities submits that the explanations in the Second Supplementary Report are insufficient to repair the failure to respect the principle of parallelism in the main Report.[4137] A finding that imports from Canada or Mexico, individually, do not constitute a substantial share or did not contribute importantly has no relation with the issue of whether non-excluded imports alone meet the standards for imposition of safeguard measures. Furthermore, the references to the

[4129] Appellate Body Report, *US – Line Pipe*, para. 196.
[4130] Appellate Body Report, *US – Line Pipe*, para. 196.
[4131] European Communities' second written submission, paras. 454-457.
[4132] Appellate Body Report, *US – Line Pipe*, para. 188
[4133] Switzerland's second written submission, para. 105.
[4134] European Communities' first written submission, paras. 604-605.
[4135] Second Supplementary Report, p. 4.
[4136] European Communities' first written submission, paras. 606-608.
[4137] European Communities' first written submission, para. 613.

USITC October 2001 Report upon which the United States relies do not consider the most recent import trends (full 2001).[4138]

7.1771 As regards tin mill products, rebar, stainless steel rod and stainless steel wire, the European Communities submits that the Panel can already conclude that the United States violated Articles 2.1 and 4.2 of the Agreement on Safeguards on the basis that the United States has not even made a finding that those particular imports covered by the safeguard measures alone fulfilled the conditions contained in the Agreement.[4139]

7.1772 According to the European Communities, the analysis provided in the Second Supplementary Report for the remaining six products is flawed as it suffers from the same defects as the main Report. For example, it does not consider the most recent period or contain data on 2001 imports even though this was available when the Second Supplementary Report was produced. In any event, there is no demonstration or adequate explanation for a sudden, recent sharp and significant surge in non-NAFTA imports of CCFRS, hot-rolled bar, cold-finished bar, carbon and alloy fittings, stainless steel bar and certain tubular products.[4140]

7.1773 Switzerland maintains that, in its original Report, the USITC unquestionably analysed the various safeguard factors based on total imports, including FTA imports. In addition, instead of making all necessary determinations on the basis of the imports that are subject to the measure, the USITC simply adds the recurrent assertion that exclusion would not change the determination based on all imports. These unfounded generalisations do not correspond to the Appellate Body's standard and are clearly wrong. The United States only writes about what it thinks it does not have to do, but it does not and cannot show that that it did fulfil the WTO requirements. According to Switzerland and Norway, the principle of parallelism does not mean that a WTO Member can exclude whatever imports it wishes by saying that such exclusions would not affect the end result. As the Appellate Body clarified, what competent authorities have to establish is that imports from sources outside free trade areas alone meet the requirements of Article 2.1 and 4.2 of the Agreement on Safeguards.[4141] This means that, assuming that the exclusion of certain imports from the measure is allowed, all the necessary determinations must be made – and explained in a reasoned and adequate manner – on the basis of imports that are subject to the measure.[4142] Norway adds that one consequence of this is that correct increased imports and causation analyses have to be made after the exclusion from the investigation.[4143]

7.1774 In this case, the United States competent authorities' explanation relevant to the question of parallelism appeared in various sections of the USITC Report. Some of the discussion appeared in the portions of the report containing the analysis for all imports. Some of the discussion also appeared in the analysis specifically pertaining to non-FTA imports in the Second Supplementary Report. These two documents were meant to be read together, as reflected in the designation of the later-prepared portion as "supplemental". The USITC's findings with regard to most of the requirements of Article 4.2 appeared in the USITC's analysis of all imports. Insofar as the exclusion of FTA imports did not change these findings, the USITC was not required to repeat them. For example, the exclusion of FTA imports did not change the shipments of the domestic producers, their employment

[4138] European Communities' second written submission, para. 482.
[4139] European Communities' first written submission, para. 614.
[4140] European Communities' first written submission, paras. 620, 622, 623.
[4141] Appellate Body Report, *US – Line Pipe*, para. 198.
[4142] Switzerland's second written submission, paras. 103-104; Norway's second written submission, para. 182.
[4143] Norway's second written submission, para. 182.

levels, their profits and losses, or trends in those indicators. The Agreement on Safeguards did not require the USITC to perform these analyses again to satisfy the parallelism requirement.[4144]

7.1775 The United States argues in response that in order to support its conclusions concerning non-NAFTA imports, the USITC Report contains for each industry: (i) a specific finding that non-NAFTA imports increased; (ii) a finding, in the analysis of all imports, that the industry was seriously injured; (iii) findings, in the analysis of all imports, concerning the pertinent conditions of competition in the industry; (iv) a specific finding describing the causal link between the non-NAFTA imports and the domestic industry's serious injury; and (v) findings, in the analysis of all imports, concerning factors other than imports that were alleged to cause serious injury.[4145]

7.1776 The United States insists that the USITC's provision of findings and analysis concerning non-FTA imports, and continued reliance on portions of its analysis of all imports that remained applicable, was a permissible means to comply with Articles 3.1 and 4.2(c). The USITC's issuance of the supplementary report after it finished its analysis of all imports does not make the supplemental report an "*ex post facto* analysis". The USITC provided the response prior to the decision to apply the safeguard measures, which meets the requirement under Article 2.1 of the Agreement on Safeguards to apply a measure "only if that Member has determined" that increased imports of a product are causing serious injury.[4146]

7.1777 The European Communities takes issue with the proposition that the scope of imports has no impact on the assessment of the domestic industry situation.[4147] For one thing, the first of the factors that domestic authorities must evaluate under Article 4.2(a) is precisely concerned with import trends. Given the symmetry that must exist between the import data used for the determinations and the imports subject to a measure, clearly this means that import trends that are relevant under Article 4.2(a) must be assessed exclusively on the basis of imports to be covered by the measure.[4148] The European Communities recalls that the USITC had made "affirmative determinations" (that is, it had found that these imports did not meet the statutory standards for exclusion) for hot-rolled bar, cold-finished bar, carbon and alloy fittings, and stainless steel bar originating in Canada and CCFRS and carbon and alloy steel fittings from Mexico.[4149] To the extent that Proclamation No. 7529 excluded those imports from the scope of the measures[4150], it cannot have been based on the October 2001 determinations, which did not determine that they could be excluded.[4151]

7.1778 The European Communities submits that adding some *ex post* comments on all imports minus NAFTA is not tantamount to meeting the requirements of the Agreement on Safeguards in respect of "all imports minus FTAs". In other words, even the *ex post* conclusions in the Second Supplementary Report still include imports from sources – Israel and Jordan – which were later excluded from the safeguard measures. Finally, there is no reasoned or adequate explanation in the USITC Report as to why making an injury finding for non-FTA imports was "redundant".[4152] Further elaborating its argument, the European Communities adds that USITC determinations on pp. 17-18 of its Report are: (i) determinations on imports from all sources, or (ii) determinations on imports from Canada and (iii)

[4144] United States' first written submission, paras. 749-750.
[4145] United States' first written submission, paras. 778-788.
[4146] United States' first written submission, para. 751.
[4147] *See* e.g. United States' first written submission, para. 750; United States' written reply to Panel question No. 95 at the first substantive meeting.
[4148] European Communities' second written submission, paras. 460-463.
[4149] Proclamation No. 7529, para. 5.
[4150] Proclamation No. 7529, para. 8.
[4151] European Communities' second written submission, para. 449.
[4152] European Communities' second written submission, paras. 460-463.

from Mexico, individually considered. The determinations on imports from all sources are neither modified nor, more specifically, turned into determinations complying with the principle of parallelism, by the individual determinations on imports from Canada and Mexico. Thus, even assuming that only imports from Canada and Mexico, and not also Israel and Jordan, had been exempted from the United States measures under review, those measures and their underlying findings and determinations do not comply with the principle of parallelism. They remain determinations that do not establish explicitly, through a reasoned and adequate explanation, that imports covered by the measures, alone, were being imported in such increased quantities and under such conditions as to cause serious injury. Specifically, one cannot in any way "subtract" from a determination based on imports from all sources the additional determinations relating to Mexico and/or Canada and claim that, by implication, the result of this "subtraction" is a determination and an explanation that satisfies the parallelism principle.[4153]

7.1779 New Zealand argues that in its December 2001 Report, the USITC had made affirmative findings that imports from both Mexico and Canada of CCFRS constituted a substantial share of total imports and that imports from Mexico contributed importantly to the serious injury allegedly caused by imports. The important role played by imports from NAFTA sources as part of the USITC's investigation into imports from all sources was quite explicit. These earlier findings are then studiously avoided in the Second Supplementary Report. The failure by the USITC to explain its earlier findings reinforces the conclusion that the United States has failed to provide an adequate and reasoned explanation to support its exclusion of imports from its NAFTA partners from the application of the safeguard measure. While the United States claims that the necessary analysis of non-NAFTA imports is somewhere to be found in the more general analysis applicable to all imports, these claims have no foundation. The USITC Report and Second Supplementary Report fail to evaluate the share of the domestic market taken by non-NAFTA imports and failed to evaluate other factors relevant to the situation of the industry concerned. The USITC did not examine the impact that NAFTA imports would have on the domestic industry if these exports were to be excluded from the measure. The USITC also failed to make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and it failed to demonstrate the causal link between increased imports from non-NAFTA sources and serious injury involving a genuine and substantial relationship of cause and effect.[4154]

7.1780 The European Communities recalls that, for several product groups, the USITC made affirmative determinations against imports from Canada and/or Mexico[4155] – that is, it determined that imports from Mexico and/or Canada did "account for a substantial share of total imports" and did "contribute importantly to the serious injury" pursuant to Section 311(a) of the NAFTA Implementation Act.[4156] At any rate, the individual determinations on imports from Mexico and Canada are irrelevant to show compliance with the principle of parallelism because they are based on a standard – that in Section 311(a) of the NAFTA Implementation Act – that is quite different from the WTO ones. Under WTO rules, all imports must be counted (or excluded from the beginning), not only the first five exporting countries, and all injury causes must be evaluated. A further reason is that the determinations of 22 October 2001 do not disaggregate the import data from Israel and Jordan

[4153] European Communities' second written submission, paras. 466-467; European Communities' second oral statement on Parallelism, para. 4.

[4154] New Zealand's second written submission, paras. 3.152-3.153.

[4155] These are the product groups listed at para. 449 of the European Communities' second written submission (for Canada: Hot-Rolled Bar, Cold-Finished Bar, Carbon and Alloy Fittings, Stainless Steel Bar; for Mexico, Certain Flat Steel and Carbon and Alloy Steel Fittings).

[4156] Quoted in the European Communities' second written submission, para. 444, footnote 349.

(in fact, not even the Second Supplementary Report does).[4157] In conclusion, all one is left with (in the sense of relevant determinations) after examining the original USITC Report are determinations based on imports from all sources.[4158]

7.1781 The United States responds that a consequence if the European Communities' argument were to be upheld would be that competent authorities could never revise their report, once issued, or provide additional information if the Member evaluating application of a safeguard measure considered that additional information related to their determination would be useful. Indeed, if the European Communities were correct, the competent authorities could not even correct ministerial errors in the report. Nothing suggests that the Agreement on Safeguards places such a straitjacket on the competent authorities.[4159]

7.1782 The European Communities submits that the United States' position is contradictory. On the one hand, the United States argues that all the relevant determinations are contained in the USITC Report of 22 October 2001. Clearly these determinations do not relate to non-FTA imports *alone*. Therefore, they do not support the measures taken by Proclamation No. 7529. On the other hand, the United States appears to contradict itself because, in its attempt to show that it complied with the parallelism requirement, it refers to information that was "reported" by the USITC on 4 February 2002 and appears to treat it as if it were new findings able to justify the safeguard measures.[4160] Should the United States argue, that these additional "reports" are in fact new determinations that the conditions for the application of safeguard measures are met, and should the Panel accept them as determinations or additional explanation relevant to the October 2001 determinations, the European Communities submits that they are also inadequate because they disregard 2001 data, and fail to consider excluded imports in the causation analysis.[4161] The determinations contained on pp. 1 and 17-18 of the USITC Report of 22 October 2001 include no "increased imports" determinations exclusively referring to imports from excluded sources. On the contrary, they concern imports from all sources. The legal conclusions of the competent authorities are that increased imports *from all sources* caused injury to the United States industry. In view of these determinations, the measures taken by the President, excluding imports from certain sources, are without legal basis and cannot stand.[4162]

(ii) Demonstration required with respect to non-excluded imports

7.1783 Norway argues that NAFTA imports were used by the United States to justify a finding both of "increased imports" and "serious injury".[4163] Japan submits that non-NAFTA imports must be analysed on their own. In other words, it is not possible to make any conclusions about non-NAFTA imports based on analyses of total imports on the one hand and NAFTA imports on the other.[4164] Similarly, China argues that there must be a reasoned and adequate explanation that establishes explicitly that imports from non-FTA partners satisfied the conditions for the application of a safeguard measure, and in particular that injury was not due to FTA partners, treated as 'other

[4157] European Communities' second written submission, paras. 466-467; Oral statement presented by the European Communities on Parallelism at the second substantive meeting of the Panel, para. 4.
[4158] European Communities' written reply to Panel question No. 59 at the second substantive meeting.
[4159] United States' written reply to Panel question No. 59 at the second substantive meeting.
[4160] United States' written reply to Panel question No. 129, para. 239; United States' first written submission, para. 751.
[4161] European Communities' second written submission, paras. 439-440.
[4162] European Communities' second written submission, paras. 441-442.
[4163] Norway's written reply to Panel question No. 59 at the second substantive meeting.
[4164] Japan's written reply to Panel question No. 59 at the second substantive meeting.

factors'.[4165] Likewise, Korea submits that the Appellate Body has made clear that, in order to satisfy the parallelism requirement, the United States must meet *all* the conditions of Article 2.1 on the basis of the same imports that are subject to the measure under Article 2.2.[4166] Therefore, all conditions of Articles 2.1 and 4.2 of the Agreement on Safeguards must be satisfied before the parallelism analysis is complete. Imports from non-NAFTA countries must be clearly and unambiguously shown to satisfy all the conditions of Articles 2.1 and 4.2. It also follows directly from that analysis that imports from NAFTA countries thus become a potential "other factor" of injury. Finally, Korea stresses that "mere assertions" cannot substitute for the complete and detailed analysis[4167] required by Articles 3 and 4 of the Agreement on Safeguards.[4168]

7.1784 Norway argues that the USITC's general discussion of causation, and the role of alternative causes, never once addressed the role of non-NAFTA imports as distinguished from all imports. No attempt at factual analysis for non-NAFTA imports was ever made. The response to USTR request was no better. Norway argues that there was no factual analysis, only the simple statement that "the same considerations that led us to conclude that increased imports of CCFRS are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of CCFRS from all sources other than Canada and Mexico". [4169] [4170] According to Norway, it should be clear that such a statement does not fulfil the requirements of the Agreement on Safeguards.[4171]

7.1785 The United States admits that the discussion the USITC provided in its analysis of all imports concerning the issues of increased imports and causal link would not automatically be applicable to non-NAFTA imports. However, for each pertinent domestic industry, the USITC provided a particularized discussion of increased imports and causal link for non-NAFTA imports. The USITC frequently found in its analysis of increased imports that overall import trends were the same for non-NAFTA imports as they were for all imports. In such circumstances, the USITC's analysis of causal link for non-NAFTA imports focused on the same periods as did the analysis for all imports. This follows from the point that the nature and timing of the serious injury suffered by the domestic industry were the same regardless of the set of imports examined. Additionally, in its discussion of causal link for all imports, the USITC made findings concerning factors other than imports that were alleged to cause serious injury. As discussed further below, these findings often focused on data pertaining to the United States industry or the United States marketplace as a whole. Such findings were equally applicable with respect to an analysis pertaining to non-NAFTA imports as they were to an analysis pertaining to all imports. This consequently was another set of findings that the USITC was not obliged to repeat in the sections of its report dealing specifically with non-NAFTA imports.[4172]

7.1786 The European Communities also points out an examination of the actual text of the Second Supplementary Report reveals additional flaws: as regards the increased imports assessment, for the "absolute increase" the USITC simply provides the import data and observes that "imports have

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[4165] China's second written submission, para. 310.

[4166] Korea does not agree that this parallelism can be achieved legally except on the basis of a finding that all imports meet the conditions of Article 2.1 and that all imports are the subject of the measure in Article 2.2 as discussed at length in the subsequent section on MFN.

[4167] See United States' first written submission, para. 770; Appellate Body Report, *US – Line Pipe*, para. 194.

[4168] Korea's second written submission, paras. 216-219.

[4169] USITC's Second Supplementary Report, dated 4 February 2002, p. 5 (Exhibit CC-11).

[4170] Norway's second written submission, para. 183.

[4171] Norway's second written submission, paras. 184-187.

[4172] United States' first written submission, paras. 784-786.

increased" without any further qualification.[4173] This effectively continues applying the "any increase" standard which the Appellate Body has clearly ruled out.[4174] To the extent that the USITC refers to import projections for 2001-2002[4175], it underlines that the same projections were not made for other product bundles. As regards causation, the USITC failed to separate and distinguish the impact of excluded imports and did not attribute them to the imports covered by the measures. The underselling analysis was not performed for all the product bundles, or was limited to one product.[4176] There is no analysis of coincidence in trends.[4177]

7.1787 The United States reiterates that the complainants continue to disregard that findings relevant to the parallelism analysis are found throughout the USITC Report. While many of the pertinent findings are in the section of the report issued as the Second Supplementary Report, which deals specifically with non-NAFTA imports, there are also pertinent findings in the analysis of all imports. The findings are not limited to a discrete section of the report. First, the USITC expressly found, for each pertinent like product, that increased non-NAFTA imports caused serious injury or threat of serious injury. Second, the analysis of non-NAFTA imports contains not only a description of how such imports increased, but a particularized causation analysis. Third, the USITC's analysis of all imports contains findings concerning serious injury, conditions of competition, and causes of serious injury that were also equally pertinent to and part of the analysis of non-NAFTA imports. The USITC's particularized causation analysis served to separate and distinguish the effects of non-NAFTA imports from the effects of NAFTA imports. Because in the particularized causation analysis the USITC considered only non-NAFTA imports, the USITC separated the volume and pricing effects of non-NAFTA imports from those of NAFTA imports. The USITC's analysis also incorporated from the analysis of all imports those factors that were unchanged regardless of which imports were analysed.[4178]

7.1788 The European Communities argues that a major omission, and indeed a fatal flaw, of the Second Supplementary Report is that it nowhere considers imports from Canada, Mexico, Israel and Jordan as an "other factor" causing injury and did not measure its nature and extent, so as to ensure that injury caused by imports from these four countries is not attributed to the imports on which the actual measures were imposed. The USITC directly jumped into some generalizations about the injurious effects caused by non-NAFTA imports and concluded that "the same considerations that led us to conclude that increased imports [of each of the seven products] are a substantial cause of serious injury are also applicable to increased imports [of these products] from all other sources other than Canada and Mexico".[4179] However, these conclusions are fundamentally vitiated for each of these seven products, because the USITC did not redo the causation analysis by considering the excluded imports as other factor.[4180] The failure of the USITC to consider excluded imports as an "other factor" for injury is all the more glaring as the USITC itself acknowledges in its Report that these imports contributed importantly to the serious injury caused by the total imports. Specifically, the USITC

[4173] See e.g. USITC Second Supplementary Report, p. 5 (Carbon and Alloy Hot-Rolled Bar); p. 6 (Cold-Finished Bar).

[4174] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129, upholding the findings in Panel Report, *Argentina – Footwear (EC)*, para. 8.161; see also Section C above.

[4175] United States' first written submission, para. 867, concerning certain tubular products other than OCTG.

[4176] USITC Second Supplementary Report, p. 7 (Cold Finished Bar), where the underselling analysis was only performed for "one inch round C12 L 14", and based on confidential data; p. 8 (Carbon and Alloy Fittings).

[4177] European Communities' second written submission, paras. 478-481, 486.

[4178] United States' second written submission, paras. 158-161.

[4179] Second Supplementary Report, pp. 6, 7, 8, 10, 11, clarification added.

[4180] See Sections IV.F.6 (b), (d), (e), (g), (h), (i), above.

found that the following imports from NAFTA countries accounted for a "substantial share of total imports and contributed importantly to the serious injury suffered by the domestic industry": CCFRS (from Mexico); hot-rolled bar (from Canada); cold-finished bar (from Canada); certain tubular products (both from Canada and Mexico); carbon and alloy fittings (both from Canada and Mexico); stainless steel bar (Canada).[4181] The European Communities adds that the reference to "other factors" (as opposed to imports) in the Appellate Body Report in *US – Lamb* and "factors other than increased imports" in Article 4.2(b) must be read as a reference to other factors than imports covered by the measure. It would be absurd if at the same time, a Member imposing safeguard measures could assess the causal link without proceeding to "non-attribution" of the effects of NAFTA imports. In fact, it would be tantamount to making an assessment of the causal link based on all imports, included NAFTA imports, since in that case the competent authorities would not have "ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports".[4182] Basing itself on this statutory standard, the USITC did not examine whether NAFTA imports caused serious injury. It only examined whether they contributed importantly to serious injury. The very conclusion, for some of them, that imports from certain sources "did not contribute *importantly*" does not mean that there such imports did not cause injury, and did not require, therefore, to be subjected to non-attribution.[4183]

7.1789 Japan submits that the shorthand method used by the United States in determining whether non-NAFTA imports are a substantial cause of serious injury, is tantamount to a finding that non-NAFTA imports alone satisfy the requirements of increased imports and causation. This approach was found to be insufficient by the Appellate Body in both *US – Wheat Gluten* and *US – Line Pipe*. All of the analyses required for finding serious injury caused by increased imports must be performed with respect to non-FTA imports only in order to justify imposition of a safeguard measure on non-FTA imports only.[4184]

7.1790 The United States responds that, in concluding that non-FTA imports are a substantial cause of serious injury, the USITC made findings that non-FTA imports, viewed alone, satisfied the increased imports and causation requirements.[4185] The United States also argues that parallelism did not require the USITC to treat excluded imports from FTA partners as a "factor other than increased imports" under Article 4.2(b). The USITC Report contains the USITC's analysis with regard to total imports, its analysis of non-FTA imports, and its analysis of FTA imports. The findings and reasoned conclusions in these analyses separate and distinguish the injury attributable to non-FTA imports from the injury attributable to FTA imports, and ensure that the one was not attributed to the other.[4186] The USITC Report contains the USITC's explicit conclusions with regard to total imports, its explicit conclusions that the exclusion of FTA imports would not change those conclusions, and explicit conclusions that non-FTA imports were a substantial cause of serious injury. This combination of conclusions has the effect of separating and distinguishing the injury attributable to non-FTA imports from the injury attributable to FTA imports. The USITC began its analysis by making a series of conclusions regarding total imports and the injury they caused to the domestic industry. These conclusions identified the injury attributable to total imports, separated and distinguished the injury attributable to increased imports from injury attributable to other factors, and ensured that injury attributable to other factors was not attributed to total imports. This process would by itself separate injury attributable to the combination of FTA and non-FTA imports from injury attributable to other

[4181] European Communities' first written submission, paras. 624-626.
[4182] Appellate Body Report, *US – Lamb*, para. 185.
[4183] European Communities' written reply to Panel question No. 91 at the first substantive meeting.
[4184] Japan's written reply to Panel question No. 96 at the first substantive meeting.
[4185] United States' written reply to Panel question No. 96 at the first substantive meeting.
[4186] United States' first written submission, para. 769.

factors. The USITC also analysed the injury caused by non-FTA imports. It typically couched the results of this analysis in terms of whether the exclusion of FTA imports would change its conclusions with regard to total imports. Since there were only two factors – non-FTA imports and FTA imports – that could possibly be responsible for the injury attributable to imports from all sources, the comparison of conclusions with regard to non-FTA imports with the conclusions with regard to total imports by process of elimination indicates any injury attributable to FTA imports.[4187]

7.1791 For example, the United States points out that with regard to hot-rolled bar, the USITC noted that non-NAFTA imports increased at a greater rate than imports from other sources (i.e., FTA imports). It noted further that non-NAFTA imports increased significantly in both absolute and relative terms, especially at the end of the period, which caused domestic producers to lose market share, suffer decreased profits and, in some cases, enter bankruptcy. It noted that the bulk of the domestic industry loss in market share was a result of non-NAFTA imports, and that unit values for non-NAFTA imports decreased at a greater rate than unit values for total imports. Finally, the USITC noted that non-NAFTA imports undersold domestic products by greater margins than did total imports.[4188] Therefore, FTA imports were responsible for a minor portion of domestic producers' lost market share, suffered a shallower decrease in unit values, and did not set the low prices in the market.[4189]

7.1792 China responds that the parallelism principle implies that NAFTA imports be excluded from both the scope of application of the measure and the scope of the investigation. As a consequence, they must be considered as "another factor" and must be subject to a proper non-application analysis. The non-analysis requirement is contained in the parallelism requirement.[4190] The United States is wrong when it affirms that "the findings and reasoned conclusions in these analyses separate and distinguish the injury attributable to non-FTA imports from the injury attributable to FTA imports, and ensure that the one was not attributed to the other". The analysis conducted by the United States was superficial and incompatible with the WTO requirements.[4191] The "causal link" analysis also requires a coincidence in time between the increased imports and the injury suffered by the domestic industry. It may well be, in this particular case, that imports from NAFTA partners are, for example, the only one which mainly coincided in time with the injury suffered by the domestic industry. However, without carrying out a "causal link" analysis specific to NAFTA imports (or non-NAFTA imports), the United States were not in a position to establish "explicitly" that the injury suffered by the industry was caused by increased imports from sources covered by the measure, and not by increased imports from NAFTA partners.[4192] China also argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4193]

7.1793 Korea argues that, to achieve that parallelism, the Appellate Body has made clear that *all* the conditions of Article 2.1 must be examined on the basis of the same imports which are subject to the measure under Article 2.2. It also follows directly from that analysis that imports from NAFTA countries become an "other factor" of injury. As the Appellate Body has stated in other contexts, the only means for determining whether imports caused injury is to establish that "other factors" causing

[4187] United States' first written submission, paras. 770-772.
[4188] Second Supplementary Report, pp. 5-6.
[4189] United States' first written submission, para. 773.
[4190] China's written reply to Panel question No. 30 at the second substantive meeting.
[4191] China's second written submission, paras. 319-320.
[4192] China's second written submission, para. 323.
[4193] China's second written submission, para. 326.

injury were separated and distinguished.[4194] Since non-NAFTA imports *alone* ("by themselves") must cause *serious* injury[4195], then the injurious effects of NAFTA imports must be separated and distinguished. In the place of such an analysis, the United States proposes that the Panel simply "assume" that "FTA imports did not change these findings, (so) the USITC was not required to repeat them".[4196] According to the United States approach, the Appellate Body admonition regarding the need to establish "explicitly" or "clearly and unambiguously"[4197], would be substituted with an assumption.[4198] Korea adds that a key element of a parallelism analysis is to ensure that injury from NAFTA imports is not attributed to non-NAFTA imports, thereby justifying safeguard action based on all imports but imposing safeguard relief only on some imports. The underlying theory of parallelism is that the term "imports" has the same meaning in Article 2.1 and Article 2.2. Therefore, since NAFTA imports should not be considered "imports" for purposes of Article 2.2, imports from NAFTA suppliers should be separately evaluated as a "factor other than increased imports" to ensure that the injurious effects, if any, from NAFTA imports are not improperly attributed to non-NAFTA imports. The United States' position would mean that injury could well be caused by NAFTA imports, but such imports could still be excluded from the measure. A measure could then be applied to repair injury caused by NAFTA imports only against non-NAFTA imports. This would violate the fundamental principle behind parallelism.[4199]

7.1794 Korea also argues that, alternatively, the United States maintains that it was obvious that NAFTA imports were not an "other factor" of injury. It also states that NAFTA imports may be so insignificant that a separate analysis is not necessary.[4200] Yet, Canada and Mexico were very significant suppliers in flat-rolled and welded non-OCTG. In flat-rolled, the USITC noted that Canada and Mexico were among the five largest suppliers[4201] and that Mexico's import increases were greater than all non-Mexican sources[4202] and Mexican AUVs were the lowest of all imports.[4203] In the case of welded non-OCTG, Canada accounted for 35% of all non-OCTG welded pipe imports. "Canada was the top supplier of welded non-OCTG products...for each of the most recent three years...(,)141% greater than (those)...from the second largest source ...".[4204] Mexico was also among the five largest suppliers and significantly undersold United States producers and increased imports by 94% over the period.[4205] Clearly, those NAFTA imports could have caused injury. However, the United States did not conduct an analysis of the Article 4.2 factors including the injurious effects of those imports because it maintains that none is necessary or required.[4206] Neither the facts nor the Agreement on Safeguards support this position. The remaining United States arguments are equally unconvincing. The United States would like to substitute its analysis that NAFTA imports did not constitute a substantial share of imports and did not "contribute importantly" to the injury in the place of the required non-attribution analysis under the Agreement on Safeguards. This analysis may meet

[4194] Appellate Body Report, *US – Line Pipe*, para. 211 (affirming Appellate Body Report, *US – Lamb*, para. 179).
[4195] Appellate Body Report, *US – Line Pipe*, para. 194.
[4196] United States' first written submission, para. 750.
[4197] Appellate Body Report, *US – Line Pipe*, para. 194.
[4198] Korea's second written submission, paras. 210-212.
[4199] Korea's written reply to Panel question No. 30 at the second substantive meeting.
[4200] United States' first written submission, para. 750.
[4201] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4202] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4203] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4204] USITC Report, Vol. I, p. 167 (Exhibit CC-6).
[4205] USITC Report, Vol. I, p. 168 (Exhibit CC-6).
[4206] United States' first written submission, paras. 749 and 769.

the United States law, but it does not satisfy the requirements of Article 4.2 of the Agreement of Safeguards.[4207]

7.1795 Brazil submits that the NAFTA imports have two effects which must be accounted for in the analysis. First, they increase the level of imports and affect the competitive situation between the imports and the domestic like product. Thus, the analysis of the role of imports in causing serious injury to the domestic industry is changed by the exclusion of NAFTA imports and this must be reflected in the analysis of the causal link between imports and serious injury. Second, NAFTA imports may themselves be a cause of the serious injury to the domestic industry. As such, NAFTA imports are a factor other than the imports subject to investigation/remedies that fall under the non-attribution requirement of Article 4.2(b). Unless the analysis is adjusted to reflect both of these effects of excluding NAFTA imports, the parallelism requirement cannot be met.[4208] Brazil also argues that, absent an appropriate non-attribution analysis of non-NAFTA imports, an analysis such as is required under Article 4.2(b) for all other factors, it is impossible to determine whether there is a genuine and substantial link between non-NAFTA imports and serious injury to the domestic industry. The effects of a factor which could, either individually or in combination with other factors, be the predominant cause of serious injury would simply not have been distinguished from the effects of the subject imports.[4209] The United States' contention that it need not conduct a non-attribution analysis treating excluded NAFTA imports as a "factor other than increased imports" under Article 4.2(b) is contrary to the logic underpinning the Appellate Body's holdings in *US – Wheat Gluten* and *US – Line Pipe*. Controlling for the effect of imports from excluded NAFTA sources is part and parcel of this requirement. Thus, increased imports coming from sources that are eventually excluded from the safeguard measure must be treated as an "other" factor in the causation/non-attribution analysis. Imports are a causal factor with respect to the issue of serious injury because they compete with the domestic like product. It would undermine the causation analysis required by the Agreement on Safeguards if a competent authority could render some portion of those imports meaningless simply by excluding certain sources from a measure. It is necessary to control for the causal importance of imports from excluded sources, so as not to attribute injury to subject imports caused by imports from those excluded sources. This is fundamental to the non-attribution requirement. A competent authority cannot ascertain a genuine and substantial causal link unless it separates and distinguishes other causal factors. While it may be true in any given investigation that there is a genuine and substantial relationship of cause and effect between increased imports and serious injury, the relevant issue is different where import sources are excluded. Under such circumstances, it is not enough that the competent authority separates and distinguishes all of the other causal factors other than the subject and excluded imports. If the competent authority does not separate and distinguish the effect of imports from excluded sources, it could potentially sanction a measure against subject imports for which there may not be a genuine and substantial causal link to serious injury.[4210] [4211]

7.1796 Brazil submits that the USITC did not conduct any specific evaluation of non-NAFTA imports. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports

[4207] Korea's second written submission, paras. 213-215.
[4208] Brazil's written reply to Panel question No. 91 at the first substantive meeting.
[4209] Brazil's written reply to Panel question No. 30 at the second substantive meeting.
[4210] The causation standard is affirmatively not just a contributory cause standard. As the Appellate Body has held, there must be a "*genuine and substantial* relationship of cause and effect between increased imports and serious injury." Appellate Body Report, *US – Lamb* at para. 179 (emphasis added), citing Appellate Body Report, *US – Wheat Gluten*.
[4211] Brazil's second written submission, paras. 102-105.

would not change its findings of injury and causation as to total imports.[4212] However, this finding does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury. As such, it does not reflect a proper non-attribution analysis of NAFTA imports. The USITC's analysis of non-NAFTA imports, therefore, did not meet the Appellate Body's standard as set forth in *US – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry.[4213]

7.1797 Similarly, Norway maintains that it is clearly the implication of the statement by the Appellate Body in *US – Line Pipe* that the United States had to perform a separate non-attribution analysis in order to "demonstrate, consistent with our ruling in *US – Wheat Gluten*, that the USITC provided a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources 'satisfied the conditions for the application of a safeguard measure …'".[4214] The United States is, therefore, under an obligation to analyse excluded imports as an alternative cause of injury, and consequently to conduct a non-attribution analysis for such excluded imports, together with any other factors found to be causing injury. As the Appellate Body has stated, the United States must provide a reasoned and adequate explanation which establishes explicitly, in a manner which leaves nothing merely implied or suggested and which is clear and unambiguous that the injury caused by excluded imports is not attributed to non-excluded imports. The United States did not perform this analysis – thus failing to meet this criterion.[4215]

7.1798 The United States insists that it is not required to treat NAFTA imports as an "other" possible cause of injury in its "parallelism" analysis. Such an analysis is not required under Article 4.2 of the Agreement on Safeguards. The second sentence of Article 4.2(b) of the Agreement – which is the provision of the Agreement that requires a competent authority not to attribute to imports the effects of other factors – specifically states that, "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".[4216] Accordingly, the Agreement on Safeguards indicates that a non-attribution analysis is only required for factors "other than imports" that may be causing injury to the domestic industry, even when certain imports are excluded from the remedy. Article 4.2(b), thus, does not require that an authority conduct the same type of analysis with respect to imports from sources not included in the remedy as it does for factors other than imports. The United States submits that, accordingly, as a matter of law, the complainants' arguments have no foundation in the language of the Agreement. Notwithstanding the lack of an explicit requirement in the Agreement on Safeguards, however, the USITC did, in fact, properly isolate the effects of NAFTA from non-NAFTA imports in its parallelism analysis. In particular, the United States expressly separated and distinguished the price and volume effects of

[4212] As noted in Brazil's first written submission, the USITC actually found in several cases that imports from NAFTA countries contributed importantly to the serious injuries of the domestic industry! For example, in the USITC's flat-rolled steel analysis, the USITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports. USITC Report Vol. I at 66. Similarly, in its hot-rolled bar and cold-finished bar analysis, the USITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports. Ibid., at 100, 107.

[4213] Brazil's second written submission, paras. 102-105.

[4214] Appellate Body Report, *US – Line Pipe*, para. 188.

[4215] Norway's second written submission, paras. 198-199.

[4216] Agreement on Safeguards, Article 4.2(b).

non-NAFTA imports from those of NAFTA imports as an integral part of the its parallelism analysis.[4217] [4218]

7.1799 Moreover, insofar as the complainants contend that the USITC attributed to non-NAFTA imports effects due to NAFTA imports, the United States contends that they have misread the USITC Report. These complainants overlook that the USITC, in its analysis of non-NAFTA imports, found a causal link between non-NAFTA imports, viewed alone, and the serious injury experienced by the pertinent domestic industry. Because NAFTA imports were not considered in the USITC's particularized causal link analysis, their effects were already excluded when the USITC found that there was a causal link between the non-NAFTA imports and the serious injury. Further analysing NAFTA imports as an alternate cause of serious injury, as advocated by the European Communities and Korea, would have been redundant and hence was unnecessary.[4219]

7.1800 Japan submits that treating NAFTA imports as "other factor" for the purposes of non-attribution would make it abundantly clear that if a measure is imposed on non-NAFTA imports only, then the injury analysis must likewise be conducted on this basis.[4220] New Zealand argues that the "parallelism requirement" is a broad one and goes well beyond one aspect (namely non-attribution) of one stage (namely, a determination as to causation) of establishing the conditions for the application of a safeguard measure. The Appellate Body made clear that the competent authority must provide "a *reasoned and adequate explanation* that *establishes explicitly*" that the non-excluded imports "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".[4221] The 'conditions for the application of a safeguard measure' include but go well beyond simply establishing causation. For example, a competent authority would also have to establish that the increased imports requirement had been met.[4222]

7.1801 The United States finally reiterates that the USITC's analysis fully satisfies the requirements of Articles 2 and 4 of the Agreement, as articulated by the Appellate Body in *US – Line Pipe*, that an authority establishes explicitly "through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for application of a safeguard measure …"[4223] The USITC found that non-NAFTA imports, considered alone, satisfied the conditions for application of a safeguard measure when it separated and distinguished non-NAFTA imports in its analysis of increased imports and causation, the areas in which distinguishing between imports from different sources was appropriate and necessary, and adopted other pertinent portions of its analysis of all imports that did not change depending on the set of imports examined.[4224]

[4217] United States' first written submission, paras. 451-455 and 769-774; United States' written reply to Panel question No. 95 at the first substantive meeting.

[4218] United States' second written submission, paras. 149-151 and 162.

[4219] United States' second written submission, paras. 162-165.

[4220] Japan's written reply to Panel question No. 30 at the second substantive meeting; Japan's written reply to Panel question No. 91 at the first substantive meeting.

[4221] Appellate Body Report, *US – Line Pipe*, para 188 (emphasis in original).

[4222] New Zealand's written reply to Panel question No. 30 at the second substantive meeting.

[4223] Appellate Body Report, *US – Line Pipe*, para. 198.

[4224] United States' second written submission, para. 166.

4. Product-specific allegations

(a) CCFRS

7.1802 Japan, Brazil and the European Communities submit that the USITC did not conduct any specific evaluation of non-NAFTA imports as required by parallelism. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports would not change its findings of injury and causation as to total imports.[4225] In doing do, it repeated the very same mistakes previously highlighted by the Appellate Body. It is remarkable that the USITC even resorted to its unsupported conclusion that it "would have reached the same result" in justifying the exclusion NAFTA countries from the recommended measure. This was the very same language the Appellate Body found to fail the parallelism requirement in *US – Line Pipe*.[4226] The statement does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury.[4227] Providing a handful of numbers with no meaningful analysis accomplishes little more. The USITC's analysis of non-NAFTA imports, therefore, did not meet the Appellate Body's parallelism standard as set forth in *US – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry. To be explicit, the USITC "must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous".[4228] It accomplished none of this. It failed to establish that non-NAFTA imports alone caused serious injury; its conclusions about the causal link between non-NAFTA imports and serious injury were vague; and it merely implied or suggested why non-NAFTA imports alone caused serious injury. The USITC's analysis therefore did not satisfy the parallelism requirement.[4229]

7.1803 China submits that the USITC Supplementary Report does not evaluate the share of the domestic market taken by non-NAFTA imports, does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. China considers that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] 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' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4230]

7.1804 Korea also argues that a review of the additional investigation demonstrates that the USITC failed to provide a "reasoned and adequate" explanation as required by the Agreement on Safeguards.

[4225] Japan's first written submission, para. 312; Brazil's first written submission, para.231, European Communities first written submission, para. 621. Remarkably, the USITC actually found in several cases that imports from NAFTA countries contributed importantly to the serious injuries of the domestic industry! For example, in the USITC's flat-rolled steel analysis, the USITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports. USITC Report Vol. I at 66 (Exhibit CC-6). Similarly, in its hot-rolled bar and cold-finished bar analysis, the USITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports. Ibid. at 100, 107.

[4226] Appellate Body Report, *US – Line Pipe*, para. 194.

[4227] Ibid., at para. 195.

[4228] Ibid., at para. 194.

[4229] Japan's first written submission, paras. 312-315; Brazil's first written submission, paras. 231-233.

[4230] China's first written submission, paras. 592–594.

With respect to the increase in imports, the USITC argues that there was an increase in non-NAFTA imports absolutely and relatively between 1996 and 2000. It does not demonstrate how such an increase meets the standard of "recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[4231] With respect to serious injury and causation, the USITC's supplemental discussion is narrowly focused upon the price gap between non-NAFTA imports and domestic products and simply asserts, without substantiation, that increased imports from non-NAFTA sources are the substantial cause of serious injury. [4232] The cursory investigation conducted by the USITC for non-NAFTA imports is far from the strict standards established by the Appellate Body in numerous cases involving this issue. More importantly, the USITC fails to explain how it was able to segregate the impact of non-NAFTA imports from NAFTA imports since it also had determined that: Mexico was one of the top five sources of flat-rolled steel; Mexico's import volume increased 26.9% during the 1996-2000 period; Mexico's rate of increase was higher than the rate of increase of non-NAFTA imports; and Mexico's AUV for flat-rolled was consistently below the AUVs of other imports. Korea argues that in spite of these specific findings with respect to the serious injury arising from Mexican imports, the USITC failed to separate that injury arising from NAFTA imports from the injury it attributed to non-NAFTA imports. [4233]

7.1805 Similarly, the European Communities, Japan and Brazil submit with regard to the USITC's analysis of total imports and non-NAFTA imports of flat-rolled steel[4234] that the USITC's initial analysis on import trends found that total imports and Canadian imports increased absolutely as a share of domestic consumption, and that Canadian imports declined but remained a substantial share of total imports.[4235] The analysis of non-Canada flat-rolled steel imports was limited to whether the volume increase and the decline in AUVs were significant.[4236] The USITC did not specifically establish causation between non-NAFTA imports and the domestic industry's serious injury. The general discussion of causation, and the role of alternative causes, never once mentioned the role of non-NAFTA imports as distinguished from all imports.[4237] This was followed by the response to USTR, in which the USITC merely stated that non-NAFTA imports increased absolutely and as a share of domestic production. As for prices, the USITC merely informed USTR that "exclu[sion] of imports from Canada and Mexico from the database does not appreciably change import pricing trends".[4238] The USITC's treatment of injury and causation was even more perfunctory and inadequate. The USITC only noted that "we would have reached the same result had we excluded imports from Canada from our injury analysis".[4239] Yet, the general discussion of causation, and the role of alternative causes, never once mentioned the role of non-NAFTA imports as distinguished from all imports.[4240] No attempt at factual analysis for non-NAFTA imports was ever made. The response to USTR was no better. Again, no factual analysis, only the simple statement that "the same considerations that led us to conclude that increased imports of CCFRS are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of CCFRS from all

[4231] See *Argentina – Footwear (EC)*, para 131.
[4232] Korea's first written submission, paras. 185, 187, 188, 189, 190, 191
[4233] USITC Report, Vol. I, pp. 66-67 (Exhibit CC-6).
[4234] This product category consists of slabs, plate, hot-rolled steel, cold-rolled steel, and coated steel.
[4235] USITC Report, Vol. I, pp. 66-67 footnote 319 (Exhibit CC-6).
[4236] Ibid., pp. 66-67, footnote 319.
[4237] Ibid., pp. 55-65.
[4238] USITC's 4 February Letter at 5 (Exhibit CC-11).
[4239] USITC Report, Vol. I, at 67 footnote 319 (Exhibit CC-6). The USITC found that "imports from Canada did not contribute importantly to the serious injury suffered by the domestic industry." (Ibid., p. 66), and thus implicitly acknowledged some contribution to injury by Canadian imports. The USITC never analysed carefully the extent of Canada's contribution.
[4240] Ibid. at 55-65.

sources other than Canada and Mexico".[4241] The USITC focused on non-NAFTA import volumes and average unit volumes to the exclusion of causation.[4242] [4243]

7.1806 Japan adds that even if one were to accept the USITC statements as accurate, the comparison demonstrates that the USITC's analysis is inadequate, particularly with respect to Canada which the USITC itself identified as "one of the top five suppliers of CCFRS imports during the [period of investigation]".[4244] [4245] The European Communities considers that there is no correct increased imports finding for non-FTA imports and that the USITC failed to acknowledge cumulated imports from FTA sources as "other factor" causing injury and failed to ensure non-attribution.[4246]

7.1807 The United States contends that the USITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the USITC specifically considered all issues relating to imports of CCFRS from non-NAFTA sources. In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports increased at a rate similar to all imports. Non-NAFTA imports of CCFRS increased by 46.8% between 1996 and 1998, and non-NAFTA imports in 2000 were still well above 1996 levels.[4247] The USITC also considered the change in non-NAFTA import volume relative to domestic production. Non-NAFTA imports were equivalent to a higher share of domestic production in 2000 than in 1996.[4248] [4249] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4250], because these are not the relevant criteria.[4251]

7.1808 The United States further argues that in its analysis of non-NAFTA imports, the USITC found that each of the causal link elements was applicable to non-NAFTA imports. The USITC found a moderate to high degree of substitutability between domestically-produced CCFRS and imported CCFRS, and there was little difference between purchaser appraisals of non-NAFTA imports and all imports.[4252] Non-NAFTA imports followed the same volume trends as did all imports. Non-NAFTA imports followed the same pricing trends as did imports from all sources, generally peaking in 1997 and then falling notably in 1998 and 1999.[4253] In fact, non-NAFTA imports actually undersold the domestic products in a greater share of direct quarterly comparisons and by greater margins than did imports from either NAFTA country.[4254] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the

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[4241] USITC's 4 February Letter, p. 5 (Exhibit CC-11).
[4242] Ibid., pp. 5-11.
[4243] Japan's first written submission, paras. 310-311; Brazil's first written submission, para. 229-230.
[4244] USITC Report, p. 66, (Exhibit CC-6).
[4245] Japan's first written submission, para. 309.
[4246] European Communities' first written submission, paras. 622-626; European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).
[4247] USITC Second Supplementary Report, p. 5.
[4248] USITC Second Supplementary Report, p. 5.
[4249] United States' first written submission, paras. 789-791.
[4250] European Communities' first written submission, paras. 622-623.
[4251] United States' first written submission, para. 792.
[4252] USITC Report, p. 58; USITC Memorandum INV-Y-212, pp. 15-19 (US-39).
[4253] USITC Second Supplementary Report, p. 5.
[4254] USITC Report, Table FLAT-77.

serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. In addition, the USITC's analysis of the effects, if any, attributable to other factors that increased imports was also equally applicable to non-NAFTA imports. Thus, the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4255]

7.1809 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4256] Imports from Mexico increased significantly between 1996 and 2000 at a rate that was higher than the rate of increase for total imports (13.7%) as shown in the USITC Report at page 66. Indeed, when total imports increased by 18.4 million tons in 1996 to 20.9 million short tons in 2000 (i.e. an increase of 2.5 million tons or 13.7%), Mexican imports, for their part, increased during the same period by almost 27%. In the same section of the USITC Report, one can also read that average unit values for CCFRS imports from Mexico were consistently below the average unit value for other imports.[4257] However, at no time has the USITC analysed the extent to which those specific characteristics of the Mexican imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Mexican imports), as other factors.[4258]

7.1810 New Zealand submits that the United States' assertion that "reasoned and adequate explanation" is constituted by "the USITC's analysis of non-NAFTA imports, *read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports*"[4259] is nothing more than an acknowledgement by the United States that the USITC Second Supplementary Report fails to provide the necessary adequate and reasoned explanation. The attempt to somehow 'save' this situation with reference to the analysis contained in the USITC Report on all imports fails for the very reason that it simply cannot be assumed that an analysis applicable to "all imports" provides the necessary information required for one relating specifically to non-NAFTA imports. The United States seeks to convert the requirement of parallelism to a less onerous enquiry in which the competent authority merely has to assert that its conclusions would not have changed if the non-FTA imports had been excluded from the determination. However, this *ex post facto* justification of an earlier pre-judgment begs the very question that the Appellate Body sought to underline.[4260] The USITC's belated attempt to satisfy the parallelism requirement in its Second Supplementary Report fell well short of the requirement to "establish explicitly" that the imports covered by the measure satisfy the conditions for the imposition of a safeguard measure. Indeed, in relation to CCFRS, the initial determination of the USITC in relation to NAFTA imports, which concluded that imports from both Canada and Mexico represented a substantial share and imports from Mexico "contributed

[4255] United States' first written submission, paras. 793-804.
[4256] China's second written submission, para. 326.
[4257] Incidentally, this statement can hardly be reconciled with the statement of the USITC Supplementary Report (p. 5) according to which "*excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined*".
[4258] China's second written submission, paras. 326-328.
[4259] United States' first written submission., paras. 789, 796, and 804 (emphasis added).
[4260] New Zealand's second written submission, paras. 3.148-3.149.

importantly" to the injury, casts even further doubt on any claim that imports, minus the increases attributable to NAFTA, could satisfy the requirements of the Agreement on Safeguards.[4261]

(b) Tin mill products

7.1811 The European Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States, for this product, failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4262]

7.1812 Korea argues that the USITC did not conduct any investigation on non-NAFTA imports alone, either in the original investigation or in response to a request of the USTR. Commissioner Miller found that imports of tin mill products from Canada were significant, and had doubled over the period with a higher rate of growth than imports from non-NAFTA countries. She also found that Canada's AUVs declined to their lowest point in 1999, when imports surged.[4263] Commissioner Miller was the only Commissioner to vote affirmatively with respect to injury to the domestic industry from tin mill products. In the first place, there was no basis whatsoever for the imposition of safeguard measures on imports of tin mill products. However having determined that such measures were appropriate, the United States was obliged to provide a reasoned explanation concerning how the serious injury caused by non-NAFTA imports was segregated and identified. The United States was also obliged to establish explicitly that the serious injury suffered by the domestic industry was due to non-NAFTA imports alone. The United States did neither. Thus, the United States is in violation of the parallelism between the scope of investigation and the scope of the measure with respect to tin mill products.[4264]

7.1813 Similarly, Norway notes that, concerning tin mill products, neither the increased imports section nor the serious injury section of the (first) report itself mentions products from these countries specifically. There is also no mention of tin mill products in the Second Supplementary Report. The dissenting Commissioner Miller, who analysed tin mill products separately did, however, make explicit findings with respect to imports from Canada. She found that imports from Canada accounted for a substantial share of total imports and contribute importantly to the serious injury[4265] (and therefore also recommended a tariff on such imports[4266]). Her statement is somewhat ambiguous, as it is connected to a footnote 29 where she – in passing – states "I further note that I would have found imports of tin mill products to be a substantial cause of serious injury had I excluded imports from Canada".[4267] She also states in footnote 28 on the same page that "I note that in my analysis of whether increased imports as a whole are a substantial cause of serious injury, I would have reached the same result had I excluded imports from Mexico". Norway does not consider that these statements of Commissioner Miller, even considering her individually, complies with the

[4261] New Zealand's written reply to Panel question No. 59 at the second substantive meeting.
[4262] China's first written submission, paras. 614-615; European Communities' first written submission, paras. 614-615.
[4263] USITC Report, Vol. I, pp. 309-310 (Exhibit CC-6).
[4264] Korea's first written submission, para. 193-194.
[4265] USITC Report, Vol. I, p. 310 (Exhibit CC-6).
[4266] USITC Report, Vol. I, p. 527 (Exhibit CC-6).
[4267] USITC Report, Vol. I, p. 310 (Exhibit CC-6).

standards set out by the Appellate Body, as there is no finding that products from other sources alone, excluding imports from all the excluded countries, fulfil the requirements of Articles 2.1 and 4. As for the final determinations of the United States for tin mill products, where the President did not follow the recommendations of Commissioner Miller, there is nowhere any particular finding establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards and, thus, no findings the President can rely upon in support of his determination. For this reason, the United States, for this product, has failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4268]

7.1814 The United States asserts that both Commissioner Miller and Commissioner Bragg provided separate analyses of non-NAFTA imports relating to tin mill products. These analyses, read in conjunction with each Commissioner's discussion of other pertinent issues contained in her analysis of all imports, demonstrate that the analyses specifically considered all issues relating to imports from non-NAFTA sources. Commissioner Miller's analysis is found in footnotes 28 and 29 of her separate opinion analysing all tin mill imports. In footnote 28, she observes that tin mill exports from Mexico were minuscule, never exceeding 286 tons in any calendar year.[4269] In footnote 29, she notes that she would have found increased imports of tin mill to be a substantial cause of serious injury if she had excluded imports from Canada.[4270] Given the minuscule volumes of imports from Mexico cited in footnote 28, the analysis Commissioner Miller provides in footnote 29 is clearly applicable when imports from both Canada and Mexico are excluded. Commissioner Miller's footnote was not an ambiguous statement made "in passing", as asserted by Norway.[4271] Instead, it demonstrates that she specifically considered all issues relating to imports of tin mill from imported sources, including increased imports and causal link. In her analysis, Commissioner Miller observed that imports from non-NAFTA sources increased by 22.4% from 1996 to 2000.[4272] The greatest annual percentage increase in non-NAFTA imports occurred between 1998 and 1999, the same year imports from all sources increased by the greatest percentage.[4273] Commissioner Miller's analysis also demonstrated that there were imports "in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic tin mill industry. The nature of that serious injury was discussed in great detail in Commissioner Miller's analysis of all imports. Each of these elements was applicable for non-NAFTA imports as well. Commissioner Miller had observed in her analysis of all imports that purchasers generally considered imported and domestically produced tin mill products to be substitutable.[4274] Because the questionnaire data indicated that non-NAFTA imports were not different from all imports in this respect, there was no need for Commissioner Miller to discuss this factor further in her analysis of non-NAFTA imports.[4275] Commissioner Miller's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Miller's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, also establishes that the she did not attribute to non-NAFTA imports any effects due to factors other than

[4268] Norway's first written submission, paras. 381-386.
[4269] USITC Report, p. 310, footnote 28.
[4270] USITC Report, p. 310, footnote 29.
[4271] Norway's first written submission, para. 392.
[4272] USITC Report, p. 310, footnote 29.
[4273] USITC Report, Table FLAT-C-8.
[4274] USITC Report, p. 307.
[4275] USITC Memorandum INV-Y-209, p. 20 (US-33).

imports. In her consideration of non-NAFTA imports Commissioner Miller did not need to conduct a separate non-attribution analysis for NAFTA imports.[4276]

7.1815 The United States further argues that Commissioner Bragg performed her analysis of non-NAFTA tin mill imports in the context of her like product analysis encompassing CCFRS. Commissioner Bragg first examined the increase in import volume. She found that non-NAFTA imports of carbon and alloy flat products including tin mill increased by 16.2% between 1996 and 2000. The largest single year increase occurred between 1997 and 1998, but an additional increase occurred between 1999 and 2000.[4277] Commissioner Bragg also noted that non-NAFTA imports accounted for a substantial majority of all imports.[4278] Commissioner Bragg demonstrated a genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic industry. The nature of that serious injury was discussed in her analysis of all imports.[4279] In her analysis of all imports, Commissioner Bragg specifically examined several other factors alleged to be the cause of serious injury. Commissioner Bragg rejected each of these factors as a cause of injury. Because Commissioner Bragg's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Agreement on Safeguards, and she rejected the other factors as causes of injury, she was not obliged to discuss these factors further in her analysis of non-NAFTA imports, as she had not attributed any of the serious injury suffered by the domestic industry to any of these other factors.[4280] [4281]

7.1816 China points out that for tin mill products, Commissioner Miller, at page 309, made clear that the quantity of imports from Canada doubled over the period (+ 50%), while the growth rate of imports from non-NAFTA countries increased only by 22.4% over the period. In the same report, Commissioner Miller indicated that the average unit values of imports from Canada declined overall from 1996 to 2000 and were lowest in 1999, when imports generally surged and the United States industry's condition worsened.[4282] However, at no moment, did the USITC analyse the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Canadian imports), as other factors.[4283]

(c) Hot-rolled bar

7.1817 China submits that the USITC Supplementary Report does not evaluate the share of the domestic market taken by non-NAFTA imports, does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. China considers that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] the conditions for the

[4276] United States' first written submission, paras. 807-818.
[4277] USITC Second Supplementary Report, p. 15.
[4278] USITC Second Supplementary Report, p. 17, footnote 87.
[4279] *See* USITC Report, pp. 282-283.
[4280] USITC Second Supplementary Report, p. 17, footnote 87.
[4281] United States' first written submission, paras. 819-823.
[4282] China's second written submission, paras. 324, 229.
[4283] China's second written submission, para. 330.

application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4284]

7.1818 The United States asserts that the USITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the USITC specifically considered all issues relating to imports of hot-rolled bar from non-NAFTA sources, including increased imports and causal link. In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports of hot-rolled bar increased at a greater rate than imports from all sources. Non-NAFTA imports increased by 107.9% from 1996 to 2000, and had major increases from 1997 to 1998 (when they increased by 70.4%) and from 1999 to 2000 (when they increased by 31.2%). In its analysis, the USITC also provided information concerning the annual evolution of non-NAFTA import volumes.[4285] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4286], because, as already argued, these are not the relevant criteria.[4287]

7.1819 The United States further argues that the USITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The USITC determined that through price-based competition increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling. Thus, there were three basic elements of the finding of causal link relating to all imports: (1) price-based competition between imports and the domestically produced product; (2) imports gaining market share at the expense of the domestically produced product; and (3) declining prices. These elements collectively led to the hot-rolled bar industry's declines in production, sales volumes and revenues, and employment, as well as its poor financial performance during the latter portion of the period of investigation. In its analysis of non-NAFTA imports, the USITC found that each of these three causal link elements was applicable for such imports. First, the non-NAFTA imports were even more competitive on price with the domestically-produced product than were all imports, inasmuch as their prices were lower than those for all imports. The USITC found that the non-NAFTA imports undersold the domestically produced product by substantial margins during the principal period it examined in its causal link analysis – 1998 through 2000.[4288] Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the USITC emphasized the domestic industry's loss of market share to imports in 1998 and 2000 and explained why this period was germane to its analysis. In its analysis of non-NAFTA imports, the USITC found that those imports were responsible for most of this loss, as they gained 3.7 of the 4.1 percentage points of market share the domestic industry lost from 1997 to 1998, and gained even more market share than the domestic industry lost from 1999 to 2000.[4289] Third, the USITC found that the value of the non-NAFTA imports fell by an even greater proportion during the period of investigation than did imports from all sources.[4290] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a

[4284] China's first written submission, paras. 595–597.
[4285] USITC Second Supplementary Report, p. 5.
[4286] European Communities' first written submission, paras. 622-623.
[4287] United States' first written submission, paras. 825-827.
[4288] USITC Second Supplementary Report, p. 6.
[4289] USITC Second Supplementary Report, p. 6; USITC Report, Table LONG-C-3.
[4290] USITC Second Supplementary Report, p. 6.

genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4291] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.[4292]

7.1820 The United States finally argues that in its analysis of all imports the USITC examined four factors other than increased imports alleged to be causes of serious injury to the domestic hot-rolled bar industry. It found that three of the four other factors (intra-industry competition, "inefficient" domestic producers, and changes in demand) did not cause the injury it observed. The fourth factor, relating to the domestic industry's input costs, related exclusively to domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports.[4293]

7.1821 In response to the Panel's question about how the USITC conducted a causation analysis that isolated the effects of non-NAFTA imports from those of NAFTA imports, the United States responds, taking hot-rolled bar as an example, that the USITC's methodology for isolating the effects of non-NAFTA imports encompassed several steps. First, in its analysis of non-NAFTA imports, the USITC distinguished import volumes from non-NAFTA sources from import volumes from Canada and Mexico. Thus, for hot-rolled bar, the USITC specifically discussed the volume of imports from non-NAFTA sources, the rate of increase of that volume, and the ratio of that volume to United States production.[4294] Second, in its analysis of all imports, the USITC made findings concerning the conditions of competition in the pertinent domestic industry. These findings were not related to either the characteristics or the data relating to imports from specific countries, so no further isolation of imports from particular sources was necessary. Third, the USITC made findings, in its analysis of all imports, concerning the condition of the pertinent domestic industry. This analysis did not concern *why* the industry was seriously injured, but *whether* it was seriously injured. Consequently, no further isolation or discussion was necessary for the non-NAFTA imports. Fourth, the USITC conducted a particularized causation analysis for the non-NAFTA imports. The USITC's causation analysis for all imports for each of the pertinent products reflected findings concerning five factors. These were: (1) import volume patterns; (2) the conditions of competition; (3) the domestic industry's condition; (4) import volume and pricing patterns; and (5) other alleged causes of serious injury. For each product, the USITC analysed the particularized data for non-NAFTA import volume and non-NAFTA import pricing. Thus, for hot-rolled bar, the USITC found that average unit values of non-NAFTA imports declined from 1996 to 2000 and that this decline was greater than that for imports from all sources. It engaged in a particularized examination of pricing data for 1998 and the first half of 2000. These periods were of particular significance to its causation analysis because they were periods when both non-NAFTA imports and all imports surged and the domestic industry lost market share. The USITC found that during these periods the non-NAFTA imports undersold domestically produced hot-rolled bar by substantial margins. Consequently, based on its analysis of the particularized non-NAFTA import data, the USITC concluded that the same considerations that supported a finding of causal link for all imports – namely, that through price-based competition increased imports caused the domestic industry to lose market share while prices were falling – supported a finding of causal link for non-

[4291] European Communities' first written submission, para. 625; China raises a similar objection. China's first written submission, para. 595.
[4292] United States' first written submission, paras. 828-833.
[4293] United States' first written submission, para. 834.
[4294] USITC Second Supplementary Report, pp. 5-6.

NAFTA imports.[4295] Again, by considering only non-NAFTA imports, the USITC isolated the volume and pricing effects of non-NAFTA imports from those for the NAFTA imports. An isolation analysis was not necessary with respect to conditions of competition or the condition of the domestic industry. An isolation analysis also was not necessary for the other alleged causes of serious injury. For example, with respect to hot-rolled bar, three of the four alleged other causes were not in fact causes of serious injury and the fourth (relating to changes in the domestic industry's input costs) pertained exclusively to domestic industry data.[4296] Consequently, the USITC conducted a causation analysis that isolated for non-NAFTA imports those factors it needed to isolate, and incorporated from the all imports analysis those factors that were unchanged regardless of which imports were analysed. Based on these factors, it explained why its conclusions on causation for all imports were also applicable to non-NAFTA imports viewed in isolation.[4297]

7.1822 The European Communities notes that the United States justifies its "increased imports" finding by reference to the USITC Second Supplementary Report. However, the "increased imports" finding of 22 October 2001 is clearly based on import data from all countries.[4298] So is the relevant Commission determination.[4299] The USITC approach underlying the determinations of 22 October 2001 reflects that followed in the United States measures at issue in *US – Line Pipe*, and analysed by the Appellate Body who held that the USITC made "no reference to product origin. The USITC considered 'imports from *all sources* in determining whether imports have increased' and relied on data corresponding to total imports".[4300] In the present case, and in respect of hot-rolled bar the USITC expressly concluded that "our affirmative determination [that is "increased imports" and "serious injury" and "causation"] for hot-rolled bar encompasses imports from Canada".[4301] The European Communities submits that three irrelevant determinations in the USITC Report do not however make one relevant one. In other words, the fact that, in addition to the increased imports and serious injury findings based on imports from all sources, the USITC made separate determinations on imports from Canada[4302] and Mexico[4303] respectively, does not change the content of the first one and does not turn it into an "all imports minus Canada and/or Mexico" one. Nor does the fact that the Commission *determination* on hot-rolled bar on p. 18 of the USITC Report's Vol. I is followed by two determinations on Canada and Mexico respectively[4304] means that the first is turned into a determination on "all imports minus Canada and/or Mexico". The Appellate Body has already rejected this type of "shortcut" in *US – Line Pipe*.[4305]

7.1823 The European Communities submits that the USITC failed to separate and distinguish the impact of excluded imports and not attribute them to the imports covered by the measures. With regard to hot-rolled bar, Canada and Mexico respectively represented the first and the third or fourth

[4295] USITC Second Supplementary Report, p. 6.
[4296] United States' first written submission, para. 834.
[4297] United States' written reply to Panel question No. 95 at the first substantive meeting.
[4298] USITC Report, Vol. I, p. 92, referring to Volume II, p. LONG 9, TABLE LONG-5. The import data referred to on p. 92 are taken from the "all imports" rows. Specifically, imports from Canada were found by the USITC to "account for a substantial share of total imports" (USITC Report, Vol. I, p. 100). Indeed, according to USITC data Canada supplied 46.0% of the quantity of all imports in 1998, 50.6% in 1999 and 45.6% in 2000 (USITC Report, Vol. I, p. 100, referring to USITC Report, Vol. II, Table LONG 5).
[4299] USITC Report, Vol. I, p. 18.
[4300] Appellate Body Report, *US – Line Pipe*, para. 186.
[4301] USITC Report, Vol. I, p. 100
[4302] USITC Report, Vol. I, p. 100.
[4303] USITC Report, Vol. I, pp. 100-101.
[4304] USITC Report, Vol. I, p. 18, column 2 from the left of the "Carbon & Alloy Long Products" column, rows 8 to 10 of the column respectively.
[4305] European Communities' second written submission, paras. 445-448.

supplying country in the most recent three years considered.[4306] They also contributed one third of the increase in imports over the period 1996-2000. Thus, it simply cannot be that the their exclusion made no difference to the causation finding. Assuming that imports caused injury, it is far from clear that a finding of a genuine and substantial causal link could be made once the injurious effects of Canadian and Mexican imports have been subjected to a non-attribution analysis. At the very least the United States authorities should have explained why the exclusion of certain imports from the increased imports base did not change at all the result.[4307]

7.1824 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4308] As it appears from the USITC Report at page 92 *et seq.*, the situation of the United States industry worsened in 1999 in terms of domestic production and increased capacity. At page 97 of the same Report, it is said that in 1999 domestic producers restricted their loss of market share to three-tenths of a percentage point. On page 92, the USITC Report indicates that imports from all sources increased slightly from 1998 to 1999, by 1%, while, at the same time, imports from Canada alone increased by almost 5%. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Canadian imports), as other factors.[4309]

(d) Cold-finished bar

7.1825 China submits that the USITC Supplementary Report merely contains an indication of loss of revenues for the United States domestic industry. It does not evaluate the share of the domestic market taken by non-NAFTA imports, it does not contain specific elements regarding the injury to the US industry caused by non-NAFTA imports, it does not evaluate other factors relevant to the situation of the industry concerned, it does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors and it does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. The European Communities considers that there is no correct increased imports finding for non-FTA imports and that the USITC failed to acknowledge cumulated imports from FTA sources as "other factor" causing injury and failed to ensure non-attribution.[4310] On the basis of the foregoing, the European Communities and China considers that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] 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' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4311]

[4306] USITC Report, Vol. I, p. 100.
[4307] European Communities' second written submission, paras. 483-484.
[4308] China's second written submission, para. 326.
[4309] China's second written submission, paras. 331-332.
[4310] European Communities' first written submission, paras. 622-626; European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).
[4311] China's first written submission, paras. 598–600.

7.1826 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic cold-finished bar industry. This analysis, according to the United States, satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4312] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports of cold-finished bar increased at a greater rate than did imports from all sources both from 1999 to 2000 and over the entire period examined. Non-NAFTA imports increased by 51.0% from 1999 to 2000, the year that imports from all sources increased most sharply. In its analysis, the USITC also provided information concerning the annual evolution of non-NAFTA import volumes.[4313] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4314], because these are not the relevant criteria. The USITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The USITC determined that aggressive pricing by the imports during the latter portion of the period of investigation caused the domestic industry to lose market share and revenues. This resulted in serious injury, most particularly the industry's poor performance in 2000. The USITC found that each of two causal link elements that were applicable for all imports – aggressive pricing and increased market share – were also applicable for non-NAFTA imports. Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4315] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports. In its analysis of all imports the USITC examined two factors other than increased imports alleged to be causes of serious injury to the domestic cold-finished bar industry. It found that one of these factors (the performance of domestic producer RTI) did not cause the injury it observed. The USITC satisfied its obligation to perform a non-attribution analysis of the other factor, demand patterns, by focusing on domestic industry data for 2000, a year in which demand for cold-finished bar increased. Thus the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. In its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4316]

7.1827 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4317] At page 107 of the USITC Report, it is said that the quantity of imports from Canada from 1998 to 2000 was 63.7% greater than the quantity of all imports from the second largest source, and Canada accounted for at least 25.5% of the quantity of all imports during each year in this period. The USITC Report also says at page 107 that Canada was the top supplier of cold-finished bar to the United States for each of the last three years in the period

[4312] United States' first written submission, para. 847.
[4313] USITC Second Supplementary Report, pp. 6-7.
[4314] European Communities' first written submission, paras. 622-623.
[4315] European Communities' first written submission, para. 625. China raises a similar objection, *see* China's first written submission, para. 598.
[4316] United States' first written submission, paras. 838-846.
[4317] China's second written submission, para. 326.

examined. At the same time, the USITC Report at page 105 indicates that the record indicates that price is an important factor in purchasing decisions for cold-finished bar. Purchasers listed price second most-frequently, after quality, as the top factor in purchasing decisions, and listed price most frequently as the number two factor. Most purchasers evaluated the imports and domestically-produced cold-finished bar as comparable with respect to product consistency and product quality. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports (in this particular case, Canadian imports), as other factors.[4318]

(e) Rebar

7.1828 The European Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States for this product failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4319]

7.1829 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic rebar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4320] The European Communities and China overlook footnote 704 of the USITC's analysis of all imports, which provides a detailed analysis of non-NAFTA rebar imports. In that footnote, the USITC expressly found that "the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated".[4321] The meaning of this sentence is unambiguous: it is an USITC finding that increased imports from non-NAFTA sources caused serious injury to the United States rebar industry. Moreover, the USITC expressly incorporated into its analysis of non-NAFTA imports the pertinent portions of its analysis for all imports. Because the USITC expressly made this finding in its analysis of imports from all sources, there was no need for the Trade Representative to request the USITC to make supplemental findings on this issue. In its analysis of non-NAFTA imports, the USITC emphasized that non-NAFTA imports of rebar increased by 434.8% from 1996 to 2000, by 183.5% from 1997 to 1998, and by 50.2% from 1998 to 1999. Each of these increases was greater than that for all imports for the applicable time period. In its analysis, the USITC also provided information concerning the annual evolution of non-NAFTA import volumes.[4322] The USITC's analysis also demonstrated that there were imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic rebar industry. The nature of that serious

[4318] China's second written submission, paras. 333-334.
[4319] China's first written submission, paras. 601-602; European Communities' first written submission, paras. 614-615.
[4320] United States' first written submission, para. 859.
[4321] USITC Report, p. 116, footnote 704.
[4322] USITC Report, p. 116, footnote 704.

injury was discussed in great detail in the USITC's analysis of all imports. The USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, therefore, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports. The USITC's report also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4323]

(f) Welded pipe

7.1830 Switzerland considers that the United States has failed to fulfil its obligation of parallelism provided by Articles 2.1 and 4.2 of the Agreement on Safeguards. More particularly, China submits that the USITC Supplementary Report does not evaluate the share of the domestic market taken by non-NAFTA imports, does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. China and Switzerland consider that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] 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' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4324]

7.1831 The European Communities submits that the USITC failed to carry out a proper increased imports and causation analysis for non-FTA imports. In particular, the USITC failed to separate and distinguish the impact of excluded imports and to ensure that these are not attributed to the imports covered by the safeguard measure. The import data in the USITC Report reveals that the shares of NAFTA imports in total imports were significant, reaching up to 50% in the case of certain tubular products.[4325] [4326]

7.1832 Korea submits that the USITC's supplementary discussion of threat of serious injury from non-NAFTA imports with respect to other welded pipe was perfunctory and far from complying with the standard set by the Appellate Body in previous safeguard cases. The additional information of the USITC narrowly focuses on the price gap between non-NAFTA imports and domestic products. Then, the USITC states conclusively that "excluding Canada and Mexico from the data base does not appreciably alter projections for foreign production, capacity, and exports to the United States. Indeed, capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002".[4327] This conclusive statement was made

[4323] United States' first written submission, paras. 848-858.

[4324] China's first written submission, paras. 603–605; Switzerland's first written submission, paras. 356-357.

[4325] USITC Report, Vol. II, Table TUBULAR-6.

[4326] European Communities' first written submission, paras. 622-627. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).

[4327] USITC Response to USTR Request For Additional Information, (Questions 1 and 3) (4 February 2002), p.10 (Exhibit CC-11).

without any substantiation other than a footnote to a few tables in the USITC Report. Moreover, the tables do not support conclusions for which they are cited by the USITC. For example, the USITC asserted that the non-NAFTA capacity is projected to reach a new peak during the period 2001-2002. The analysis of the tables cited by the USITC shows that the non-NAFTA capacity stood at 17,383,373 tons in 1998 and 17,064,937 tons in 1999, while, according to the USITC table, it was projected to drop to 16,988,276 tons in 2001 and 17,074,446 tons in 2002, respectively.[4328] The perfunctory discussion of the impact of non-NAFTA imports is far from the Appellate Body's stated requirements of a "reasoned and adequate explanation" of how the facts support their injury determination by conducting a substantive evaluation of the "bearing", or the "influence" or "effect" or "impact" that the relevant factors have on the situation of the domestic industry.[4329] More importantly, the USITC failed to even acknowledge, much less explain, how it segregated the threat of injury it had determined to be caused by the largest single supplier to the United States market–*i.e.*, Canada–from all other imports. According to the USITC: Canada was the largest single supplier for the three most recent years; the quantity of imports from Canada between 1999-2000 was 141% greater than the quantity from the second largest supplier; between 1998-2000, Canada accounted for at least 35% of the imports; and imports from Canada increased their market share from 10.8% in 1999 to 14.2% in 2000.[4330] Korea concludes that the USITC clearly did not segregate the threat caused by imports from Canada from the threat caused by non-NAFTA imports. Therefore, the USITC failed to provide "reasoned and adequate explanation" that establishes explicitly that non-NAFTA imports, by themselves, satisfy 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.[4331] [4332]

7.1833 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries threatened to cause serious injury to the domestic industry producing welded pipe. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4333] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports increased by 80.7% from 1996 to 2000, and had major increases of 20-30% in every year of the period examined except 1999.[4334] Non-NAFTA imports of welded pipe increased at a greater rate than imports from all sources.[4335] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4336], because, as already argued, these are not the relevant criteria. USITC's analysis of all imports also described the causal link between all imports and the threat of serious injury in considerable detail. The USITC determined that, through price-based competition, increased imports caused domestic producers of welded pipe to lose market share at the same time prices were falling. The USITC also determined that increases in exports to the United States market resulting from increases in foreign capacity would continue unabated in the imminent future. These elements collectively led to the domestic industry's continuing declines in production, sales volumes and revenues, and

[4328] USITC Response to USTR Request For Additional Information, (Questions 1 and 3) (4 February 2002), p.10 (Exhibit CC-11).

[4329] Appellate Body Report, *US – Lamb*, paras. 103 and 104 (emphasis in original).

[4330] USITC Report, Vol. I, pp. 166-167 (Exhibit CC-6).

[4331] Appellate body Report, *US – Lamb*, para. 103; Appellate Body Report, *US – Wheat Gluten*, para. 98.

[4332] Korea's first written submission, paras. 195-199.

[4333] United States' first written submission, para. 871.

[4334] USITC Second Supplementary Report, p. 10.

[4335] USITC Report, Table TUBULAR-C-4.

[4336] European Communities' first written submission, paras. 622-623.

employment, as well as declines in its performance during the period of investigation, and would likely continue to cause serious injury to the domestic industry in the imminent future, if these trends continued unabated. In its analysis of non-NAFTA imports, the USITC found that each of these three causal link elements was applicable for such imports. First, the non-NAFTA imports undersold the domestically produced product in all but one quarter (32 of 33 quarters) for which data were available, and the prices for such imports declined over the period examined including during the most recent quarters.[4337] The value of the non-NAFTA imports fell by an even greater amount during the period of investigation than did imports from all sources.[4338] Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the USITC emphasized the domestic industry's loss of market share to imports, particularly between 1999 and 2000. In its analysis of non-NAFTA imports, the USITC found that market share for non-NAFTA imports increased from 13.1% in 1996 to 19.8% in 2000.[4339] Non-NAFTA imports gained 6.7 of the 10.5 percentage points of market share the domestic industry lost from 1996 to 2000.[4340] Third, the USITC found that foreign capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002, and thus projections regarding these factors for all imports were not appreciably altered by considering only non-NAFTA imports.[4341] In its analysis of all imports the USITC examined three factors other than increased imports alleged to be causes of the threat of serious injury to the domestic welded pipe industry. It found that these other factors (changes in demand, increased domestic capacity, and non-import difficulties of a particular producer) did not cause the injury it observed. Because the USITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Agreement on Safeguards, and its conclusions were not based upon the particular set of imports it examined, the USITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports.[4342]

7.1834 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4343] It is stated at page 167 of the USITC Report that Canada was the top supplier of welded non-OCTG products to the United States for each of the most recent three years in the period examined. The Report then goes on to state that the quantity of imports from Canada from 1998 to 2000 was 141% greater than the quantity of imports from the second largest source during this three-year period. From 1998 to 2000, Canada also accounted for at least 35% of the quantity of all imports during each year in this period. In addition, imports from Canada increased their market share by value from 10.8% in 1999 to 14.2% in 2000. At the same time, it is worth noting that certain United States producers are integrated with Canadian producers and that no domestic producer of welded pipe products took a position regarding NAFTA exclusions during the injury phase of the investigation. Furthermore, at page 167, it is evident that Mexico was among the top five suppliers of welded non-OCTG products to the United States in each of the most recent three years in the period examined. Mexico was also the fourth largest supplier each year during 1998-2000 and the quantity of imports from Mexico increased by 94.7% from 1996 to 2000. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian and Mexican imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used

[4337] USITC Second Supplementary Report, p. 10.
[4338] USITC Report, Table TUBULAR-C-4.
[4339] USITC Second Supplementary Report, p. 10; USITC Report, Table TUBULAR-C-4.
[4340] USITC Report, Table TUBULAR-C-4.
[4341] USITC Second Supplementary Report, p. 10; USITC Report, Tables TUBULAR-30-32.
[4342] United States' first written submission, paras. 861-870.
[4343] China's second written submission, para. 326.

by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports, as other factors.[4344]

(g) FFTJ

7.1835 China submits that the USITC supplemental finding on non-NAFTA import prices does not evaluate the share of the domestic market taken by non-NAFTA imports, it does not contain specific elements regarding the injury to the US industry caused by non-NAFTA imports, it does not evaluate other factors relevant to the situation of the industry concerned, it does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and it does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. The European Communities submits that the USITC failed to carry out a proper increased imports and causation analysis for non-FTA imports. In particular, the USITC failed to separate and distinguish the impact of excluded imports and to ensure that these are not attributed to the imports covered by the safeguard measure. The European Communities and China consider that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] 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' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4345]

7.1836 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic FFTJ industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4346] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports of FFTJ increased during the period of investigation. Non-NAFTA imports increased from 76,079 short tons in 1996 to 100,592 short tons in 2000; there were annual increases during each year of the period of investigation except 1997. The ratio of non-NAFTA imports to United States production also increased during each year of the period of investigation except 1997, rising from 37.1% in 1996 to 51.8% in 2000.[4347] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4348], because these are not the relevant criteria. The USITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The USITC emphasized that the increasing presence of imports in the United States market from 1997 to 2000 coincided with declines in the domestic industry's sales, production, capacity utilization, employment, and profitability. The USITC also emphasized that, for the butt-weld pipe fitting product for which it collected pricing data, imports

[4344] China's second written submission, paras. 335-336.

[4345] China's first written submission, paras. 606–608; European Communities' first written submission, paras. 622-626; European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).

[4346] United States' first written submission, para. 883.

[4347] USITC Second Supplementary Report, p. 8. The USITC also found that non-NAFTA import volume, both on an absolute basis and relative to United States production, was higher in interim 2001 than in interim 2000. Ibid.

[4348] European Communities' first written submission, paras. 622-623.

consistently undersold the domestically produced product, with the highest margins of underselling occurring at the conclusion of the period of investigation. In its analysis of non-NAFTA imports, the USITC found that the first of the three causal link elements on which it relied in its analysis of all imports – increasing import presence in the United States market – was applicable for non-NAFTA imports. The USITC specifically noted the increases in market share for non-NAFTA imports during its period of investigation. Indeed, non-NAFTA imports were responsible for 7.7 of the 8.8 percentage points of market share the domestic industry lost between 1997 and 2000.[4349] The second element in the USITC's analysis of causal link for all imports focused on domestic industry performance data. Because these data did not change depending on which imports were being examined, there was no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports. The third element of the causal link analysis – underselling – was also applicable to non-NAFTA imports, as the USITC found. Non-NAFTA imports undersold domestically-produced products by margins in excess of 20% for every quarter in the period of investigation after the third quarter of 1999.[4350] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4351] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports. In its analysis of all imports, the USITC examined five factors other than increased imports alleged to be causes of serious injury to the domestic FFTJ industry. It found that four of the five other factors (demand for oil and gas related products, increased capacity, industry inefficiency, and worker shortages) did not cause the injury it observed. Its analysis of the remaining factor, relating to purchaser consolidation, focused exclusively on domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports.[4352]

7.1837 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4353] As stated in the USITC Report at page 179, Canada was the third largest supplier of FFTJ in each of the three recent years and thus was among the top five suppliers. The USITC Report also indicates that imports from Canada have accounted for an increasing share of total imports. Since 1998, imports from Canada have increased more than twice as fast (39.4%) as imports from all sources (15.6%) and Canada has accounted for 24.8% of the total increase in imports from all sources since 1998. At the same time, Mexico has been one of the top five suppliers of the product concerned and that imports had surged to an exceptionally high level in 1998 (46% higher than the next highest year during 1996-2000). At the same time (Page 172 of the USITC Report), it is indicated that in 1998 the domestic industry experienced several plant closures, and idle fitting and flange capacity. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian and Mexican imports could have a specific impact on the injury caused to the United States industry, different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it

[4349] USITC Second Supplementary Report, p. 8; USITC Report, Table TUBULAR-C-6.

[4350] USITC Second Supplementary Report, p. 8; USITC Report, Table TUBULAR-61. The USITC also made this finding in its analysis of all imports. USITC Report, p. 176.

[4351] European Communities' first written submission, para. 625; China raises a similar objection. China's first written submission, para. 606.

[4352] United States' first written submission, paras. 873-882

[4353] China's second written submission, para. 326.

from establishing that the USITC did not attribute to non-NAFTA imports any effects due to NAFTA imports, as other factors.[4354]

(h) Stainless steel bar

7.1838 China submits that the USITC Supplementary Report does not evaluate other factors relevant to the situation of the industry concerned, does not make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and does not indicate explicitly whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements. The European Communities submits that the USITC failed to carry out a proper increased imports and causation analysis for non-FTA imports. In particular, the USITC failed to separate and distinguish the impact of excluded imports and to ensure that these are not attributed to the imports covered by the safeguard measure. The European Communities and China consider that the USITC Supplementary Report for this product "does not establish explicitly that imports from sources covered by the measure 'satisf[y] 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' [and] does not amount to a 'reasoned and adequate explanation of how the facts support [the] determination'", in accordance with the Appellate Body's interpretation.[4355]

7.1839 The United States asserts that the USITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic stainless steel bar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4356] In its analysis of non-NAFTA imports, the USITC found that non-NAFTA imports increased by 61.1% from 1996 to 2000, and while the quantity of such imports fluctuated somewhat during the period of investigation, the largest single increase occurred from 1999 to 2000 (when they increased by 42.1%).[4357] Non-NAFTA imports of stainless steel bar increased at a greater rate than imports from all sources from 1996 to 2000 and from 1999 to 2000.[4358] Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The European Communities is also wrong to criticize the USITC for failing to find that the increase was "recent, sudden, sharp, and significant", and for failing to use full-year 2001 data[4359], because these are not the relevant criteria. The analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The USITC determined that, through price-based competition, increased imports caused domestic stainless steel bar producers to lose market share, particularly in the latter half of the period of investigation. Thus, the basic elements of the finding of causal link relating to all imports were: (1) price-based competition between imports and the like product; and (2) imports gaining market share at the expense of the domestically produced product. These elements collectively led to the stainless steel bar industry's declines in production, sales volumes and revenues, and employment, as well as its poor financial performance. In its analysis of non-NAFTA imports, the USITC found that each of the causal link elements was applicable for such imports. First, the non-NAFTA imports were even more

[4354] China's second written submission, paras. 337-338.

[4355] China's first written submission, paras. 609–611; European Communities' first written submission, paras. 622-626 and European Communities' second written submission, paras. 478-483. The detailed arguments are set out in the product-specific section on non-attribution (H.3(b)).

[4356] United States' first written submission, para. 894.

[4357] USITC Second Supplementary Report, pp. 8-9.

[4358] USITC Report, Table STAINLESS-C-4.

[4359] European Communities' first written submission, paras. 622-623.

competitive on price with the domestically-produced product than were all imports, inasmuch as the percentage of price comparisons in which underselling occurred during the period was greater for non-NAFTA imports than for all imports. The USITC found that the non-NAFTA imports undersold the domestically produced product by margins of up to 51%.[4360] The average unit values of the non-NAFTA imports fell by an even greater amount during the period of investigation than did imports from all sources.[4361] Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the USITC emphasized the domestic industry's loss of market share to imports. In its analysis of non-NAFTA imports, the USITC found that those imports were responsible for all of this loss, as they gained all 11 percentage points of market share the domestic industry lost from 1996 to 2000.[4362] Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The USITC did not reach this conclusion by "jump[ing] into some generalizations", as alleged by the European Communities.[4363] Instead, the USITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

7.1840 The United States further argues that the USITC examined three factors other than increased imports alleged to be causes of serious injury to the domestic stainless steel bar industry. It found that these other factors (changes in demand during late 2000 and 2001, increases in energy costs, and the poor operating results of two producers during the period) did not cause the injury it observed. Because the USITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Agreement on Safeguards, and its conclusions were not based upon the particular set of imports it examined, the USITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports. Moreover, the third factor, relating to two producers' performance, related exclusively to domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss this factor further in its analysis of non-NAFTA imports. Thus, the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4364]

7.1841 China argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4365] As indicated in the USITC Report, Canada was one of the five largest suppliers of stainless steel bar during the last three full years of the period of investigation. The Report further states that Canada's growth rate in interim 2001 was 20.4% while the growth rate for all imports was a negative 17.1%. The USITC Report also notes that imports of Canadian stainless steel bar undersold domestic merchandise in seven out of ten possible price comparisons. However, at no time has the USITC analysed the extent to which those specific characteristics of the Canadian imports could have a specific impact on the injury caused to the United States industry,

[4360] USITC Second Supplementary Report, p. 9.
[4361] USITC Report, Table STAINLESS-C-4.
[4362] USITC Second Supplementary Report, p. 9; USITC Report, Table STAINLESS-C-4.
[4363] European Communities' first written submission, para. 625. China raises a similar objection. China's first written submission, para. 609.
[4364] United States' first written submission, paras. 885–893.
[4365] China's second written submission, para. 326.

different from the one attributable to non-NAFTA imports. Accordingly, China considers that the methodology used by the United States prevented it from establishing that the USITC did not attribute to non-NAFTA imports (in this particular case, Canada) any effects due to NAFTA imports, as other factors.[4366]

(i) Stainless steel wire

7.1842 The Europoean Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States, for this product, failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4367]

7.1843 The United States asserts that the European Communities is incorrect in complaining that the USITC did not make a finding that non-NAFTA imports of stainless steel wire fulfilled the necessary conditions for applying a safeguard measure.[4368] Both Chairman Koplan and Commissioner Bragg provided separate analyses of non-NAFTA imports relating to stainless steel wire. These analyses, read in conjunction with each Commissioner's discussion of other pertinent issues contained in his or her analysis of all imports, demonstrate that the analyses specifically considered all issues relating to imports from non-NAFTA sources. In his analysis of non-NAFTA imports, Chairman Koplan found that Canada and Mexico together accounted for a small and declining share of apparent domestic consumption over the period of investigation, while non-NAFTA imports accounted for an increasing share, with a particularly notable increase occurring between the interim periods.[4369] These were the same import volume trends he had identified in his analysis of all imports.[4370] Chairman Koplan thus found that the conclusions he had made concerning the effects of increased imports were equally applicable for non-NAFTA imports.[4371] Consequently, China's argument that the USITC Report provided no particular findings establishing serious injury by non-NAFTA imports is wrong.[4372] Chairman Koplan provided the necessary analysis by demonstrating an increase in non-NAFTA imports in the latter portion of the period and by further demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury which threatened the domestic stainless steel wire industry. The nature of that threat of serious injury was discussed in great detail in Chairman Koplan's analysis of all imports. Chairman Koplan's analysis of all imports described the causal link between all imports and the threat of serious injury in some detail. Chairman Koplan established a direct correlation between the significant increase in the market share of all imports in interim 2001 and the substantial decline in the industry's condition in that period.[4373] In his analysis of non-NAFTA imports, Chairman Koplan found this causal link was applicable to non-NAFTA imports. Chairman Koplan specifically found that imports from Canada and Mexico did not account for substantial shares of all imports during the period of investigation. He further specifically found

[4366] China's second written submission, paras. 339-340.
[4367] China's first written submission, paras. 616-617; European Communities' first written submission, paras. 614-615.
[4368] European Communities' first written submission, para. 614; China makes a similar objection. China's first written submission, para. 616.
[4369] USITC Report, p. 260, footnote 36.
[4370] USITC Report, p. 259.
[4371] USITC Report, p. 260, footnote 36.
[4372] China's first written submission, paras. 616-617.
[4373] USITC Report, p. 258-259.

that non-NAFTA imports increased late in the period, with a particularly notable increase occurring between the interim periods, at the time the domestic industry's performance deteriorated.[4374] Chairman Koplan specifically found that non-NAFTA imports gained market share at the expense of the domestic industry. In his analysis of all imports, Chairman Koplan emphasized the loss of market share late in the period of investigation. In his analysis of non-NAFTA imports, Chairman Koplan found that non-NAFTA imports were responsible for this loss.[4375] Consequently, Chairman Koplan's analysis of non-NAFTA imports, when read in conjunction with his analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Chairman Koplan examined the decline in demand as a factor other than increased imports alleged to be a cause of the threat of serious injury facing the domestic stainless steel wire industry. Chairman Koplan found, however, that the declines in the domestic industry's production and shipments were greater than the total decline in apparent domestic consumption, and the volume of imports increased despite the decline in demand.[4376] Non-NAFTA imports accounted for all of that increase. Therefore, Chairman Koplan was not obliged to discuss this factor further in his analysis of non-NAFTA imports. Thus, Chairman Koplan's analysis of non-NAFTA imports, when read in conjunction with his analysis of all imports, also establishes that he did not attribute to non-NAFTA imports any effects due to factors other than imports. In his consideration of non-NAFTA imports Chairman Koplan did not need to conduct a separate non-attribution analysis for NAFTA imports.[4377]

7.1844 The United States further argues that Commissioner Bragg performed her analysis of non-NAFTA stainless steel wire imports in the context of her like product encompassing stainless steel wire and stainless steel wire rope. Commissioner Bragg found that non-NAFTA imports increased significantly, both in terms of import levels and trends. Commissioner Bragg found that non-NAFTA imports increased by 35.2% between 1996 and 2000. She further found that non-NAFTA imports accounted for a larger share of the domestic market in 2000 than in 1996, and that their market share was larger in interim 2001 than in interim 2000. By interim 2001 non-NAFTA imports accounted for 31.1% of the United States market.[4378] Commissioner Bragg's analysis also demonstrated that there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the threat of serious injury facing the domestic stainless steel wire products industry. The nature of that threat was discussed in detail in Commissioner Bragg's analysis of all imports. Commissioner Bragg's analysis of all imports also described the causal link between all imports and the threat of serious injury in considerable detail. Commissioner Bragg found that increased imports at declining prices prevented domestic producers from taking advantage of increased consumption and threatened the domestic industry with serious injury.[4379] Commissioner Bragg found that this analysis was applicable for non-NAFTA imports as well. She found that prices for non-NAFTA imports declined between 1996 and 2000, and non-NAFTA imports undersold domestic products in the majority of quarterly comparisons. She also emphasized that non-NAFTA imports took market share away from the domestic industry.[4380] Consequently, Commissioner Bragg's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the

[4374] USITC Report, pp. 259-260, footnote36.
[4375] USITC Report, p. 260, footnote 36.
[4376] USITC Report, p. 259.
[4377] United States' first written submission, paras. 907-916
[4378] USITC Second Supplementary Report, pp. 22-23.
[4379] USITC Report, pp. 301-302.
[4380] USITC Second Supplementary Report, p. 23.

increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. In her analysis of all imports, Commissioner Bragg examined three factors other than increased imports alleged to be causes of the threat of serious injury to the stainless steel wire products domestic industry. Commissioner Bragg examined the general downturn in the economy, raw material costs, and the appreciation of the United States dollar.[4381] Commissioner Bragg's findings concerning these factors were based on a combination of overall United States marketplace data and domestic industry data, neither of which changed depending on which imports were being examined. Thus, there was no need for her to discuss these factors further in her analysis of non-NAFTA imports. Consequently, Commissioner Bragg's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Her analysis also establishes that she did not attribute to non-NAFTA imports any effects due to factors other than imports. In her consideration of non-NAFTA imports Commissioner Bragg did not need to conduct a separate non-attribution analysis for NAFTA imports. The analyses of non-NAFTA imports of both Chairman Koplan and Commissioner Bragg, when read in conjunction with the analysis of all imports, establish that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Chairman Koplan and Commissioner Bragg reached their conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.[4382]

(j) Stainless steel rod

7.1845 The European Communities and China submit that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The European Communities adds that the finding that this product does not "contribute importantly to the serious injury or threat thereof" in the USITC Report of October 2001 is not sufficient. For these reasons, the European Communities and China consider that the United States, for this product, failed to respect its obligation under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4383]

7.1846 The United States asserts that the USITC's report contains a complete and detailed analysis establishing that increased imports from non-NAFTA countries caused serious injury to the domestic industry producing stainless steel rod. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards.[4384] The European Communities and China overlook footnote 1437 of the USITC's analysis of all imports. In that footnote, the USITC found that imports from Canada and Mexico accounted for an extremely small percentage of total imports during the investigation period.[4385] In no single year of the period of investigation did combined imports from NAFTA sources exceed 0.08% of total imports.[4386] Exclusion of this volume of imports had no effect on the USITC's increased import determination, as the timing and the rate of the changes in import volume

[4381] USITC Report, p. 302.
[4382] United States' first written submission, paras. 917-924.
[4383] China's first written submission, paras. 612-613; European Communities' first written submission, paras. 614-619.
[4384] United States' first written submission, para. 906.
[4385] USITC Report, p. 223, footnote 1437.
[4386] USITC Memorandum INV-Y-180, Table G26 (US-40).

were essentially unchanged. Consequently, the European Communities' argument that the USITC Report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong.[4387] Additionally, the appropriate consideration under the Agreement on Safeguards is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities...and under such conditions as to cause or threaten to cause serious injury". The USITC provided this analysis by demonstrating the causal link between non-NAFTA imports and the serious injury experienced by the domestic industry producing stainless steel rod. The nature of that injury was discussed in great detail in the USITC's analysis of all imports. USITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The USITC determined that the increased quantities of imports caused domestic producers first to lose market share, then to lose revenue as they attempted to bring domestic prices into line with low-priced imports. There were several basic elements to the causal link finding: (1) high substitutability between imports and domestic merchandise in a market where price was an important consideration; (2) import increases during a period of stable demand; (3) persistent underselling by imports; and (4) consequent losses by the domestic industry of market share, production, shipments, net commercial sales and net commercial revenues. The USITC found a "clear and direct correlation" between changes in import volumes and the overall condition of the industry.[4388] In its analysis of non-NAFTA imports, the USITC found that each of these causal links was applicable to non-NAFTA imports. The USITC found specifically that exclusion of imports from Canada and Mexico did not change its volume or pricing analysis in any significant way.[4389] Non-NAFTA imports exhibited the same trends in import volume and in underselling as did imports from all sources. Consequently, the USITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. In its analysis of all imports the USITC examined several factors other than increased imports alleged to be causes of serious injury to the domestic industry producing stainless steel rod. The USITC specifically examined: (1) demand declines late in the period; (2) energy cost changes late in the period; and (3) the "aberrational" performance of one domestic producer. The USITC identified and discussed in detail the nature and extent of any adverse effects attributable to each of these factors during the period of investigation and thus ensured it did not attribute to imports any injury caused by another factor. The USITC's analysis of what effects, if any, were attributable to those other factors is also equally applicable to non-NAFTA imports. In its discussion of all imports, the USITC distinguished from the serious injury attributable to imports any effects attributable to declines in demand. It noted that demand declines only occurred late in the period under investigation.[4390] By contrast, the domestic industry had experienced declines in market share, production volumes, sales, employment, and profitability before the decline in demand began but after import volumes had increased.[4391] As the USITC noted in its analysis of non-NAFTA imports, the volume and pricing of non-NAFTA imports followed the same trend over the period of investigation as did imports from all sources; indeed, non-NAFTA imports accounted for essentially all imports and all underselling observations.[4392] Thus the USITC's conclusion regarding the nature and extent of injury attributable to increased imports was unchanged, and the USITC was not obliged to further discuss demand declines in its analysis of non-NAFTA imports. The examination of the remaining two factors – increased energy costs and the poor performance of one domestic producer

[4387] European Communities' first written submission, para. 614.
[4388] USITC Report, pp. 220-221.
[4389] USITC Report, p. 223, footnote 1437.
[4390] USITC Report, p. 221.
[4391] USITC Report, p. 221.
[4392] USITC Second Supplementary Report, p. 5.

during the period of investigation – pertained exclusively to domestic industry data which did not change depending on which imports were being examined. Consequently, there was also no need for the USITC to discuss these factors further in its analysis of non-NAFTA imports. Thus, the USITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the USITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the USITC did not need to conduct a separate non-attribution analysis for NAFTA imports.[4393]

L. ARTICLE 5.2 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIII OF GATT 1994

1. Basis for determining overall quota level

7.1847 China argues that the basis upon which the United States allocated the shares of the quota for slab in setting the tariff rate quota for that product is unclear.[4394] In particular, China argues that taking into account the official United States statistics, the overall quota for the first year (5.4 million short tonnes) was fixed at a very low level in light of former trade.[4395] China argues that, except for the six first months of 2001 and for 1997 (5.3 million tons), imports in the United States were always higher than 5.3 million tons. For the other years (1996, 1999 and 2000), the volume of imports was very large (6.2 million tons, 7.3 million tons and 7.2 million tons respectively).[4396] China argues that, therefore, it was not possible to fix an overall quota at 5.4 million tons. According to China, this fixation should be considered a violation of Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT 1994.[4397]

7.1848 In response, the United States argues that it based the total quota amount of 5.4 million tons on imports of slab during 2000, exclusive of FTA imports that were not subject to the safeguard measures.[4398] The United States submits that the year 2000 happened to be the year with the highest import levels of slab during the USITC's investigation period.[4399]

2. Allocation of shares of tariff rate quotas and "substantial interest"

7.1849 China also notes that it has not been granted any specific quota in respect of the safeguard measure for slab and is included in the volume allocated to "all other" countries.[4400] China points to Article 5.2 of the Agreement on Safeguards and argues that pursuant to this Article, a Member shall allot shares of the tariff rate quota to Members "having a substantial interest". The same terminology also exists in Article XIII of the GATT 1994, which provides that "the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions".[4401]

7.1850 China argues that following the approach of the Panel in the *EC – Bananas III* case, a Member having a "substantial interest" may be defined as a Member with a share of at least 10% of the total imports in the country concerned. For countries with a share between 5% and 10%, a case by

[4393] United States' first written submission, paras. 895–905.
[4394] China's first written submission, para. 628.
[4395] China's first written submission, para. 629.
[4396] China's first written submission, para. 630.
[4397] China's first written submission, para. 631.
[4398] United States' first written submission, para. 1216.
[4399] United States' first written submission, paras. 1215 and 1226.
[4400] China's first written submission, para. 632.
[4401] China's first written submission, para. 634.

case analysis should be conducted. For countries with a share between 0% and 5%, it should be concluded *a priori* that these countries do not have a substantial interest.[4402]

7.1851 China submits that it does not seem to reach a sufficient percentage for slabs imports in order to have a "substantial interest" since China's share accounts for less than 1% during the period).[4403] However, China argues that even if it has no "substantial interest" for slabs imports, the United States should still not be allowed to discriminate between WTO Members.[4404] China notes in particular that in the *EC – Bananas III* case, the Appellate body confirmed that the non-discrimination principle applies to the allocation of shares in a tariff rate quota, and implies, in particular, that a Member cannot *"allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest"*.[4405] In this regard, China submits that, in the present case, the United States allotted shares of the tariff quota to certain Members not having a "substantial interest" for slabs. For example, China notes that the market shares of certain countries were far below 5% (Ukraine and Japan). Moreover, China submits that for Russia (7.45%) and Australia (6.38%), the assessment of their "substantial interest" was highly questionable.[4406]

7.1852 China argues that, therefore, it appears that the United States allotted shares of the tariff quota to WTO Members (at least Japan and Ukraine) not having a "substantial interest" for slabs, while they did not do the same for other Members (such as China).[4407] China, therefore, considers that the safeguard measure on slabs must be regarded as incompatible with Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT 1994.[4408] In this regard, China further argues that the Panel in *US – Line Pipe* established that Article 5 of the Agreement on Safeguards and Article XIII of the GATT 1994 may be relied upon simultaneously to analyse a safeguard measure.[4409] China further notes that, according to Article XIII.5, these requirements also apply to tariff rate quotas. In particular, China argues that Article XIII.2(d), whose wording is identical to Article 5.2(a) of the Agreement on Safeguards, applies to the allocation of shares of a tariff rate quota in the context of a safeguard measure.[4410]

7.1853 With regard to the argument that the tariff allocation system is inconsistent with Article 5.2 and Article XIII because it provided allotments to some Members that were not substantial suppliers while failing to provide allotments to other Members, including China, that were not substantial suppliers, the United States relies upon the Panel decision in *US – Line Pipe* to argue that Article 5.2, which applies to quantitative restrictions, does not apply to safeguard measures that take the form of a tariff rate quota.[4411] The United States submits in response to the assertion by China that the Panel in *US – Line Pipe* decided that Article 5 and Article XIII could apply simultaneously to analyse a safeguard measure, that the Panel actually reached the opposite conclusion with regard to safeguard measures in the form of a tariff rate quota.[4412] It notes that the Panel found that "[w]e do not consider that tariff quotas are 'quantitative restriction[s]' within the meaning of Article 5" and that "[s]ince we have already found that a tariff quota is not a 'quantitative restriction' (a broader category including

[4402] China's first written submission, para. 635.
[4403] China's first written submission, para. 636.
[4404] China's first written submission, para. 637.
[4405] China's first oral statement, para 8.
[4406] China's first written submission, para. 638.
[4407] China's first written submission, para. 639.
[4408] China's first written submission, para. 640.
[4409] China's first written submission, para. 621.
[4410] China's first oral statement, para 5.
[4411] United States' first written submission, para. 1220.
[4412] United States' first written submission, para. 1221.

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)."[4413] However, the United States does agree that Article XIII:2 applies to the allotment of shares under a tariff rate quota in accordance with Article 5 of the Agreement on Safeguards.[4414]

7.1854 China responds by referring to the following language in the *EC – Bananas III* case: "As provided in paragraph 5, Article XIII also applies to tariff quotas. Article XIII:1 sets out a basic principle of non-discrimination in the administration of both quantitative restrictions and tariff quotas". China submits that, as a consequence, Article XIII:2(a) whose wording is identical to Article 5.2(a) of the Agreement on Safeguards, shall apply to the allocation of shares of a tariff rate quota in the context of a safeguard measure. China asserts that, therefore, should Article 5.2 of the Agreement on Safeguards not apply, as the United States claims, to safeguard measures that take the form of a tariff rate quota, the allocation of shares in this tariff rate quota should remain subject to Article XIII.2 (a) of the GATT 1994, which imposes the same requirements as those formulated in Article 5.2(a), on a Member applying a safeguard measure. China argues that, nonetheless, Article 5.2(a) whose wording is identical to Article XIII.2(a), should apply to the allocation of shares of a tariff rate quota.[4415]

7.1855 The United States notes that China ascribes to the Panel in *EC – Bananas III* an "approach" under which a Member with at least 10% of total imports is automatically a substantial supplier, a Member with less than 5% of total imports is automatically not a substantial supplier, and a case-by-case analysis is applied to Members with between 5% and 10% of total imports.[4416] In deriving a numerical test from the *EC – Bananas III* Panel Report, the United States submits that China does exactly what the Panel stated it would not do. According to the United States, the Panel not only rejected precise numerical thresholds in general, but specifically rejected the 10% threshold proposed by the complainants.[4417] The United States submits that the Panel's finding in that case that it was not unreasonable for the European Communities to conclude that Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the European Communities banana market in terms of Article XIII:2(d) was tightly circumscribed and conditioned on the "particular circumstances" of the case. According to the United States, that finding cannot be read to create a set of presumptions as to what share of imports gives a supplier a "substantial interest in supplying the product" in the meaning of Article XIII:2(d). Accordingly, the US approach of setting a two-percent threshold for treatment as a substantial supplier in light of the conditions of the slab market, rather than using numerical thresholds based on the market for a different product, was consistent with Article XIII:2(d).[4418]

7.1856 China argues that although it is true that the Panel, in the *EC – Bananas III* case, also stated that "a determination of substantial interest might well vary somewhat based on the structure of the market", it should be underlined that a "substantial interest" cannot be determined arbitrarily and cannot correspond to negligible amounts. According to China, this analysis may entail a comparative exercise that is based on the structure of the market. This involves an assessment of the position of the different suppliers of the product concerned on this market. This, argues China, is confirmed by

[4413] United States' first written submission, para. 1220, citing Panel Report, *US – Line Pipe*, paras. 7.69 and 7.73-7.74.
[4414] United States' written reply to Panel question No. 64 at the second substantive meeting.
[4415] China's second written submission, paras. 348-351.
[4416] United States' first written submission, para. 1222.
[4417] United States' first written submission, para. 1223.
[4418] United States' first written submission, paras. 1224-1225.

the reasoning of the Panel in the *EC – Bananas III* case, which based its conclusions regarding the identification of Members having a substantial interest on the level of their market shares.[4419]

7.1857 China submits that, in this particular case, it is clear that a 2% threshold cannot be considered as corresponding to a "substantial" interest in the supply of slabs. According to China, this is particularly true considering the shares of imports of the main suppliers as determined by the United States. Based on the total of imports for 2001, Brazil's share is 39.20%, Mexico's is 23.52% and Russia's is 18.83%. Based on the total of non-NAFTA imports for 2001, Brazil's share is 51.84% and Russia's is 24.90%. In comparison to these data, China submits that it seems unreasonable to consider that Members with a share of only 2% of imports have the same "substantial" interest as these major suppliers.[4420] Accordingly, it seems reasonable to consider that the thresholds identified by the Panel in the *EC – Bananas III* case and which, in China's understanding, reflect the common practice of WTO Members, should also apply in the present case.[4421]

7.1858 China further asserts that although, according to the data provided by the United States related to the top ten suppliers, there were three countries (Canada, Venezuela and China) below the 2% level, imports from those countries were not treated in the same way, and that indeed while imports form Canada and Venezuela were finally excluded from the scope of the safeguard measures, imports from China were fully subject to the import restrictions on slabs without any specific allocation in the tariff rate quota.[4422]

7.1859 The United States counter argues that China has failed to meet its burden of proof in objecting that the 2% threshold chosen by the United States is too low. According to the United States, China appears to make the argument that a Member cannot have a substantial interest if any other source accounts for a significantly greater share of imports, which is not the standard applied by Article XIII. The United States argues that Article XIII simply states that a Member is entitled to an allotment of a tariff rate quota it is has a "substantial interest in supplying the product" and does not impose obligations regarding how a Member applying tariff rate quotas determine whether another Member has a substantial interest and so the United States was entitled to base its compliance with Article XIII solely on the volume of another Member's shipments, on its share of imports, or any other information that would establish that the other Member has a substantial interest in supplying the product. The United States argues that elsewhere even China seems to argue for an absolute rule that countries accounting for at least 10% of imports must be treated as having a substantial interest. This would mean that a Member could thereby meet this threshold regardless of whether another source accounts for a significantly greater share of imports.[4423]

7.1860 The United States argues as regards the suggestion that it treated differently Members with less than a 2% market share, that except for developing countries and FTA partners that were excluded entirely from the safeguard measure, the United States did treat these Members in the same manner.[4424]

[4419] China's written reply to Panel question No. 63 at the second substantive meeting.
[4420] China's second written submission, paras. 356-357.
[4421] China's first oral statement, paras. 10-12.
[4422] China's written reply to Panel question No. 66 at the second substantive meeting.
[4423] United States' written reply to Panel question No. 63 at the second substantive meeting.
[4424] United States' written reply to Panel question No. 66 at the second substantive meeting.

3. Period for determining "substantial interest"

7.1861 The United States submits that it considered the one-year period of 2001 to be a recent, representative period for shares of imports. Therefore, the USITC based the identification of substantial suppliers and allotments of the duty-free quantity among substantial suppliers on shares of total imports in 2001. In so doing, the United States argues that it complied fully with the obligation under Article XIII:2(d) to provide allotments to substantial supplying Members "based upon the proportions, supplied by such Members during a previous representative period".[4425] The United States submits that it decided that in light of the size of the US market for slab and the large quantity of imports, 2% of total imports was an appropriate threshold in this case. Consistent with these considerations, the United States treated as substantial suppliers all countries that exceeded 2% of total imports in 2001[4426], and provided specific allocations only to those countries that it considered to have a substantial interest.[4427] The United States notes in this regard that, with the exception of Brazil and Mexico, the share of total imports held by each source fluctuated to a large degree from year to year. The use of 2001 import share data had the additional benefit of treating as substantial suppliers only countries that had consistently supplied more than 2% of imports. Thus, according to the United States, the identification of substantial suppliers was not based on temporary fluctuations in import shares.[4428] China argues that based on full-year imports data for 2001 there would be a cluster of countries with a market share above 18%, and a cluster of countries with a market share below 6%, being understood that no other country is to be found between these two thresholds. According to the same logic, but based on the supplied quantities, on would identify a cluster of countries that have supplied over 1,000,000 tons, and a cluster of countries that have supplied less than 400,000 tons. According to China, those are also clear dividing lines.[4429] China noted that the United States based its determinations of substantial suppliers on data concerning the full year 2001, i.e. data that were supposed not to be available by the time of the adoption of the safeguard measure. However, this implies that the justifications given by the United States in its first written submission and in its answers to the questions of China are based on data that were included neither in the USITC report nor in the proclamation and therefore have not been communicated to the interested parties.[4430]

7.1862 The United States also argues that its use of data for the year 2001 for determination of "substantial interest" was not inconsistent with the USITC's analysis of whether imports increased. According to the United States, the ""substantial interest"" standard arises under Article XIII:2(d), which provides that a Member allocating a TRQ among other Members must allot shares to Members "having a substantial interest in supplying the product . . . based upon the proportions, supplied by such [Members] during a previous representative period, of the total quantity or value of imports of the product". The United States argues that, however, Article XIII provides no guidance for determining what constitutes a "previous representative period", and the Agreement on Safeguards does not require that the period used be coterminous with or subsumed within the investigation period. The United States submits that there can be no question that 2001 was "recent" at the time of the safeguard measures. Data for that year was also representative of import patterns. The United States asserts that it was, therefore, entirely consistent with Article XIII:2 for the President to use 2001 as the recent representative period.[4431]

[4425] United States' first written submission, para. 1215.
[4426] United States' first written submission, para. 1216.
[4427] United States' written reply to Panel question No. 67 at the second substantive meeting.
[4428] United States' first written submission, para. 1217.
[4429] China's second written submission, paras. 366-368.
[4430] China's second written submission, para. 359.
[4431] United States' written reply to Panel question No. 65 at the second substantive meeting.

M. ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS (SPECIAL AND DIFFERENTIAL TREATMENT)

1. Identification of developing countries for the purposes of Article 9.1

7.1863 China argues that the United States unilaterally and arbitrarily links developing country status of Article 9.1 of the Agreement on Safeguards with the United States' Generalised System of Preferences. In this regard, China points out that within the context of the GSP – a unilateral instrument – the donor country has clear discretion in deciding the list of beneficiaries.[4432] China further points out that there may be GSP schemes (including the United States GSP) that include criteria for country eligibility, which are unrelated to the level of development. Accordingly, if a country is excluded from the United States GSP, this does not necessarily mean that this country is not a developing country.[4433] The application of such criteria would allow a WTO Member to exclude countries, which level of development would qualify them under the generally accepted term of "developing country" from the benefit of GSP Schemes for reasons other than considerations based on the level of development, and that such criteria would allow a country to select their GSP beneficiaries and to discriminate between countries whose level of development would allow them to be objectively considered as "developing countries".[4434] Further in China's view, it is not possible that a single Member be considered a developing country by, say, the United States and not the European Communities and others in respect of the same dispute or the same provision. To proceed otherwise would deprive WTO developing country Members from all legal certainty as far as their rights and obligations under WTO Agreements are concerned. To proceed otherwise would also be in contradiction with the need for a multilateral approach of the "special and differential treatment" provisions within the WTO.[4435]

7.1864 In response, the United States argues that it is possible that a single Member be considered a developing country by, say the United States, and not the European Communities and others in respect of the same dispute or the same provision. By way of example, the United States notes that it treated Albania, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Slovakia, Slovenia, Hungary, Poland, and Turkey as developing country Members in the application of its steel safeguard measures whereas the European Communities treated none of these Members as developing countries when it applied its own safeguard measures on steel.[4436] The United States argues that China itself has accepted this principle by agreeing in its Protocol of Accession to developing country treatment in some areas, and non-developing country treatment in others.[4437] The United States argues further that these differences arise from the text of Article 9.1, which does not indicate how a Member must comply with its obligations under that Article. Since it is an obligation relating to application of a safeguard measure, it falls to the Member applying a measure to identify, in the first instance, Members eligible for treatment as developing countries for purposes of Article 9.1. Since different Members may apply different procedures, they may reach different results.[4438]

7.1865 The United States acknowledges that, for each of the ten safeguard measures, it identified developing country Members in keeping with its list of countries eligible for the its GSP, a program of

[4432] China's first written submission, para. 655.
[4433] China's first written submission, para. 656.
[4434] China's first oral statement, paras. 24 and 25.
[4435] China's written reply to Panel question No. 127 at the first substantive meeting.
[4436] United States' written reply to Panel question No. 127 at the first substantive meeting.
[4437] United States' written reply to Panel question No. 126 at the first substantive meeting.
[4438] United States' written reply to Panel question No. 127 at the first substantive meeting.

benefits for developing countries.[4439] The United States notes in this regard that the WTO Agreement does not define the term "developing country" nor does it establish a procedure or method for determining when a Member qualifies for that status.[4440] The United States argues that, therefore, in assessing this claim, the Panel need not address the procedure used by the United Sates for identifying developing country Members as a general matter.[4441] According to the United States, under Article 9.1, it is the Member applying a safeguard measure that has the obligation to identify the developing country Members not subject to application of the measure. This conclusion, argues the United States, derives from the ordinary meaning of Article 9.1 and its context within the Agreement on Safeguards and WTO Agreement.[4442] The United States further argues that this conclusion is confirmed by the requirement in footnote 2 to Article 9.1 that "[a] Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards". Neither the footnote nor the Article 12 rules for making notifications provides any role in this process for exporting Members, indicating that the importing Member alone has the obligation to identify which Members are developing country Members and which of those to exclude. The United States submits that the structure of Article 12 supports this conclusion. Under that article, the Member that makes a decision or takes an action with respect to a safeguard measure is the party that provides notification of such decision or action.[4443] The United States asserts that the Appellate Body confirmed this interpretation in *US – Line Pipe*, when it stated, "[w]e agree with the United States that Article 9.1 does not indicate how a Member must comply with this obligation".[4444] Therefore, according to the United States, the Article 9.1 requirement that the Member taking a safeguard measure notify any exclusion of developing country Members demonstrates that it is the Member taking the measure that has the obligation to decide which countries qualify for exclusion.[4445]

7.1866 The United States asserts further that since the obligation falls upon the application of the measure, it is the Member applying the measure that must determine how to comply. Article 9.1 assigns no obligation concerning or role in this identification process to exporting Members, developing country or otherwise.[4446] According to the United States, this approach will seldom create difficulties because, in most cases, Members have not disagreed as to the treatment they will afford each other.[4447] The United States argues that since the Member applying the measure is responsible for compliance with Article 9.1, it must identify which Members are developing countries for the purposes of the Agreement on Safeguards, and whether imports from those sources are below the 3% threshold.[4448]

7.1867 The United States also notes that development status factors into the first, second, and third criteria for GSP eligibility under section 502(c) of the Trade Act of 1974. The United States argues that these development criteria are introduced by the phrase "shall take into account", which demonstrates that they are required criteria.[4449] Moreover, under section 502(b)(1) of the Trade Act,

[4439] United States' first written submission, para. 1258.
[4440] United States' first written submission, para. 1261.
[4441] United States' first oral statement, para. 81.
[4442] United States' first written submission, para. 1259.
[4443] United States' first written submission, para. 1264.
[4444] United States' first written submission, para. 1263.
[4445] United States' first written submission, para. 1264.
[4446] United States' first written submission, para. 1260.
[4447] United States' first written submission, para. 1262.
[4448] United States' first written submission, para. 1261.
[4449] United States' second oral statement, para 151.

specific developed countries – Australia, Canada, EU member states, Iceland, Japan, Monaco, New Zealand, Norway, and Switzerland – may not be designated as GSP beneficiaries.[4450]

7.1868 China however counter-argues that the criteria under the first second and third criteria Section 502 (c) are discretionary. Further, there are a number of other discretionary criteria which have nothing to do with development status such as Section 502 (c) (4), which deals with access to markets and export practices. China submits that there are also seven[4451] other mandatory criteria which are unrelated to development status, contained in Section 502 (b), which excludes for instance a country from GSP beneficiary status if it is dominated or controlled by international communism.[4452] China argues that allowing the United States to base their decision on the GSP–eligible beneficiaries list means that the United States would have the possibility to exclude China from the benefit of Article 9.1 for this safeguard case, or any future case, for reasons that have nothing to do with development. China argues that it is in acknowledgement of this problem that President Bush issued the 3 July Proclamation allowing the USTR to add developing countries to the United States GSP List.[4453]

7.1869 China notes that, in the present case, the US President affirmed that "For purposes of the safeguard measures established under the Proclamation, I determine that the beneficiary countries under the Generalized System of Preferences are developing countries".[4454] China argues that this statement establishes a clear link between the United States GSP and the developing country status under Art 9.1 of the Agreement on Safeguards. According to China, the United States confirmed this link by stating that:"…the President determined that the GSP list of countries encompasses all the countries eligible for treatment as developing country Member under Article 9.1,……and that the list in subdivision (d)(i) contains all developing countries that are also WTO Members". China argues that there would seem to be a contradiction between this statement and the text of a presidential proclamation of 3 July 2002. Indeed, paragraph 1 of this proclamation states that: "The USTR is authorized, upon publication of a notice in the Federal Register of his determination that it is appropriate to add WTO member developing countries to the list of countries in subdivision (d)(i) of Note 11, to add such countries to that list". According to China, this clearly demonstrates that the list in subdivision (d)(i) did not necessarily cover all the developing countries that are WTO Members.[4455] China argues that such a determination is not acceptable as far as China is concerned. Indeed, the fact that a WTO Member is excluded from the United States GSP cannot be a reason, in itself, to consider that it is not a developing country within the meaning of Article 9.1 of the Agreement on Safeguards.[4456]

7.1870 China notes in this context that, in the past, opposition had already been voiced in the WTO over the manner in which the United States had excluded a developing WTO Member from eligibility under Article 9.1 of the Agreement on Safeguards on the grounds that the developing Member was not included in the preference-giving piece of legislation. China relies upon statements made by two Members in meetings of the Committee on Safeguards, to the effect, *inter alia*, that "it had been

[4450] United States' written reply to Panel question No. 126 at the first substantive meeting.
[4451] China's second oral statement, para. 25.
[4452] China's second written submission, para. 398, China's second oral statement, para. 24.
[4453] China's second written submission, paras. 399-400.
[4454] China's first written submission, para. 653.
[4455] China's first oral statement, paras. 18-20.
[4456] China's first written submission, para. 654.

longstanding GATT practice that developing country status was self-elected, and that this practice had not changed since the coming into force of the WTO".[4457]

7.1871 With respect to the argument that the long-standing practice under the GATT and the WTO has been that the determination of a Member's development status is by self-selection, the United States submits that China provides no evidence of such a practice in defining or interpreting the rights and obligations of Members. Instead, China has offered, in support, a statement representing the views of two Members. China fails to establish the legal relevance of such a practice even if it existed, since that "practice" would not contribute to the definition of a developing country Member but only indicate individual Members who considered that they met the definition. The United States submits that the statements referred to by China are not an authoritative, or even indicative, statement of the practice of the Members. According to the United States, in fact, the WTO does not even have an established procedure for Members to register their claim to be a developing country Member. Under China's reasoning any and all WTO Members could claim benefits intended for developing countries which would effectively read out of Article 9.1 the term "developing".[4458]

7.1872 The United States also argues that China has not established that its identification of developing country members in keeping with the GSP list is inconsistent with the Agreement on Safeguards. In this regard, the United States argues that it applied Article 9.1 in keeping with the list of developing countries that are eligible for special and differential treatment under the US GSP. The United States asserts that there is nothing about the US GSP list that establishes an inconsistency with Article 9.1.[4459]

7.1873 China argues that the US President affirmed that: "For purposes of the safeguard measures established under the Proclamation, I determine that the beneficiary countries under the Generalized System of Preferences are developing countries".[4460] China notes that the US President did not say that, "for the purposes of the safeguard measures established under the Proclamation, "developing countries" within the meaning of Article 9.1 of the Agreement on Safeguards are the beneficiary countries under the GSP".[4461] China argues that such a particularly convoluted wording from the United States authorities reveals that a WTO Member that is not a beneficiary country under the United States GSP may still be classified as developing country in the context of Article 9.1 of the Agreement on Safeguards.[4462]

7.1874 China also notes that the "positive list" of developing countries excluded from the application of the United States measures is given, in subdivision d(i) of point 11 of the Annex to the Presidential Proclamation, with the following statement: "… the following developing countries that are members of the World Trade Organization shall not be subject to the rates of duty and tariff-rate quotas provided for therein".[4463] China asserts that this statement also reveals that not all the developing countries that are Members of the WTO are excluded from the United States' measures.[4464]

7.1875 The United States argues that the relevant documents do not support China's claim that the United States failed to exclude members that the United States considered to be developing country members. China notes that the introductory text to subdivision (d)(i) states that "the following

[4457] China's first written submission, para. 658.
[4458] United States' first written submission, para. 1261.
[4459] United States' first written submission, para. 1270.
[4460] China's first written submission, para. 661.
[4461] China's first written submission, para. 662.
[4462] China's first written submission, para. 663.
[4463] China's first written submission, para. 664.
[4464] China's first written submission, para. 665.

developing countries that are members of the World Trade Organization shall not be subject to the rates of duty and tariff-rate quotas provided therein". China considers that the use of "the following" in this statement indicates that the list does not contain all developing country WTO Members. The United States submits that this is incorrect. The statement merely reflects that the subsequent list represents a subset of the group of all developing countries, namely, those developing countries that are also WTO Members. Indeed, not all beneficiary countries under the US GSP program are WTO members.[4465] The United States argues that the President determined that the GSP list of countries encompasses all the countries eligible for treatment as developing country Members under Article 9.1, and that the list in subdivision (d)(i) contains all developing countries that are also WTO Members.[4466]

7.1876 The United States argues that none of the Complainants have established a *prima facie* case of inconsistency with the Safeguards Agreement. In order to do so, they would have had to show that the safeguard measures were applied to a developing country Member accounting for less than three percent of total imports, when total imports from such countries did not exceed nine percent of total imports. Neither China nor Norway has met this threshold requirement. Norway does not identify any developing country Member that it believes was improperly subjected to a safeguard measure. China, for its part, argues only that it has designated itself a developing country Member for purposes of Article 9.1.[4467]

7.1877 In response to a question posed by the Panel, the United States acknowledged that the United States GSP is not always the basis upon which the United States identifies developing countries for the purposes of provisions on special and differential treatment contained in other WTO Agreements. The United States also acknowledged that the GSP list did not represent developing countries for WTO purposes. By way of explanation, the United States notes that some of the countries on the GSP list – such as Comoros, Equatorial Guinea, and Ethiopia – are not WTO Members. Nevertheless, the United States notes that there is no list of developing countries in the WTO against which to compare its GSP list.[4468]

2. Qualification of China as a developing country

7.1878 According to China, self-designation should apply and entitle that Member to benefit of the WTO special and differential treatment provisions available for developing countries as long as this right is not challenged specifically by another Member on the basis of an adequate and reasoned explanation.[4469] China notes that its claim that it qualifies as a developing country for the purposes of Article 9.1 is based on the self-designation by China as a developing country for the purposes of the WTO Agreements.[4470] China argues that this situation is reflected in the report of the Working Party on the accession of China, as well as in the Protocol of Accession.[4471]

7.1879 China argues that by referring to documents related to its Protocol of Accession, it is clear that China has provided sufficient evidence that it has met its burden of proof that the United States failed to comply with Article 9.1 of the Agreement on Safeguards.[4472] China also notes that the reports of the Working Party have been accepted and adopted by WTO Members, including the

[4465] United States' first written submission, para. 1275.
[4466] United States' first written submission, para. 1276.
[4467] United States' first oral statement, paras. 82-83.
[4468] United States' written reply to Panel question No. 124 at the first substantive meeting.
[4469] China's written reply to Panel question No. 121 at the first substantive meeting.
[4470] China's written reply to Panel question No. 121 at the first substantive meeting.
[4471] China's written reply to Panel question No. 121 at the first substantive meeting.
[4472] China's second written submission, para. 378.

United States. China argues that, consequently, all these documents are an integral part of the WTO Agreement.[4473]

7.1880 With regard to China's self-designation as a developing country, China notes that although important achievements have been made in its economic development, China is still a developing country and, therefore, should have the right to enjoy all the differential and more favourable treatment accorded to developing country Members pursuant to the WTO Agreement. Accordingly, some WTO Members felt the need to address China's specific situation through a pragmatic and "tailored" approach . This approach, says China, is reflected in China's Protocol of Accession. China submits that this reflects the agreement reached between China and other WTO Members that China, for certain specific WTO Agreements, would not benefit from certain WTO provisions available only to developing countries. China submits that this underlines the fact that WTO Members acknowledged that China is a developing country and was entitled to benefit from the special and differential treatment provisions contained in the WTO Agreements and available only to developing countries but also, that the benefits linked to this status should simply be excluded for certain WTO Agreements. These specific Agreements included those related to agriculture, TRIMs and subsidies. China notes that, however, there was no specific provision in the Accession Protocol related to the Agreement on Safeguards and the application of Article 9.1 and that, unlike the other three specific areas, nobody questioned the fact that China could benefit from special and differential treatment in other areas , during China's accession process.[4474]

7.1881 China submits that this is particularly true in the context of Article 9.1 of the Agreement on Safeguards. More particularly, China submits that such a conclusion is all the more understandable that Article 9.1 should be considered as being pragmatic enough. Indeed, if a developing country is above the 3% threshold, that country will not benefit from Article 9.1. Accordingly, accepting the status of developing country for China in the context of Article 9.1 has limited consequences, since the *de minimis* test acts as a "safety net" for the Member applying the measure.[4475] China submits that China's self-designation should, therefore, have remained valid in the context of this Agreement. In any event, the United States should have provided a reasoned and adequate explanation as to why it was possible to exclude China from the benefit of Article 9.1.[4476]

7.1882 The United States submits that China's sole argument in support of its claim to be a developing country Member is the assertion that it is, and has always claimed to be, a developing country Member, especially when it acceded to the WTO. The United States argues that although China may consider itself a developing country Member, its Protocol of Accession to the WTO clearly indicates that Members took a different view of China's situation. Members indicated that because of significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach needed to be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO members. "Each agreement and China's situation should be carefully considered and specifically addressed". This is precisely the approach taken throughout China's accession documents.[4477] The United States asserts that in particular instances, under certain WTO agreements, China has explicitly abandoned any claims to treatment as a developing country.[4478] The United States contends that China has admitted that the Protocol does not specifically address treatment under the Safeguards Agreement. Thus, in

[4473] China's second written submission, para. 389.
[4474] China's second written submission, para. 386.
[4475] China's second written submission, para. 387.
[4476] China's written reply to Panel question No. 122 at the first substantive meeting.
[4477] United States' first written submission, para. 1267.
[4478] United States' first written submission, para. 1268.

the United States' view, the only possible conclusion is that the Protocol and Working Party Report do not establish China's entitlement to treatment as a developing country for purposes of Article 9.1.[4479]

7.1883 The United States submits that these commitments demonstrate that China is not invariably treated as a developing country Member for purposes of the covered agreements. Thus, it cannot rely on a pattern of developing country treatment to support a claim for that status. Since it has provided no other basis for asserting developing country status, the United States submits that China has not met its burden of proof to establish that the US was required under the Agreement on Safeguards to exclude exports from China from the United States' safeguard measures.[4480]

7.1884 In this regard, the United States notes that it has not taken a position in this dispute as to how any other Member would establish that it would be entitled to treatment as a developing country under Article 9.1. Nor is it necessary to resolve that question, as no other Member has claimed to be a developing country Member that has been subject to the steel safeguard measures in a manner inconsistent with Article 9.1.[4481]

3. Qualification of China under the *de minimis* test

7.1885 China argues, in response to a question posed by the Panel, that although it was not primarily up to China to apply the *de minimis* test, it appears, on the basis of preliminary calculations and of USITC statistics available to the United States' President, that China had a share of imports into the United States accounting for less than 3%, with the de minimis exporting developing country Members collectively accounting for no more than 9% of total imports, for at least the following products: slab, hot-rolled steel sheets, coated steel, hot-rolled bar, cold-rolled bar, rebar, tin mill products, stainless steel bar and stainless steel rod.[4482] China argues that, therefore, for a large number of products, China should have been excluded from the scope of application of the safeguard measure. China alleges that the necessary statistical data were available to the USITC at the time of the adoption of the measures from which the United States failed to draw the proper conclusions.[4483] The fact that the *de minimis* test was not alleged is due to the fact that, as a first step, the United States denied China's right to be a "developing country" within the meaning of Article 9.1 and that, therefore, there was no need to examine the second step (i.e. the de minimis test) when the United States denied the right to benefit from the first step.[4484]

4. Relationship between Articles 9.1 and 3.1 of the Agreement on Safeguards

7.1886 China argues that Article 9.1 of the Agreement on Safeguards needs to be read in connection with Article 3.1 of the Agreement, which provides that: "The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".[4485] China is of the opinion that Article 3.1 of the Agreement on Safeguards covers the elements of Article 9.1 because Article 3.1 contains both a requirement of "due process" (rights of interested parties, access to non-confidential files…), which might be limited to the investigation, but also a requirement to provide a "reasoned and adequate explanation", which cannot be limited to the mere "investigation".[4486] China also argues that Article 9.1's coverage is confirmed by the fact that the first

[4479] United States' oral statement at the second substantive meeting, para. 150.
[4480] United States' first written submission, para. 1269.
[4481] United States' written reply to Panel question No. 154 at the first substantive meeting.
[4482] China's second oral statement, para. 7.
[4483] China's second written submission, paras. 376-377.
[4484] China's written reply to Panel question No. 123 at the first substantive meeting.
[4485] China's first written submission, para. 642.
[4486] China's written reply to Panel question No. 120 at the first substantive meeting.

sentence of Article 3.1 refers to Article X of GATT 1994, indicating that Article 3.1, in this aspect, is nothing more than a *lex speciales* of Article X in the specific context of safeguard.[4487]

7.1887 China argues that this approach is confirmed in *US – Lamb* case where the Appellate Body found 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".[4488] China further relies upon the Appellate Body decisions in *US – Lamb* and *US – Cotton Yarn* to argue that the standard of review under Article 11 of the DSU in relation to claims under the Agreement on Safeguards is such that "panels must examine whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data".[4489] In China's view, whether a Member is a developing country accounting for less than 3% of total imports is a pertinent issue in the application of Article 9.1 and, therefore, must be subject to "findings and reasoned conclusions" published in accordance with Article 3.1.[4490]

7.1888 China argues that the obligation of the United States authorities in this case was twofold: to explain in an adequate and reasoned manner the reasons why China is not a developing country; or to explain in an adequate and reasoned manner the reasons why Chinese products did not meet the *de minimis* test of Article 9.1 of the Agreement on Safeguards.[4491] China submits that the existence of a "developing country", on the one hand, and the fact that the *de minimis* test is met, on the other hand, are in its view "pertinent issues of fact" under Article 3.1, for the application of a safeguard measure.[4492] China argues that it follows that the published report of the competent authorities under that provision must contain an adequate and reasoned explanation as to how the facts support their determination.[4493]

7.1889 China argues that, however, in the present case, the United States authorities failed to provide a reasoned and adequate explanation of how the facts support their determination that Article 9.1 of the Agreement on Safeguards is not applicable to China.[4494] In particular, China argues that the United States authorities failed to provide a reasoned explanation as to how the facts support their determination on Article 9.1 with regard to China and why Chinese products did not meet the de minimis test of Article 9.1 of the Agreement on Safeguards. In this regard, China argues that since China is a developing country and has always claimed itself as such, in particular when it joined the WTO, the United States authorities could not reasonably exclude China from the benefit of Article 9.1 of the Agreement on Safeguards, unless in its published report the United States authorities were able to explain, in an adequate and reasoned manner, the reasons why China had to fall within the scope of the United States' measures.[4495]

7.1890 The United States submits that China is mistaken. The "pertinent issues of fact and law" under Article 3.1 are those related to the investigation and determination of serious injury by the competent authorities. Issues related to the application of the safeguard measure under Article 5.1 – an inquiry that the Appellate Body has found to be "separate and distinct" from the finding of serious

[4487] China's second written submission, para. 410.
[4488] China's first written submission, para. 643.
[4489] China's first written submission, paras. 644-645.
[4490] United States' first written submission, para. 1283.
[4491] China's first written submission, para. 668.
[4492] China's first written submission, para. 670.
[4493] China's first written submission, para. 671.
[4494] China's first written submission, para. 672.
[4495] China's first written submission, paras. 652 and 667.

injury – are not subject to Article 3.1.[4496] The United States argues further that compliance with Article 9.1 is not part of the investigation or determination of serious injury. The obligation is phrased in terms of the application of the safeguard measure to developing country Members. Thus, China is mistaken in its view that "the existence of a 'developing country' . . . and the fact that the de minimis test is met" are "pertinent issues of fact" to be addressed under Article 3.1. These matters may be pertinent to a non-application determination under Article 9.1, but they are not issues pertinent to the conduct of an investigation under Article 3.1.[4497] The United States argues that, moreover, nothing in the reasoning of the Appellate Body reports cited by China supports China's conclusion that the reports indicate an obligation to explain an Article 9.1 determination as part of an Article 3.1 report. Indeed, in each of the citations noted by China, the Appellate Body is addressing the requirement of Article 3.1 that competent authorities publish a report containing the findings and conclusions reached in an investigation. The Appellate Body findings do not indicate that the competent authorities must address whether the application of a measure is consistent with Article 5.1, or whether non-application of the measure is required under Article 9.1. Thus, these findings of the Appellate Body do not support China's views.[4498]

7.1891 China argues that the United States is trying to create an illogical line of reasoning between the investigation and the application of the measure. In particular, China argues that the United States wrongly asserts that the question of non-application of the measure to the developing countries under Article 9.1 comes after the investigation. In China's view, this is misleading, as all imports are subject to investigation. The imports from developing countries, in particular, are placed under the scrutiny of the competent authorities whose role is to determine which individual country's imports are under the 3% threshold, and whether the sum of the imports from developing countries does or does not exceed 9%. China asserts that, clearly, the findings on Article 9.1 are not only relevant when the measure is applied, but these findings constitute a part of the investigation process, and therefore must be covered by the obligation expressed in Article 3.1 of providing a reasoned and adequate explanation.[4499]

5. Time/period during which developing countries identified

7.1892 Norway argues that the safeguard measures in question are inconsistent with Article I:1 of the GATT 1994 and Article 9.1 of the Agreement on Safeguards. In this regard, Norway submits that GATT 1994 Article I:1 sets out the general MFN principle, which is also applicable within the sphere of the Agreement on Safeguards. According to Norway, any deviation from this principle must have a legal basis, one of them being the possibility to exclude certain developing countries found in Article 9 of the Agreement on Safeguards.[4500]

7.1893 Norway submits that the pivotal question in Article 9.1 is what the correct recent representative reference period is for the establishment of the exclusions.[4501] Norway argues that in the present case, the United States used import figures for various years and not the same years as the period of investigation (1996-2000) when establishing which developing countries had imports under

[4496] United States' first written submission, para. 1284.
[4497] United States' first written submission, para. 1285.
[4498] United States' first written submission, para. 1286.
[4499] China's second oral statement, paras. 28-30.
[4500] Norway's first written submission, para. 398.
[4501] Norway's first written submission, para. 399.

the threshold in Article 9.1. During consultations, the United States explained that they had mostly relied on import statistics for 1996-97 to determine the import levels of developing countries.[4502]

7.1894 Norway points to the statement by the Appellate Body in *US – Line Pipe*, where it made reference to the fact that the United States should have looked at "the latest data available at the time the line pipe measure took effect" . Norway believes that the statement of the Appellate Body in *US – Line Pipe* implies that the United States in the present case should have computed their percentages based on 2000 or 2001 figures, not 1996-97.[4503] Norway submits that, having failed to do so, the United States breached Article 9.1 of the Agreement on Safeguards, and thus also Article I.1 of the GATT 1994.[4504]

7.1895 The United States argues that the Appellate Body has found that the Agreement on Safeguards does not indicate how a Member must comply with Article 9.1 and that it is for the importing member to decide how to apply the safeguard measure. [4505]

7.1896 In counter-response, Norway argues that it must be flatly rejected that it is for the importing member to decide how to implement Article 9:1. All obligations under the covered agreements are the subject of multilateral control. According to Norway, this is the very purpose of the Agreement on Safeguards, as stated explicitly in the preamble.[4506]

7.1897 The United States submits that the period 2000 through interim 2001 was one in which the USITC found that increased imports caused or were threatening to cause serious injury. The United States considered that, as a general matter, this period did not reflect normal flows of imports and would accordingly lead to an aberrational calculation as to whether developing countries qualified for non-application of the safeguard measures under Article 9.1. By way of example, the United States asserts that for certain carbon flat-rolled steel, imports from developing countries had reached a level in 2000 at which those countries accounting for less than 3% of total imports collectively accounted for more than 9% of total imports. If that period were used, no developing country would be eligible for exclusion from the safeguard measure on certain carbon flat-rolled steel. The 1996-1997 period predates the beginning of the increase in imports for most products subject to the steel safeguard measures. Therefore, the United States considered this period particularly appropriate for applying the Article 9.1 criteria.[4507]

7.1898 The United States argues that Norway has not established that the United States' use of 1996-97 as the period for calculating the 3% threshold for non-application was inconsistent with Article 9.1. The United States argues that Norway misreads both Article 9.1 and the Appellate Body Report. The text of Article 3.1 does not specify any particular period for calculating whether developing country Members' imports meet the 3% and 9% thresholds.[4508] The 1996-1997 period was consistent with these requirements. Since that period predates the increase in imports, it allows an evaluation of import levels undistorted by the increased imports or the serious injury they caused to the domestic industries. By using such a period, the United States could accurately evaluate whether particular developing country Members qualified for non-application.[4509] The United States further submits that Norway misreads the *US – Line Pipe* Report when it states that the Appellate Body

[4502] Norway's first written submission, para. 400.
[4503] Norway's first oral statement on behalf of all complainants, para. 5.
[4504] Norway's first written submission, para. 401.
[4505] United States' first written submission, para 1260.
[4506] Norway's first oral statement on behalf of all complainants, para. 4.
[4507] United States' written reply to Panel question No. 125 at the first substantive meeting.
[4508] United States' first written submission, para. 1279.
[4509] United States' first written submission, para. 1280.

"made reference to the fact that the United States should have looked at 'the latest data available.'" The Appellate Body was not making a normative statement about what data a Member should consider, but responding to the Panel's citation to particular data. Moreover, it considered that data primarily to evaluate whether the US mechanism for excluding developing countries would work "automatically", a question that has not been raised in this dispute.[4510]

7.1899 Norway further argues that Article 9.1 uses the present tense "as long as its shares of imports … does not exceed 3 per cent". Norway argues that this indicates that import figures for the 'very recent past ' are relevant.[4511] The United States counter argues that the use of the present tense in Article 9.1 does not preclude the possibility of using any period within the investigation period, and that in this case the United States chose a period prior to the increase in imports. The United States also questions the significance of the use of the present tense in the English language version of this provision. The French text of Article 9.1 is written, in part, in the future tense ("tant que la part de ce Membre dans les importations du produit considéré du Membre importateur ne *dépassera* pas 3 pour cent") ("as long as the share of the imports of the product concerned in the importing Member *will not exceed* 3 percent") (emphasis added). Thus, according to the United States, it appears that the negotiators did not attach great significance to the tense of the obligation under Article 9.1.[4512]

6. Conclusions

7.1900 China argues that in view of all the above, it would not be appropriate to consider that the United States authorities fulfilled their obligations under Article 9.1 and 3.1 of the Agreement on Safeguards because it failed to provide adequate and reasoned explanation as to how the facts support the exclusion of China from the benefit of Article 9.1 of the Agreement on Safeguards.[4513] China argues that accepting the conclusion of the United States authorities would allow a WTO Member to unilaterally and arbitrarily define another Member's status under the WTO. China submits that this would be a grave concern to all Members, particularly developing countries. China further argues that allowing such a practice runs the risk of opening a back door to nullifying or impairing WTO benefits accruing to individual Members.[4514] For all the above reasons, China argues that the Panel should reach the conclusion that the determination made by the United States authorities is inconsistent with the specific requirements of both Articles 9.1 and 3.1 of the Agreement on Safeguards.[4515]

7.1901 The United States argues that it is well established that under the WTO Agreement the burden of proof rests upon the party who asserts the affirmative of a particular claim or defence. In this instance, China and Norway are asserting that the United States failed to comply with Article 9.1. Thus, according to the United States, they bear the burden of proof, which would require a showing that the United States has applied the measure to a developing country Member that accounts for less than 3% of total imports. The United States argues that neither China nor Norway has met that burden.[4516] According to the United States Norway does not identify any developing country Member that it believes was improperly subjected to a safeguard measure and China argues only that is has designated itself a developing country for purposes of Article 9.1, which is not how Article 9.1 works.[4517]

[4510] United States' first written submission, para. 1281.
[4511] Norway's second written submission, para. 204.
[4512] United States' written reply to Panel question No. 68 at the second substantive meeting.
[4513] China's first written submission, para. 676.
[4514] China's first written submission, para. 666.
[4515] China's first written submission, para. 674.
[4516] United States' first written submission, para. 1266.
[4517] United States' first oral statement, para. 83.

N. ARTICLE I:1 OF THE GATT 1994 AND ARTICLE 2.2 OF THE AGREEMENT ON SAFEGUARDS (NON-DISCRIMINATION)

1. Exclusion of imports from free-trade areas

(a) The MFN principle

7.1902 Japan and Korea argue that according to the plain meaning of "irrespective of its source" in Article 2.2 of the Agreement on Safeguards, safeguard measures must be applied on an MFN basis, subject only to the special treatment of customs union members[4518] and the Article 9 exception for developing countries[4519] and even then only in certain circumstances.[4520] More specifically, the MFN principle embodied in Article 2.2 requires that once a Member conducts an investigation of total products imported and the effects of imports on its domestic industry and reaches an affirmative determination[4521], any safeguard measures imposed on the basis of that investigation must be applied to imports from all sources, even imports from countries with which the Members have a specific agreement prohibiting the application of safeguard measures.[4522] Japan and Korea argue that Article 2.2 prohibits Members from exempting other countries, such as those with which the Member has signed a free trade agreement.[4523]

7.1903 Japan submits that like Article 2.2 of the Agreement on Safeguards, Article I:1 of GATT 1994 requires Members to treat imports from other Members similarly. If an "advantage, favour, privilege or immunity" is granted to any Member, the same courtesy must be accorded "immediately and unconditionally" to all other Members. In the context of a safeguards measure, this MFN principle requires the United States to treat imports equally. If the President decides to exclude countries that are members of a free trade agreement which is clearly an "advantage, favour, privilege or immunity" because the free trade agreement countries would not be subject to the measure – the President must also extend the exclusion to other WTO members (absent an exception, such as those afforded to customs union members and developing countries, in certain circumstances).[4524]

7.1904 Japan and Korea assert that, in this case, the United States violated the MFN principle by exempting Canada and Mexico, which are signatories to the North American Free Trade Agreement, and Israel, which is a signatory to the United States-Israel Free-trade area from the measures.[4525] Japan argues that safeguards measures are intended to be global in nature. Any country-specific exclusion (with the exception of developing countries under Article 9) violates this principle. Provisions within free trade agreements are no exception and cannot justify the departure from the non-discrimination principle. The United States plainly breached its obligation to apply the safeguard measure to a product "irrespective of its source".[4526]

(b) Application of Article XXIV of GATT 1994

7.1905 With respect to arguments by Japan and Korea that Article I and Article 2.2 embody the MFN principle of the WTO and that this principle prevents the exclusion of any Member (other than a

[4518] Japan's second written submission, para. 170.
[4519] Japan's first written submission, para. 329; Korea' first written submission, para. 172.
[4520] Japan's second written submission, para. 170.
[4521] Japan's second written submission, para. 170.
[4522] Japan's first written submission, para. 329.
[4523] Japan's first written submission, paras. 330-331.
[4524] Japan's first written submission, para. 330.
[4525] Japan's first written submission, para. 331; Korea's first written submission, para. 173.
[4526] Japan's first written submission, para. 334

developing country Member subject to Article 9.1) from a safeguard measure, the United States argues that Article XXIV creates an exception to the MFN obligation for parties to a free trade agreement, allowing them to terminate duties and other restrictive regulations of commerce – including safeguard measures – between them. Footnote 1 of the Agreement on Safeguards establishes that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". Therefore, the United States' exclusion of products of Canada, Mexico, Israel, and Jordan from the steel safeguard measures is not inconsistent with GATT 1994 or the Agreement on Safeguards.[4527]

7.1906 The United States submits that the text of GATT 1994 is clear on this point. Article XXIV:4 recognizes "the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration" among Members, consistent with the objective of 'facilitating trade between the constituent territories' of the free trade area[4528] while not raising barriers to trade with other Members. To this end, Article XXIV:5 provides that "the provisions of this Agreement shall not prevent" the formation of a free-trade area, provided that certain conditions are met.[4529] The United States further argues that to the extent that Articles I or XIX can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception. This is because under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Article XIX, can be read to prevent participants in an FTA from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures.[4530]

7.1907 The United States argues that the United States' free trade agreements with Canada, Mexico, Israel, and Jordan clearly meet the requirements of Article XXIV.[4531] In this regard, the United States asserts that no complainant has disputed that the safeguard exclusion is an integral component of the elimination of trade restrictive measures incorporated in NAFTA, the Israel FTA, and the Jordan FTA, or that the United States acted in compliance with these agreements in excluding FTA partners' goods from the steel safeguard measures. The United States submits that, therefore, the exclusion of the products of each of these countries from the steel safeguard measures is part of the general elimination of duties and restrictive regulations of trade in those agreements, and falls within the purview of Article XXIV. By virtue of Article XXIV:5, this application by the United States of the safeguards exclusion is not foreclosed either by the requirements of Articles I or XIX.[4532]

7.1908 The United States argues that while Article 2.2 of the Agreement on Safeguards also creates a nondiscrimination requirement, this requirement does not supersede the Article XXIV authorization for Members to exclude free trade agreement partners from safeguard measures. The last sentence of footnote 1 of the Agreement on Safeguards deals with the relationship between Article XXIV and the Agreement on Safeguards. It specifies 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, issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles.[4533] The United States submits that application of the customary rules of treaty interpretation supports this conclusion. According to these rules, the words in footnote 1 of the Agreement on Safeguards must be interpreted in good faith in accordance with their ordinary meaning in their

[4527] United States' first written submission, para. 1228.
[4528] United States' second oral statement, para 141.
[4529] United States' first written submission, para. 1229.
[4530] United States' first written submission, para. 1231.
[4531] United States' first written submission, para. 1232.
[4532] United States' first written submission, para. 1240.
[4533] United States' first written submission, para. 1241.

context and in the light of the object and purpose of the Agreement on Safeguards. The ordinary meaning of the first four words of the footnote, "nothing in this Agreement", is to place a limitation on the entire agreement by indicating something that it does not do. The end of the sentence indicates what is being limited – "the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994".[4534] The United States submits that, in other words, the footnote means that the provisions of the Agreement on Safeguards 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 agreement on the other.[4535]

7.1909 The United States notes that the Panel in *US – Line Pipe* addressed this question and concluded that the information presented by the United States established a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b). According to the United States, it found further 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 [safeguard] measure". The United States submits that the Panel also found, based on footnote 1 of the Agreement on Safeguards, that "Article XXIV can provide a defence against claims of discrimination brought under Article 2.2".[4536] The United States asserts that the Appellate Body declared these findings "moot". Accordingly, the DSB did not adopt these findings when it adopted the Panel Report, as modified by the Appellate Body Report. However, the Appellate Body at no point criticized the Panel's reasoning, which the United States says it finds persuasive on these issues.[4537]

7.1910 Japan submits that the reliance by the United States on the Panel decision in *US – Line Pipe* is misplaced. First, the Appellate Body declared that the Panel's finding was moot and had no legal effect. Second, according to Japan, the Panel's reasoning in *US – Line Pipe* is flawed; it is shallow and conclusory rather than convincing.[4538]

7.1911 In response, the United States argues that the declaration that a finding is moot means only that it need not have been made. Such a finding does not signify any infirmity in the reasoning underlying the substantive finding. The United States argues that, therefore, the Panel's findings on Article XXIV in *US – Line Pipe*, like an unadopted panel report, may provide guidance to a later panel.[4539]

7.1912 Japan further argues that the United States' assertion that footnote 1 to Article 2 of the Agreement on Safeguards does not disturb the exceptions permitted by GATT 1994 Article XXIV is misguided and that the United States both misreads footnote 1 and misinterprets prior decisions on this issue. First, Japan notes that footnote 1 is inapplicable to free-trade areas (or their members). It does not define a "Member" as a free-trade area or a country belonging to one; nor does it mention free-trade areas in any other way. According to Japan, the United States claims, in essence, that the last sentence of footnote 1 has nothing to do with the rest of the footnote, and that it covers free-trade areas as well as customs unions. In Japan's view, this sentence, however, merely 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". It says nothing about free-trade areas. If the Members meant for the same rules to apply to both customs unions and free-trade areas, they would have said so quite

[4534] United States' first written submission, para. 1242.
[4535] United States' first written submission, para. 1245.
[4536] United States' first written submission, para. 1247.
[4537] United States' first written submission, para. 1248.
[4538] Japan's second written submission, para. 171.
[4539] United States' second oral statement, para. 143.

clearly. Japan argues that the use of the Article XXIV exception is strictly conditioned with respect to customs unions. The Appellate Body in *Argentina – Footwear (EC)*, citing *Turkey – Textiles*, said that, under certain conditions, "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions". ... [T]his defence is available only when it is demonstrated by the Member imposing the measure 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 "that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue". Japan submits that, therefore, it would be anomalous, indeed, if free-trade areas and their members (which are not even mentioned in footnote 1) were subject to no restrictions conditioning their ability to use the defense of Article XXIV while customs unions (which are specified in the text) could benefit from the defence only in limited circumstances.[4540]

7.1913 Korea agrees that by its explicit terms, footnote 1 applies to customs unions. Further there is no basis to conclude that footnote 1 is actually two footnotes that must be read separately, as the United States suggests, but never demonstrates. According to Korea, the last sentence of footnote 1 cannot be read as separate and apart from the entire footnote – which by its terms applies to customs unions alone. Thus, Korea argues that footnote 1 deals with the particular circumstances of safeguard investigations conducted by a customs union as to all the elements of an investigation when conducted on the basis of a single market.[4541]

7.1914 Norway argues that safeguard measures based on GATT 1994 Article XIX and the Agreement on Safeguards may be excluded as between free trade partners, although such an exclusion is not required.[4542] The Agreement on Safeguard requires that where such an exclusion is undertaken that the imports from these countries also be excluded from the safeguards findings and determinations. In this regard, Norway argues that GATT 1994 Article XXIV applies to the Agreement on Safeguards as it applies to GATT 1994 Article XIX.[4543] According to Norway, the correct understanding and application of GATT 1994 Article XXIV:8(b) has been somewhat disputed for a long time, but particularly since the 1970s. Norway notes that itself, and its European free trade partners have routinely exempted their partners from safeguard actions, based on GATT 1994 Article XXIV:8(b) and the provisions of the respective FTA mandating such preferential treatment. Norway submits that the Agreement on Safeguards did not change the relationship between Article XXIV and Article XIX. The last sentence of footnote 1 to Article 2 of the Agreement on Safeguards indicates that nothing was changed and nothing was finally agreed during the Uruguay Round. The sentence itself and the history behind it implies, like Article XXIV itself does, that the possibility for exemption applies both to customs unions and free trade areas.[4544] Norway argues that this follows from the general nature of the wording, which refers to the whole of paragraph 8, not only to paragraph 8(a) that concerns customs unions or only to 8(b) that concerns free trade areas. This also follows from the fact that the footnote is attached to the word "Member" in paragraph 1. If it should apply only to customs unions, and thus override Article XXIV and limit the rights of Member States, it would have had to state so explicitly. Thus, Norway submits, the non-discrimination requirement of Article 2.2 of the Agreement on Safeguards does not supersede the authorisation of Article XXIV for Members to exclude free trade area partners from safeguard measures.[4545]

[4540] Japan's second written submission, paras. 172-175.
[4541] Korea's second written submission, para. 223.
[4542] Norway's written reply to Panel question No. 117 at the first substantive meeting.
[4543] Norway's second written submission, para. 188.
[4544] Norway's second written submission, paras. 189-190.
[4545] Norway's second oral statement on behalf of all complainants, para. 4.

7.1915 Norway notes that the issue has been touched upon in *Turkey – Textiles* and *Argentina – Footwear (EC)*, both of which, however, concerned "customs unions" and not Free Trade Agreements. Norway notes that the issue was raised once more in *US – Line Pipe*, where the Appellate Body explicitly declined to rule on this point However, Norway notes that in *Turkey – Textiles* the Appellate Body and the Panel admitted that an Article XXIV defence in principle exists – but found that the conditions for its application were not met in that specific case.[4546]

7.1916 Japan and Korea argue that, even if one assumes that the last sentence of footnote 1 applies to free-trade areas, the Article XXIV defense is not available to the United States.[4547] Korea argues that Article XXIV is intended to preserve the rights of members to form free trade areas. Article XXIV.5 is intended to protect members' rights to enter into free trade areas by assuring that the provisions of the Agreement on Safeguards do not prevent it, as long as the establishment of a free trade area does not make the duties and other regulations of commerce applicable to WTO members higher than prior to the formation of such a free trade area. Korea submits that in this case, the inclusion of NAFTA members in safeguard measures would not "prevent" the formation of NAFTA – NAFTA specifically permits NAFTA members to decide unilaterally whether or not to include each other in safeguard measures on an *ad hoc* basis. Therefore, Korea argues that regardless of the full meaning of Article XXIV, the United States does not need to invoke Article XXIV to ensure that "this Agreement shall not prevent the formation of a free trade area". Korea submits that this defence is, therefore, unavailable to the United States and the United States is therefore in violation of Article 2.2 of the Agreement on Safeguards.[4548]

7.1917 Article XXIV:8(b) defines 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. In response to a question from the Panel as to the significance of the fact that Article XIX is not mentioned in the brackets of Article XXIV:8(b), Japan asserts that assuming, for purposes of argument, that an FTA member must eliminate application of safeguard measures to its FTA partners by virtue of the brackets, Members would also have to eliminate other measures not enumerated in the brackets, particularly anti-dumping and countervailing duty measures. Clearly, the United States has not eliminated – and has no intention to eliminate – anti-dumping and countervailing duty measures against Canada, Mexico and Israel.[4549] Japan argues that, on realising this, the United States changes its position and expects to back away from its contention that it *must* eliminate safeguard measures as a "restrictive regulation of commerce" because they are not among the measures that a Member is permitted to retain.[4550]

7.1918 In response to the same question, Korea argues that the measures mentioned in the parenthetical clause in Article XXIV:8(b) of the GATT 1994 are illustrations of the measures available even among the members of an FTA. It is not an exhaustive list. The measures specifically identified in the parenthetical clause are those that by their very nature do not prevent the formation of free trade areas and, therefore, are permitted, if necessary. As to any other measures not listed, the fundamental question is: Does the maintenance of those measures prevent the formation of a free trade area? Each measure and the circumstances of its imposition must be examined for all measures not explicitly permitted. In the case of NAFTA and the other FTAs at issue, the imposition of safeguard measures between members would not have prevented the formation of NAFTA, etc. To

[4546] Norway's second written submission, paras. 189-191.
[4547] Japan's second written submission, para. 176; Korea's second written submission, para. 224.
[4548] Korea's second written submission, paras. 225-226.
[4549] Japan's written reply to Panel question No. 117 at the first substantive meeting.
[4550] Japan's second written submission, para. 179.

the contrary, the members of NAFTA and the FTAs explicitly preserved the right of members to impose safeguard measures against each other.[4551]

7.1919 The United States argues that the formation of a free trade area does not rest on the elimination of any single measure. The United States relies upon Article XXIV:8(b) in asserting that formation of a free trade area requires the elimination of a package of duties and other restrictive regulations of commerce that collectively covers substantially all trade. This standard does not require an analysis of each distinct measure but, rather, the group. The United States notes that Article XXIV 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. The United States argues that if FTA parties can achieve the Article XXIV:8 threshold (covering "substantially all trade") without including all duties and other restrictive regulations of commerce, they may retain such duties and regulations. Thus, as with any duty or other restrictive regulation of commerce, retention of safeguard measures, in whole or in part, is consistent with Article XXIV:8(b) as long as those measures that are eliminated cover substantially all trade among the parties. According to the United States, the only significance associated with the absence of Article XIX from the bracketed text in Article XXIV:8(b) is that, unlike the measures described within the brackets, Article XIX measures are not automatically exempt from the requirement to eliminate duties and other restrictive regulations of commerce on substantially all trade. They may still be retained if the parties to an free trade agreement otherwise meet the requirements of Article XXIV:8. The United States asserts that this was the case for the NAFTA.[4552]

7.1920 Japan further argues that, assuming that Article XXIV applies to the exclusion of free trade agreement partners from safeguard measures, the phrase "are eliminated", as used in Article XXIV:8(b), appears to indicate that safeguard measures should be excluded unconditionally at the time a free trade agreement is negotiated[4553], and that this wording makes clear that a general exception from safeguard measures must be written into an FTA in order for the Article XXIV exception to be applicable.[4554] Japan argues that, moreover, if the measure is not subject to general exemption, how would one judge whether or not the "substantially all" requirement under Articles XXIV:8(b) is met in terms of such conditional elimination? Safeguard measures were not eliminated in either United States FTA. According to Japan, Article 802.1 of the NAFTA conditions exemption of Canada and Mexico from a safeguard measure to situations where imports from them do not account for "a substantial share of total imports" and they do not "contribute importantly" to the serious injury. Similarly, Article 5.3 of the United States-Israel Free Trade Agreement limits exemption from a safeguard measure to situations where imports from Israel are not "a substantial cause of the serious injury". Japan argues that the conditional exemption in certain cases when certain subjective conditions are satisfied does not meet the requirements for asserting Article XXIV:8(b) as a defense to Article 2.2 of the Agreement on Safeguards and GATT 1994 Article I:1.[4555] Korea adds that even if a NAFTA member unilaterally decides that it wishes to exempt another NAFTA member from the application of a safeguard measure on a case-by-case basis, it is not required to do so by its obligations under the free trade agreement. In other words, safeguard measures could be preserved against other NAFTA members at the discretion of each national authority and so it cannot be said to be an integral component of the elimination of trade restrictive measures, argues Korea.[4556]

[4551] Korea's written reply to Panel question No. 117 at the first substantive meeting.
[4552] United States' written reply to Panel question No. 117 at the first substantive meeting.
[4553] Japan's written reply to Panel question No. 118 at the first substantive meeting.
[4554] Japan's second written submission, para. 176.
[4555] Japan's second written submission, paras. 176-178.
[4556] Korea's second written submission, para. 229.

Consequently, no "exception" to the clear mandate of Article 2.2 is established for NAFTA safeguard measures by Article XXIV. Korea further adds that the United States cannot "invoke" Article XXIV on a case-by-case basis depending on whether the United States decides to exempt Canada and/or Mexico based on its own internal regulation.[4557] The fact that the United States cannot "invoke" an Article XXIV defence on a case-by-case basis is further confirmed by the review procedures established by the NAFTA itself. Further, Korea notes that such determinations to include NAFTA members in a safeguard measure are even exempted from review by NAFTA dispute settlement panels.[4558]

7.1921 The United States argues that Article XXIV would permit only a safeguard exclusion that is permitted under the terms of the FTA.[4559] Further, according to the United States, the *US – Line Pipe* Report addresses and disposes of all the arguments raised by Japan and Korea.[4560] In addition, , the United States notes that Japan and Korea both claim that NAFTA did not truly "eliminate" safeguard measures because it would allow inclusion of Canada and Mexico in certain limited circumstances. However, the United States claims, what Japan and Korea fail to recognize is that NAFTA requires elimination of safeguard measures in particular circumstances. If those circumstances exist, one party must exclude another from any safeguard measures. There is no choice. The United States further submits that, contrary to Korea's view, this obligation is subject to dispute settlement under NAFTA. According to the United States, there is, in fact, nothing in Article XXIV that requires complete elimination of a duty or other restrictive regulation of commerce. In fact, Article XXIV:8 envisages the retention of some such measures in that it requires elimination on "substantially all" – not all – trade among FTA parties. Indeed, it is not uncommon for Members who enter into FTAs to retain certain trade restrictive measures in whole or in part.[4561]

7.1922 Norway submits that the relevant issue is not whether the free trade partners may be excluded from safeguard actions, but which criteria apply to make such an exclusion permissible. Norway submits that there are three main criteria. [4562] Firstly, that NAFTA itself must fulfil the requirements of an FTA under the GATT 1994 Article XXIV:8(b) , which is not contested.[4563] Secondly, according to Norway, Article XXIV:8(b) implies that the general exclusion from the GATT 1994 Article XIX safeguards must follow from the FTA itself, either directly or implicitly (i.e by way of a prohibition on all restrictions on commerce). Norway submits that a GATT 1994 Article XXIV exception can, of course, only cover as much as is covered by the FTA itself.[4564] Norway argues that the proscription of safeguards under GATT 1994 Article XIX must, therefore, be contained in the free trade agreement in order for Article XXIV to apply. According to Norway, this does not mean that the specific safeguard measure (for e.g. regarding steel) should be dealt with in the free trade agreement but, rather, that the agreement should only contain provision(s) dealing with the exclusion from safeguards. Norway agrees with Korea that conditional exclusions or permissions to exclude, as under NAFTA, do not sit well with GATT 1994 Article XXIV, as the United States is not required under the FTA to exclude its free trade partners.[4565] According to Norway, Article 802.1 of the NAFTA conditions exclusion of Canada and Mexico from a safeguard measure to situations where imports from them do not account for "a substantial share of total imports" and they do not "contribute importantly" to the serious

[4557] Korea's written reply to Panel question No. 118 at the first substantive meeting.
[4558] Korea's second written submission, para 231.
[4559] United States' written reply to Panel question No. 118 at the first substantive meeting.
[4560] United States' second oral statement, para. 144.
[4561] United States' second oral statement, paras. 144-146.
[4562] Norway's second written submission, para. 192.
[4563] Norway's second written submission, para. 193.
[4564] Norway's second written submission, para. 194.
[4565] Norway's written reply to Panel question No. 118 at the first substantive meeting.

injury.[4566] Similarly, Article 5.3 of the United States-Israel Free Trade Area limits exemption from a safeguard measure to situations where imports from Israel are not "a substantial cause of the serious injury". Norway submits that these Agreements, particularly the NAFTA, with their conditional exceptions, do not fit well with this second criterion – as it is difficult to ascertain from their provisions whether the exclusion from safeguards (based on GATT 1994 Article XIX and Agreement on Safeguards) is required by the FTA in a particular case – and thus that this exclusion conforms to Article XXIV. Norway argues that, therefore, the second condition does not seems to be fulfilled by the Agreements of the United States.[4567] As for the third criteria, Norway links this with the application of the principle of parallelism and non-attribution.[4568]

7.1923 As a separate argument, Japan and Korea reiterate that this claim is a separate and distinct claim from the Article 2.2 and 2.1 "parallelism" claim.[4569] Japan also note that, with regard to the exclusion of imports from Israel, this is Japan's only claim. Therefore, Japan submits that exercise of judicial economy with respect to this claim would not be appropriate because, as stated by the Appellate Body in *Australia – Salmon*: 'The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute" [DSU Article 3.7]. To provide only a partial resolution of the matter at issue would be a false judicial economy.'[4570]

2. Exclusion from the benefit of Article 9.1 of the Agreement on Safeguards

7.1924 China argues that due to the fact that Chinese products were unfairly and illegally included in the scope of application of the United States safeguard measures while, at the same time, imports originating from other developing countries were excluded, China considers that the United States violated the Most Favored Nation treatment provided by Article I:1 of the GATT 1994.[4571] In the view of China, there is a discrimination, and therefore a violation of Article I.1 of the GATT 1994 as well as Article 2.2 of the Agreement on Safeguards, when a country is excluded from the benefit of Article 9.1 while all criteria of this provision are met. This is the case if not all the de minimis exporting developing country Members are excluded.[4572]

7.1925 The United States argues that China fails to recognize that Article I:1 and Article 2.2 require most favoured nation treatment – the same treatment to all Members. When a Member affords developing country Members the same treatment as developed country Members, it is acting *in conformity with* Article I:1 and Article 2.2. Article 9.1 acts to require differential treatment inconsistent with those Articles, and provides a defense against a claim from developed countries that Article I:1 or Article 2.2 entitles them to the same differential treatment. Therefore, the United States argues, if a Member fails to provide treatment consistent with Article 9.1 to a developing country Member, it has acted inconsistently with Article 9.1, but not with Article I:1 or Article 2.2.[4573]

[4566] Exhibited by the United States in Exhibit US-50.
[4567] Norway's second written submission, para. 194-195.
[4568] Norway's second written submission, para. 197-199.
[4569] Japan's second written submission, para 181; Korea's second written submission, para. 220.
[4570] Japan's second written submission, para. 181.
[4571] China's first written submission, para. 677.
[4572] China's written reply to Panel question No. 119 at the first substantive meeting.
[4573] United States' second written submission, para. 244.

O. DECISION-MAKING

1. Articles 2.1 and 4.2(b) of the Agreement on Safeguards

7.1926 Brazil and Japan submit that Articles 2.1 and 4.2(b) require an exact correspondence between the injury determination, the like product definition, and the measure imposed.[4574] In particular, Japan argues that according to the plain meaning of Articles 2.1 and 4.2(b) of the Agreement on Safeguards, a safeguard measure cannot be applied to imports of a product without an affirmative injury or threat determination based on an examination of the domestic industry producing the like or directly competitive product. Japan asserts that, in other words, there must be a one-to-one relationship between the injury determination and the like product definition.[4575]

7.1927 The United States argues that, for purposes of determining whether increased imports are causing serious injury to a domestic industry, the "determination of the competent authorities" is a matter of the Member's domestic law. There is a well-established practice under US law that when USITC Commissioners disagree with respect to the like product definition, the USITC determination is based on the overlap of the determinations of the individual Commissioners. Here, the six Commissioners produced three affirmative and three negative individual determinations concerning stainless steel wire. Under US domestic law, the President may treat the USITC's equally divided determination as an affirmative determination. An overlap of decisions is acceptable as long as each decisionmaker addressed the goods in question and found that the increased imports caused serious injury or threat of serious injury.[4576]

7.1928 The United States further argues that in *US – Lin*e Pipe, the Appellate Body found that if a Member has taken a safeguard action that satisfies the requirements of the Agreement, the particular manner in which the decision is reached by the competent authorities is of no consequence. In that dispute, the Appellate Body found that a combination of individual determinations based on serious injury and threat of serious injury was sufficient to support an overall affirmative determination.[4577]

(a) Tin mill products

7.1929 According to Brazil and Japan, exact correspondence between the injury determination, the like product definition, and the measure imposed did not exist in the case of tin mill products given the very different findings of the commissioners on injury, like product and the measure recommended with respect to tin mill products.[4578]

7.1930 Brazil and Japan argue that in this case, the commissioners did not agree on either the like product definition or the injury findings for tin mill products. In particular, two commissioners, Bragg and Devaney, treated tin mill products as part of the CCFRS product category.[4579] They, in turn, made an affirmative injury determination concerning this broader category.[4580] The other four

[4574] Brazil's first written submission, para. 250; Japan's first written submission, paras. 153-154. Japan claimed Article X:3(a) violation as well as Articles 2.1 and 4.2(b) violation for the like product determinations on tin mill and stainless wire products, Ibid. para. 152. See also paras.7.1954-7.1974

[4575] Japan's first written submission, para. 154.

[4576] United States' written reply to Panel question No. 78 at the second substantive meeting.

[4577] United States' first written submission, para. 1005, citing Appellate Body Report, *US – Line Pipe*, para. 171.

[4578] Brazil's first written submission, para. 250; Japan's first written submission, para. 156.

[4579] USITC Report at 273 (Bragg on tin mill), 277 (Bragg on stainless wire), 36 footnote 65 (Devaney on tin mill), and 335 (Devaney on stainless wire) (Exhibit CC-6).

[4580] Japan's first written submission, para. 155.

commissioners considered tin mill products as a separate like product from the CCFRS product category. Three of these four commissioners made negative injury determinations on the tin mill products. Commissioners Hillman, Okun, and Koplan found that imports of tin mill products were not injuring the domestic tin mill industry; only Commissioner Miller found otherwise.[4581] Brazil and Japan argue that, in other words, only one commissioner found that imports of tin mill products unbundled from other products injured the domestic industry making those products.[4582] Brazil and Japan assert that the overall injury votes on tin mill products was three-to-three. However, the decision on the proper like product definitions for the products was four-to-two in favor of treating them as their own like product categories: tin mill was separate from other flat products. Brazil and Japan argue further that the injury votes on the preferred like product definition were three-to-one negative determinations.[4583] [4584]

7.1931 Japan argues that the USITC's injury determinations on these products were improperly treated by the President as three-to-three ties.[4585] Japan notes that the votes on tin mill products should only have been viewed as tied if they were based on the same like product definition, given how critical this definition is to the ultimate outcome of the analysis.[4586] Japan argues that the President applied what he believed was his discretion under Section 330(d)(1) of the Tariff Act of 1930, as amended, to treat the votes on tin mill products either as affirmative or as negative decisions. Japan asserts that, in this instance, the President chose the former. The President, however, announced a remedy for tin mill products separate from his remedy for CCFRS products, thereby indicating his agreement with the four commissioners who treated tin mill products as a separate like product.[4587] Japan submits that, yet, only one commissioner found that imports of these products injured the relevant domestic industry.[4588] Japan asserts that the President's reliance on tie votes that did not correspond to the separate like product definitions with which he implicitly agreed violates Articles 2.1 and 4.2(b). According to Japan, the measure is not supported by an affirmative injury determination on the tin mill category itself.[4589]

7.1932 The United States argues that the Appellate Body's conclusion is also instructive with regard to the affirmative votes made by those Commissioners whose respective starting point for their assessment of serious injury began with a different definition of the relevant like products. By way of example, both Commissioners Bragg and Devaney defined a like product that consisted of a broad grouping of flat-rolled steel products, including tin mill steel. They both analyzed increased imports corresponding to the like product, as they defined it, considered the conditions of competition, and assessed whether the domestic industry was suffering or threatened with serious injury and lastly considered the causal link, if any, between any such injury and the increased imports. The United States argues that, as discussed in more details in sections on injury and causation, their legal findings fulfilled the requirements of Articles 2.1 and 4.2 of the Agreement. Therefore, they satisfied the applicable requirements set forth in the Agreement to be completed by the competent authorities in this regard. At the same time, four other Commissioners defined a like product consisting exclusively of tin mill steel and conducted the same methodical analysis required by Articles 2 and 4 of the Agreement. One of the four Commissioners concluded that increased imports of tin mill steel were

[4581] USITC Report, Vol. I, at 25 (Hillman, Okun, and Koplan) and 307 (Miller's separate views).
[4582] Brazil's first written submission, para. 248; Japan's first written submission, para. 156.
[4583] USITC Report, Vol. I, at 49.
[4584] Japan's first written submission, para. 157.
[4585] Japan's first written submission, paras. 158-159.
[4586] Japan's oral statement for the second substantive meeting, para. 24; see also Japan's second written submission, paras. 50-51.
[4587] Japan's first written submission, para. 159.
[4588] Japan's first written submission, para. 160.
[4589] Japan's first written submission, para. 161.

causing serious injury to the domestic industry producing tin mill steel as discussed in the injury and causation.[4590]

(b) Stainless steel products

7.1933 Japan argues that, in this case, the commissioners did not agree on either the like product definition or the injury findings for stainless steel wire products. In particular, two commissioners, Bragg and Devaney, treated stainless wire products as a part of a combined stainless wire/wire rope category.[4591] They, in turn, made an affirmative injury determination concerning this broader category.[4592] The other four commissioners considered stainless wire as separate from stainless wire rope. Three of these four commissioners made negative injury determinations on the stainless wire products. Commissioners Hillman, Okun, and Miller found that imports of stainless wire were not injuring the domestic stainless wire industry; only Commissioner Koplan found otherwise.[4593] Japan argues that, in other words, only one commissioner found that imports of tin mill products and stainless wire products, unbundled from other products, injured the domestic industry making those products.[4594] Japan asserts that the overall injury votes on stainless steel products was three-to-three. However, the decision on the proper like product definitions for the products was four-to-two in favor of treating them as their own like product categories: stainless steel wire was separate from stainless wire rope. Japan argues further that the injury votes on the preferred like product definition were three-to-one negative determinations.[4595] [4596]

7.1934 Japan argues that the USITC's injury determinations on these products were improperly treated by the President as three-to-three ties.[4597] Japan notes that the votes on stainless wire products should only have been viewed as tied if they were based on the same like product definition, given how critical this definition is to the ultimate outcome of the analysis.[4598] Japan argues that the President applied what he believed was his discretion under Section 330(d)(1) of the Tariff Act of 1930, as amended to treat the votes stainless products either as affirmative or as negative decisions. Japan asserts that, in this instance, the President chose the former. However, for stainless wire, the President had to treat it as a separate like product since the Commission had voted four-to-two that stainless wire rope imports were not injuring the domestic stainless wire rope industry.[4599] [4600] Japan argues that the President's choice to impose a separate measure on stainless wire products shows that he agreed with a majority of commissioners that stainless wire was a separate like product. Japan submits that, yet, only one commissioner found that imports of these products injured the relevant

[4590] United States' first written submission, para. 1006.
[4591] USITC Report at 273 (Bragg on tin mill), 277 (Bragg on stainless wire), 36 footnote 65 (Devaney on tin mill), and 335 (Devaney on stainless wire) (Exhibit CC-6).
[4592] Japan's first written submission, para. 155.
[4593] USITC Report, Vol. I, p. 27 (Hillman, Okun, and Miller) and 256 (Koplan's separate views).
[4594] Japan's first written submission, para. 156.
[4595] USITC Report, Vol. I, p. 49.
[4596] Japan's first written submission, para. 157.
[4597] Japan's first written submission, paras. 158-159.
[4598] Japan's oral statement for the second substantive meeting, para. 24; see also Japan's second written submission, paras. 50-51.
[4599] USITC Report at 27 (Koplan, Bragg, and Devaney affirmative determination on stainless wire and Okun, Miller, and Hillman negative determination with respect to stainless wire); *also*, p. 27 footnote 13 (Bragg and Devaney indicate that stainless wire and wire rope are one like product) and 277 (Bragg's separate views for stainless steel wire products) along with 335 (Devaney's separate views with respect to stainless steel wire and wire rope). *See also* ibid., p. 26 (Koplan, Okun, Miller and Hillman determine that stainless rope does not cause serious injury to the domestic industry) (Exhibit CC-6).
[4600] Japan's first written submission, para. 159.

domestic industry.[4601] [4602] Japan submits that, therefore, in fact, the President made his decision based on the vote of a single Commissioner.[4603] Japan asserts that the President's reliance on tie votes that did not correspond to the separate like product definitions with which he implicitly agreed violates Articles 2.1 and 4.2(b). According to Japan, the measure is not supported by an affirmative injury determination on the stainless steel wire category itself.[4604]

2. Article X:3(a) of GATT 1994

(a) Like product determinations

(i) Comparison with determinations in other anti-dumping and countervailing duty cases

7.1935 Japan argues that because the USITC adopted a like product analysis contrary to its 15 years of precedent in the anti-dumping and countervailing duties context, its actions are inconsistent with Article X:3(a) of GATT 1994.[4605] In particular, Japan argues that plate, hot-rolled, cold-rolled, and corrosion-resistant steel have traditionally been treated as separate like products by the USITC in other recent trade remedy cases.[4606] The factual findings in these cases confirm the factual findings in this case about physical properties, production processes, and end-uses.[4607] Japan argues the USITC has consistently found that no individual CCFRS is commercially interchangeable with any other CCFRS product. Indeed, the USITC considered and rejected making even cut-to-length plate and plate-in-coil (a hot-rolled steel product) a single like product, citing "differences in physical characteristics and end-uses", "some limitations on…interchangeability", and "differences in production facilities".[4608] [4609] Japan asserts that the USITC, however, chose to completely ignore this precedent. More particularly, Japan argues that nowhere in its Section 201 determination does the USITC attempt to square its finding of a single CCFRS product with its innumerable factual findings from previous anti-dumping and countervailing duties cases demonstrating the contrary. According to Japan, nowhere does the USITC rebut, or even address, arguments that the USITC's like product factual findings from past anti-dumping and countervailing duties cases are relevant for its consideration of the same products and factors in the Section 201 context.[4610]

7.1936 Japan also asserts that inconsistent with its previous decisions, the USITC failed to perform its like products analysis of CCFRS products in a "uniform", "impartial", or "reasonable" manner, consistent with Article X:3(a) of GATT 1994. The analysis was not "uniform" because it did not treat

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[4601] Treated as a separate like product, imports of tin mill products were found by Commissioner Miller to be seriously injuring the domestic tin mill industry. Ibid. at 307. Likewise, stainless wire was regarded by Chairman Koplan as a separate like product and found the domestic stainless wire industry to be seriously injured. Ibid. at 256.

[4602] Japan's first written submission, para. 160.

[4603] Japan's oral statement for the second substantive meeting, para. 24; see also Japan's second written submission, para. 56.

[4604] Japan's first written submission, para. 161.

[4605] Japan's first written submission, para. 125.

[4606] *See, e.g.*, USITC *Hot-Rolled (Final)* USITC Pub. 3446 (August 2001) (Exhibit CC-30), USITC *Hot-Rolled (Final)* USITC Pub. 3468 (November 2001) (Exhibit CC-31), USITC *Flat-Rolled (Preliminary)* USITC Pub. 2549 (August 1992) (Exhibit CC-32), USITC-*Cold-Rolled (Final)* USITC Pub. 3283 (March 2000) (Exhibit CC-34).

[4607] Japan's first written submission, para. 132.

[4608] *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753-756 (Final), USITC Pub. 3076 (December 1997), at 5-7 (Exhibit CC-41).

[4609] Japan's first written submission, para. 134.

[4610] Japan's first written submission, paras. 135-136.

imports the same under similar circumstances. Nor was it "reasonable" to break with its past factual findings on the same CCFRS and like product factors without explanation.[4611] Japan argues that based on past precedent, and its own factual findings, the USITC could only have determined that each CCFRS product constitutes a separate like product. Its failure to do so constitutes an inconsistency with the US obligation under Article X:3(a) to apply its laws in a uniform, impartial, and reasonable manner.[4612]

7.1937 According to Japan, the analysis was not "impartial" because the USITC's omission of these factual findings was not accidental oversight, but a wilful gambit to facilitate an affirmative injury determination on CCFRS products to benefit the US domestic industries over their foreign competitors. Japan submits that under the safeguards statute, the USITC cannot render an affirmative determination unless it finds: (1) an increase in imports, either actual or as a percentage of domestic production; (2) the domestic industry producing the like product is suffering serious injury; and (3) imports were a substantial cause of the serious injury.[4613] In Japan's view, in analysing the question of increased imports, the USITC traditionally compares import volume and the ratio of imports to domestic production in the first and last full years of its period of investigation[4614]; in this case, it compared 1996 and 2000.[4615] [4616] Japan argues that had the USITC made each CCFRS product a separate domestic like product, consistent with past practice, then it could not have found the requisite increase in import volume for plate – plate import volume declined 50.9% between 1996 and 2000[4617] – and would have had to somehow explain away the decline in the ratio of imports to domestic production for cold-rolled steel and corrosion-resistant steel.[4618] With a single CCFRS like product, the USITC was able simply to note that imports increased from one end-point to another, both absolutely and as a ratio to domestic production[4619] (though, as discussed below, this increased imports analysis fails to meet the standard established by the Agreement on Safeguards, as interpreted by the Appellate Body).[4620]

7.1938 Japan also argues that had the USITC made each CCFRS product a separate like product, it could not have established causation for many of the products. For example, slab import volume increased the most of any CCFRS product between 1996 and 2000, but almost all of these imports were purchased by domestic producers themselves, because they could not produce sufficient volumes of slab to meet booming steel demand[4621]; in this way, slab imports actually benefited domestic producers.[4622] [4623] Japan argues that the USITC also could not have found cold-rolled steel imports a "substantial cause" of serious injury to the domestic cold-rolled steel industry, when it had just

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[4611] Japan's first written submission, para. 137.
[4612] Japan's first written submission, para. 142.
[4613] 19 U.S.C. §§2252(c)(1)(A-C) (Exhibit CC-47).
[4614] USITC Report, pp. 32-33 (Exhibit CC-6).
[4615] Ibid., p. 49.
[4616] Japan's first written submission, para. 138.
[4617] USITC Report, Vol. I, FLAT-9.
[4618] Ibid., FLAT-11 (cold-rolled import volume as a share of domestic production declined from 7.5% to 7.3%), and FLAT-13 (corrosion-resistant import volume as a share of domestic production declined from 13.3% to 11.8%.).
[4619] Ibid., pp. 49-50.
[4620] Japan's first written submission, para. 139.
[4621] USITC Report, Vol. I., p. 56 ("steelmakers themselves are the only purchasers of slabs").
[4622] Ibid., p. 62 ("The domestic industry includes a number of producers who rely on imported certain carbon flat-rolled steel–especially slab–for use as raw materials in the production of further processed certain carbon flat-rolled steel. Some of these producers may have benefited from the decline in import prices during the POI.").
[4623] Japan's first written submission, para. 140.

determined that cold-rolled steel imports had not caused material injury to the domestic industry in its March 2000 anti-dumping determination for cold-rolled steel[4624], under a lower causation standard.[4625] By combining the major CCFRS products into a single domestic like product, the USITC was able to ignore conditions of competition unique to individual CCFRS products, thereby facilitating its affirmative determination.[4626]

7.1939 In response to the argument that the USITC's like product definitions were not reasonable because the agency departed from a like product determination made in earlier investigations involving dumped and subsidized steel products, the United States relies upon the Panel's decision in *US – Stainless Steel* to argue that the requirement of reasonable administration of laws and regulations is not violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts.[4627] More particularly, the United States argues that with respect to differing like product determinations issued by the USITC in prior anti-dumping and countervailing duty cases, Article X:3(a) does not require "uniform" administration between different laws. It requires the uniform, impartial, and reasonable administration of each law. Otherwise, the complainants' approach would require all laws, no matter how different in their texts, purposes, and scope, to be administered in the same way with the same substantive outcome.[4628]

7.1940 In counter-response, Japan argues that the safeguards law, like the anti-dumping and countervailing duty laws, is a trade remedy law. Although the standards are not identical, the basic purposes of the laws are similar. Of particular importance, all three laws focus on the economic effect of imports on the competing domestic industry producing like or substitutable/directly competitive/similar products. Thus, given the similarities, decisions regarding like products in the context of one of these trade remedy laws are highly relevant to analysing the uniform application requirement of Article X:3(a).[4629]

7.1941 The United States argues that the fact that the USITC has reached different like product determinations in different cases does not establish a violation of Article X:3(a). First, the USITC would not violate Article X:3(a) even if it had reached different like product findings in different safeguards cases. In applying the United States' safeguards law, the USITC has applied the same five factors to define the domestic "like product" as it has applied for decades. Thus, its application of the safeguards law is uniform, in compliance with Article X. The United States submits that if the facts in two different cases differ, or if the scope of the petition in two cases differs, this may lead to two different like product findings. Such an outcome is completely consistent with a uniform application of the law to different facts. Second, Article X is not violated simply because the interpretation of the term "like product" may differ across different statutes. Article X refers to the administration of laws, not the substance of the underlying laws themselves. There is no obligation under Article X to define the same term in the same way in different statutes. Thus, if the underlying laws define the term "like product" differently, then there is no obligation to administer the laws in a way that ignores these differences. The United States submits that, in the case at hand, the US unfair trade laws approach the

[4624] USITC *Cold-Rolled (Final)* USITC Pub. 3283 (March 2000), at 24 (Exhibit CC-34).

[4625] In anti-dumping investigations, the USITC need only find that a domestic industry is suffering material injury "by reason of" subject imports. 19 U.S.C. § 1677(7)(A) (defining "material injury" as "harm which is not inconsequential, immaterial or unimportant."). In Section 201 investigations, the USITC must find that imports are a "substantial cause" of "serious injury" meaning "a cause which is important and not less than any other cause." 19 U.S.C §2252(b)(1)(B) (Exhibit CC-47).

[4626] Japan's first written submission, para. 141.

[4627] United States' first written submission, para. 1303.

[4628] United States' first written submission, para. 1304.

[4629] Japan's written reply to Panel question No. 136 at the first substantive meeting.

term "like product" differently than the United States' safeguards law. The USITC explicitly addressed some of these differences in its determination. Third, even if the underlying statutes did not directly address how the term "like product" should be interpreted, Article X would not require the USITC to interpret the term uniformly across different statutes. Requiring uniform interpretation across different laws would ignore essential differences between the laws and the situations in which they are applied. Finally, even if Article X required the USITC to interpret the term "like product" the same way for purposes of the anti-dumping, countervailing duty, and safeguard statutes, this would not necessarily mean that the USITC would reach the same "like product" findings in all cases. The United States submits that each case must be judged on its individual facts. The facts of an anti-dumping or countervailing duty cases may differ significantly from the facts of a safeguard case.[4630]

7.1942 In counter-response, Japan submits that the question at stake is whether the USITC administered its laws concerning like product delineations appropriately. The United States appears to be saying that like product means something different in the anti-dumping and countervailing duties context, but never explains why this is necessarily so. In this regard, Japan notes that the United States explained in the like product discussion that, under both laws, the purpose is to discern the clear dividing line between products. Japan questions why the clear dividing line would be different in an anti-dumping and countervailing duties context from a safeguard context unless the USITC was interested in justifying the difference where it otherwise was unjustifiable.[4631]

7.1943 The United States responds by stating that Article X:3 applies only to administration of a particular law. It does not require a Member to administer its safeguards law in the same manner as its anti-dumping laws, food safety laws, or any other laws. The United States submits that, indeed, there are good reasons why the same term may be interpreted and applied differently under different laws, especially if those laws have different objectives. In the view of the United States, adoption of Japan's interpretation of Article X:3 would disregard these differences, and commit Panels to a boundless review of Members' entire legal systems to determine whether terms received identical treatment in every law. The United States submits that it sees no indication that Article X:3 imposes such a requirement.[4632]

(ii) Comparison with other determinations in the same case

7.1944 Japan argues that because the USITC adopted a like product analysis contrary to like product distinctions for other products in this case, its actions are inconsistent with Article X:3(a) of GATT 1994.[4633] More particularly, Japan argues that the USITC made similar factual findings for semi-finished flat, long, and stainless steel products under its like product factors, but failed to render similar like product determinations.[4634]

7.1945 By way of elaboration, Japan submits that while the USITC lumped semi-finished flat steels – or slab – into the same like product as finished flat steels, it decided to treat semi-finished long products and semi-finished stainless products as separate like products, apart from finished products. Carbon billets, which bear the same relationship to carbon long products as does carbon slab to carbon sheet products in that both are the input for further rolling into the next stage product, were found to be a separate like product from finished long products. Stainless slab, which bears the identical relationship to stainless plate and other CCFRS products as carbon slab bears to finished carbon flat

[4630] United States' written reply to Panel question No. 136 at the first substantive meeting.
[4631] Japan's oral statement at the second substantive meeting, para. 34.
[4632] United States' second written submission, para. 243.
[4633] Japan's first written submission, para. 125.
[4634] Japan's first written submission, para. 143.

products, was found to be a different like product than stainless plate and other flat-rolled stainless products. Likewise, within the CCFRS category, although both tin mill products and corrosion resistant products use a cold rolled substrate, they were treated as separate like products. According to Japan, such treatment was not uniform, reasonable or impartial.[4635]

7.1946 Japan argues that the USITC combined semi-finished slab with the major finished CCFRS products made from slab – hot-rolled steel, plate, cold-rolled steel, and corrosion-resistant steel – into a single CCFRS like product by ignoring the findings of its own analysis of like product factors.[4636] According to Japan, these findings demonstrated that slab is not "like" any of the finished CCFRS products in terms of physical characteristics, end-uses, production processes, channels of distribution, and tariff classifications. In terms of physical characteristics, slab is much thicker than any finished CCFRS product, all of which are reduced in thickness via rolling.[4637] In terms of production processes, slab is continuously cast, whereas all finished CCFRS products are rolled[4638], and some are coated.[4639] In terms of channels of distribution and end-uses, nearly all slab is internally consumed by domestic producers themselves for the production of downstream products.[4640] By contrast, most corrosion-resistant steel and plate is sold to end-users and distributors, as is a substantial proportion of hot-rolled and cold-rolled steel, destined for a variety of end-use applications.[4641] Japan submits that the USITC folded all CCFRS products into a single like product in part because most finished CCFRS products are sold into the automotive and construction markets, but this logic does not apply to slab. Finally, as with all CCFRS products, slab is classified under its own tariff classification numbers.[4642]

7.1947 Japan argues that the USITC's like product findings for semi-finished carbon steel, semi-finished long products (billets) and semi-finished stainless products should have resulted in determinations that all three were not "like" the corresponding finished steel products. Yet, the USITC did not render like product determinations consistent with these findings: semi-finished long and stainless products were made separate like products, but carbon slab was not.[4643] [4644] Japan argues that likewise, within the CCFRS category, both tin mill products and corrosion-resistant products use a cold-rolled substrate.[4645] Tin mill products are coated with tin or chromium; corrosion-resistant products are coated with zinc or zinc-aluminum alloys. Yet, they were treated as separate like products, with all commissioners treating corrosion-resistant products as part of the larger flat product category, and four commissioners treating tin mill products as its own separate like product.[4646] Japan submits that, if anything, it would make more sense to consider tin mill and corrosion-resistant products as a single like product given their physical characteristics, their location in the production chain, and their sometimes common treatment in the HTS. Japan submits that, however, the USITC made the odd leap to consider, effectively, slab and plate to be more comparable to corrosion-resistant steel than tin mill products.[4647]

[4635] Japan's second written submission, para. 75.
[4636] USITC Report at 36 (Exhibit CC-6).
[4637] Ibid., at OVERVIEW – 8.
[4638] Ibid., at OVERVIEW – 10.
[4639] Ibid.
[4640] Ibid., p. FLAT – 1.
[4641] Ibid., p. OVERVIEW – 13, Table OVERVIEW – 2.
[4642] Japan's first written submission, para. 144.
[4643] USITC Report, Vol. I, p. 36 (flat), p. 83 (long), p. 193 (stainless).
[4644] Japan's first written submission, para. 145.
[4645] *Compare* USITC Report, Vol. I, p. 42 (discussing cold-rolled products) to 48 (discussion of tin mill products).
[4646] Ibid., p. 48 (with Commissioner Devaney not joining in the views of the Commission in tin mills).
[4647] Japan's first written submission, para. 146.

7.1948 In response, the United States argues that in evaluating the complainants' arguments that the USITC's determinations were not "uniform, impartial and reasonable", the Panel should apply the ordinary meaning of these terms as used in Article X:3: "uniform" means "of one unchanging form, character or kind;" "impartial" means "not partial; not favouring one party or side more than another; unprejudiced; unbiased; fair;" and "reasonable" means that the actions must be rational and not absurd.[4648]

7.1949 The United States argues that, in claiming that the USITC failed to provide uniformity when it included slab in a single like product with finished CCFRS, while placing semifinished and finished products in separate like products for other steel products, Japan has shown only that the results were different, and has demonstrated no difference in the way the USITC applied the relevant legal standard to the facts. According to the United States, the record before the USITC fully supported both the conclusions reached for each product, and the differences among those conclusions. Thus, the different outcomes all reflect the application of a uniform test to distinct facts.[4649]

7.1950 Japan also argues that the USITC's like product analysis of CCFRS products increased the probability of an affirmative injury determination because it made slab part of a single domestic like product encompassing finished CCFRS products, while making semi-finished long and stainless products separate like products; and it made corrosion-resistant products part of the CCFRS like product, while making tin mill products a separate like product. Japan submits that in all such instances, the USITC did not administer the safeguards law in a "uniform, impartial, and reasonable manner", as required by GATT 1994 Article X:3(a).[4650]

7.1951 Japan states that the USITC's decisions were not "uniform" or "reasonable" because the USITC had no principled reason for relying on its analysis of like product factors for semi-finished long, semifinished stainless products, and tin mill products while ignoring the same analysis for slab and corrosion-resistant products, based on the allegedly greater degree of vertical integration for those products. It was not "impartial" because the USITC's decision to combine all CCFRS products, including slab, into a single like product was calculated to facilitate an affirmative injury determination – under WTO-inconsistent application of US law – based on a wrongful like product definition and resulting in the application of safeguard measure to a wider range of imports than should have been lawfully allowed under the Agreement on Safeguards.[4651]

7.1952 The United States argues that the USITC provided a uniform, impartial, and reasonable like product analysis by applying the same legal standards to the distinct facts of each case and reaching legal conclusions supported by the facts of the case..[4652] According to the United States, relying upon the Panels' decisions in *Argentina – Hides and Leather* and *US – Stainless Steel*, Article X:3(a) requires that the administration of a measure be uniform, and not that the results of the measure be the same each time it is applied. The United States submits that the USITC applied the same like product factors that it uses in every safeguard investigation to each group of imports in the steel investigation. Based on the facts, the USITC determined that those factors justified the product definitions that it used.[4653]

[4648] United States' first written submission, para. 1298.
[4649] United States' first written submission, para. 1300.
[4650] Japan's first written submission, para. 125.
[4651] Japan's first written submission, para. 147.
[4652] United States' first written submission, para. 1298.
[4653] United States' first written submission, para. 1299.

7.1953 The United States also submits that the complainants have failed to establish that the USITC's product definitions were anything other than impartial. According to the United States, the USITC showed no favoritism to either side. In several instances the Commissioners decided in favor of foreign producers by rejecting domestic producer requests to join or subdivide product categories. The claims to the contrary are unsupportable.[4654] The United States also argues that the complainants have also failed to establish that the USITC product definitions are "unreasonable". Rather, the agency fully explained its findings, and supported them with record evidence.[4655]

(b) Treatment of affirmative votes

(i) General

7.1954 Japan argues that the treatment of USITC votes by the President is one of the key areas to which Article X:3(a) applies. According to Japan, there is no doubt that the US domestic rules on the President's treatment of USITC tie votes falls within the scope of paragraph 1 of Article X:3(a) – "administrative laws, regulations, decisions and rulings" pertaining to "restrictions or prohibition on imports".[4656] In this regard, Japan argues that section 330(d)(1) of the Tariff Act of 1930 specifies, in pertinent part, that when the USITC determines "whether increased imports *of an article* are a substantial cause of serious injury … and the commissioners voting are equally divided with respect to such determination", then the President can choose either of the two decisions.[4657] "An article", according to a majority of commissioners, was clearly defined as: (i) tin mill products, separate from all other CCFRS products; and (ii) stainless wire, separate from stainless wire rope. Japan submits that only one of four commissioners found imports of these separate articles to injure the relevant domestic industries. However, the President treated the Commission's decision as a tie vote and accordingly an affirmative injury determination and he imposed a safeguard measure on imports of tin mill and stainless wire.[4658]

7.1955 Japan argues that such treatment is an unreasonable administration of the safeguard law, because the President regarded the vote in this particular case as a tie when two of the affirmative votes were based on a like product definition with which he disagreed. According to Japan, such a decision simply strains logic. Japan also argues that the President's treatment also constitutes non-uniform administration of the safeguard law because the President's treatment of the divided votes as "equally divided" within the meaning of Section 330(d)(1) of the Tariff Act is a clear departure from the ordinary and longstanding practice in the administration of United States' safeguard law. For the President to treat the Commission's determination in this instance as a tie vote and an affirmative injury determination and to impose a safeguard measure on imports of tin mill and stainless wire products is considered to be at least unreasonable and non-uniform and therefore is inconsistent with Article X:3(a).[4659] Japan adds that, as required by Article X:3, the President has an obligation to treat divided USITC votes in a consistent and transparent way, given that the result of the investigation, including whether the US eventually imposes a safeguard measure or not, depends on such vote treatment.[4660] Japan asserts that for the President to rely on the inappropriate mixture of votes based on different like product definitions in this case does not represent a uniform or reasonable application

[4654] United States' first written submission, para. 1302.
[4655] United States' first written submission, para. 1303.
[4656] Japan's first written submission, paras. 151 and 162.
[4657] Japan's first written submission, para. 163.
[4658] Japan's first written submission, para. 164. For Japan's argument for the United States' violation of Articles 2.1 and 4.2(b) of the Agreement on Safeguards, see paras. 7.1926-7.1934, and *supra*. footnote 4574
[4659] Japan's first written submission, para. 164.
[4660] Japan's first written submission, paras. 151 and 162.

of US law, as required by Article X:3(a) of GATT 1994. Japan submits that, left unchecked, such action impermissibly would erode the predictability and stability of the administration of the safeguard law.[4661]

7.1956 With respect to arguments that the President's "treatment" of the USITC votes on tin mill and stainless steel wire as "a tie" was inconsistent with Article X:3(a) because Section 330(d)(1) of the Tariff Act did not permit such treatment, the United States relies upon the panel decision in *US – Stainless Steel* to argue that Article X:3(a) does not bring within the mandate of a panel the allegation that a Member has acted inconsistently with its own domestic legislation.[4662] The United States argues that it is also noteworthy that a US court recently held that the USITC's counting of affirmative and negative determinations by individual Commissioners in the safeguard investigation on tin mill steel was consistent with US law. Moreover, the Court specifically held that Commissioners Devaney and Bragg considered tin mill products in their analysis, and thus made affirmative injury and causation findings with respect to tin mill products. The United States submits that this same reasoning applies to the divided vote on stainless steel wire products.[4663]

7.1957 With respect to arguments that the USITC made a negative determination by a vote of 3-1 on tin mill product and that the President included tin mill in the remedy based on what is alleged to be just one affirmative vote[4664] and that, with respect to stainless steel wire, the President did not consider the determinations of two of the Commissioners since their determinations were based on a broader domestic industry, consisting of producers of stainless steel wire and stainless steel wire rope, and that the President's decision was based on the decision of only one Commissioner, the United States submits that none of the complainants provide support for their claims, either in the text of the Agreement on Safeguards, or in panel or Appellate Body reports, that the USITC's method of counting votes – cumulating the votes of the individual Commissioners – is within the purview of a panel, or explain how it is inconsistent with Articles 2.1 and 4.2 of the Agreement. The United States submits that nor do they provide support for their underlying claim that the findings of the different decision-makers must be exactly the same on all issues in order to be aggregated.[4665]

7.1958 In counter-response, Japan submits that in addition to the legal flaw that consistency with WTO obligations is not dependent on a domestic court's declaration that action is consistent with a domestic law, the US argument is, in essence, that the absence of standards and criteria in a law renders it impossible to find that the law was administered in a non-uniform, partial and unreasonable manner. Japan submits that, to the contrary, the unfettered ability to apply different standards is as massive a violation of the requirements of GATT Article X:3(a) as can be imagined. The treatment of some so-called tie votes as affirmative and others as negative is not only obviously non-uniform but also partial and unreasonable, particularly without any explanation from the President, as the competent authority, as to why he made inconsistent decisions. Japan submits that, furthermore, the decision to rely on three affirmative votes when only one of those votes agreed with the President's like product delineations is clearly unreasonable.[4666]

7.1959 In response to a question from the Panel, the United States argues that the President does not cast a "tie-breaking vote". He is not a "competent authority" under Articles 3 and 4 of the Agreement on Safeguards and does not vote on whether the increased imports are a substantial cause of serious

[4661] Japan's first written submission, para. 165.
[4662] United States' first written submission, para. 1309.
[4663] United States' first written submission, para. 1310.
[4664] United States' first written submission, para. 999.
[4665] United States' first written submission, para. 1001.
[4666] Japan's second written submission, para. 78.

injury or threat of serious injury. Instead, the President simply identifies which of two evenly supported determinations is the determination of the Commission. Second, the United States submits that the President clearly acted consistently with US law. The United States' safeguard statute states that when "the commissioners voting are equally divided with respect to such determination, then the determination, agreed upon by either group of commissioners may be considered by the President as the determination of the Commission". The Commissioners were equally divided with respect to the determinations on tin mill and stainless steel wire products. In fact, the US Court of International Trade recently found that the USITC vote on tin mill was, in fact, evenly divided despite the fact that the Commissioners voting in the affirmative reach different like product findings. Therefore, the President had the authority under the statute to decide which determination was the determination of the USITC. The United States submits that, finally, interpreting US law is not an appropriate function of the Panel in this dispute. In the case at hand, the WTO agreements do not address the question of how a Member may designate which among multiple findings constitutes the determination of the competent authorities under the Agreement on Safeguards. Whether the President acted consistently with US law is not relevant to the question of whether the United States complied with its WTO obligations. The United States submits that, consequently, there is no basis for the Panel to engage in an examination of whether the President's actions were consistent with US law.[4667]

7.1960 In response to the same question from the Panel, Japan submits that the issue is not whether US law permits the President to treat tie votes by the Commission as affirmative. It is that in this proceeding, with respect to tin mill and stainless wire, the President should not have treated the Commission action as a tie vote because the Commissioners had differing views about the proper scope of the like product. Japan argues that, by acting as he did, the President's decision contravened Articles 2.1, 3.1 and 4.2 of the Agreement on Safeguards and Article X:3(a) of GATT 1994.[4668]

7.1961 With respect to the argument that Article X:3(a) does not permit the "inappropriate integration" by the USITC or the President of affirmative votes from Commissioners who defined the like product differently from each other (see paragraph 7.1970), the United States submits that it is unclear exactly why the complainants consider this to be "inappropriate". [4669]

7.1962 The United States submits that if the complainants' point is that it is impermissible to treat an injury determination regarding a product (such as stainless steel wire products) as applicable to a subset of that product (such as stainless steel wire), that would seem to be an issue of interpreting the Agreement on Safeguards, and not Article X.[4670] The United States submits that even if this substantive decision somehow fell within Article X:3(a), it certainly represents a uniform, impartial, and reasonable application of the law. This analysis of individual Commissioners' determinations based on different like products applies in every case, making it uniform. It is also impartial, in that it does not favor one side over the other. Finally, the US practice follows the logical principle that an affirmative (or negative) determination with regard to a product also covers subsets of that product. Although complainants may disagree with this logic, it is plainly reasonable.[4671]

7.1963 The United States further submits that if the complainants' impermissible integration point refers to their argument that the President agreed with one set of Commissioners in defining the like products for tin mill and stainless steel wire, but another set in deciding how to treat the injury votes, they misunderstand the President's action. The President did not evaluate and separately endorse parts

[4667] United States' written reply to Panel question 132 at the first substantive meeting.
[4668] Japan's written reply to Panel question 132 at the first substantive meeting.
[4669] United States' first written submission, para. 1311.
[4670] United States' first written submission, para. 1311.
[4671] United States' first written submission, para. 1312.

of the USITC determination. With regard to the like products subject to safeguard measures, he accepted the findings of the USITC majority as presented, without agreeing or disagreeing with them. With regard to the divided votes, he considered the determinations of both sides, including the use of different like product definitions in the affirmative determinations for tin mill and stainless steel wire. US practice recognizes that determinations based on different like products may be equally valid, albeit different, ways of analysing imports, and this practice is uniform, impartial, and reasonable. For the President to consider a determination based on this principle to be the determination of the USITC is, therefore, also uniform, impartial, and reasonable.[4672]

7.1964 The United States argues that there is no basis to Japan's claim that the President's actions deviated from an "ordinary and longstanding practice in the administration of US safeguards law". According to the United States, Japan does not cite or otherwise identify this alleged practice, nor is there any authority to cite. The United States reiterates that a US court upheld the President's action in accepting these tie votes as affirmative determinations. In any event, it is impossible for the panel to determine whether the President acted inconsistently with a practice which has not been identified with specificity.[4673]

7.1965 The United States also argues that the fact that the President designated some divided determinations as affirmative (tin mill and stainless steel wire) and others as negative (tool steel and stainless fittings and flanges) does not establish an inconsistency with Article X:3(a). Panels have found that Article X:3(a) requires identical treatment, not identical outcomes. Indeed, where the facts of two cases differ, uniform treatment might require different outcomes. Thus, the mere fact that administration of a law or regulation in different cases leads to different results cannot by itself establish inconsistency with Article X:3(a).[4674] The United States submits that in the case of the four divided determinations, there is no question that the facts differed tremendously. The four domestic industries produced different products, under different market conditions, and with greatly different performance levels of revenue, sales, market share, profits, and other performance indicators. Two of the Commissioners recognized that the four domestic industries might warrant different findings. Commissioner Miller issued an affirmative determination with regard to tin mill, but not the other three divided votes. Chairman Koplan issued an affirmative determination with regard to stainless steel wire, tool steel, and stainless steel fittings and flanges, but not with regard to tin mill. Therefore, by doing nothing more than to observe that the divided votes in different factual situations had different results, the United States argues that the complainants have failed to meet their burden of proof to establish an inconsistency with Article X:3(a).[4675]

7.1966 The United States also argues that according to the complainants, a tie vote must always be treated as a negative determination, or always be treated as an affirmative determination. The United States submits that as the complainants would have it, the President should not have the flexibility to make decisions based on the unique facts and merits of each particular case. According to the United States, the complainants' position is untenable. The United States submits that each tie vote must be judged on its merits. Article X:3(a) cannot require the same outcome in all tie vote situations, just as it could not require, for example, the same injury findings in all safeguards cases or the same dumping margin in all dumping cases. The United States submits that, in fact, Article X:3(a) requires uniform

[4672] United States' first written submission, para. 1313.
[4673] United States' first written submission, para. 1314.
[4674] United States' first written submission, para. 1315.
[4675] United States' first written submission, para. 1316.

administration of the law, not uniform outcomes, and where the facts of two cases differ, uniform treatment might actually require different outcomes.[4676]

7.1967 In response to the United States' claims Japan argues that the United States fails to comprehend that for the two products where the President chose the affirmative side (tin mill and stainless steel wire), the Commissioners did not agree on the product definition. The Commission was therefore not, in fact, evenly divided. Furthermore, even if the Panel were to decide that the USITC was in fact, evenly divided, the President still failed to provide an explanation for his decision. Therefore the Article X:3(a) violation is attributable to the way in which the President treated the affirmative votes of individual Commissioners based on differing views about the proper scope of the like product definitions. Absent a common basis for the affirmative votes, the United States cannot contend that the President administered the law in a uniform, impartial and reasonable manner.[4677]

(i) Tin mill products

7.1968 Brazil and Japan explain that the President decided to impose safeguard measures on tin mill products based on his treatment of the USITC's tie vote on injury as an affirmative determination. Brazil, Japan and Korea argue that the Commission's decision on tin mill products, however, should not have been treated as equally divided, and does not support the measures.[4678] Brazil and Japan argue that, in effect, the President agreed with the three affirmative votes on tin mill products. However, in doing so he also agreed with the four commissioners who found tin mill products to be separate like products. Hence, he effectively imposed a measure on products for which only one out of four commissioners with whom he agreed in terms of the like product definition (treating the tin mill and stainless wire products as separate products) had made an affirmative determination.[4679] Similarly, Korea argues that the President of the United States considered the situation in relation to tin mill products to be a "tie" vote – three affirmative and three negative – even though the majority of Commissioners who examined the like product adopted by the President–tin mill products – reached a negative injury determination.[4680]

7.1969 Further, Korea argues that since both the USITC and the President determined that the relevant like product was tin mill products, the President had to rely on the causation and serious injury decisions related to the tin mill industry. The President did not (and could not) impose safeguard measures on that basis. Instead, he based his decision on the combination of a single affirmative injury vote by Commissioner Miller together with the votes of two other Commissioners who rendered their affirmative decision based on a different, unadopted like product. Korea argues that it was, in fact, a double counting of the votes of Commissioners Bragg and Devaney in the sense that their affirmative votes were counted both for the injury determination on CCFRS products and again for the injury determination on tin mill products.[4681]

7.1970 Brazil and Japan argue that the WTO Agreements, particularly Article X:3(a) of the GATT 1994, require the President to administer the safeguard law in a uniform, impartial and reasonable manner. According to Brazil and Japan, the rights of other WTO Members to fundamental fairness and due process envisioned under Article X:3(a) were breached when the President treated the USITC

[4676] Korea's written reply to Panel question 134 at the first substantive meeting.

[4677] Japan's second written submission, paras. 48 and 76.

[4678] Brazil's first written submission, para. 248; Japan's first written submission, para. 149; Korea's first written submission, para. 170.

[4679] Brazil's first written submission, para. 249; Japan's first written submission, paras. 149 and 152.

[4680] Report Submitted to the US Congress at Tin Mill Products (March 2002) (Exhibit CC-89).

[4681] Korea's first written submission, para. 170; see also Japan's first written submission, paras. 155-157.

votes on tin mill as "evenly divided" based on an inappropriate integration of affirmative votes premised on different like product definitions.[4682] Similarly, Korea argues that the US statute was not administered in a "uniform, impartial and reasonable manner" and, the United States violated its Article X:3(a) obligation.[4683]

7.1971 In response, the United States argues that the USITC and the President permissibly exercised their authority under US law in their treatment of divided votes. Although two of the Commissioners based their analyses on like product definitions different from those adopted by the remaining four Commissioners, all six of them rendered a determination that included imported tin mill and stainless steel wire. According to the United States, US legislation permitted the USITC to count each of these individual determinations in deciding whether the determination of the USITC was affirmative, negative, or divided. The legislation also permitted the President to accept the determination of the USITC as reported to him. For the divided votes, the President also had the authority to consider the Commission determination to be affirmative or negative. That he made different designations with regard to the four divided votes does not call into question the uniformity, impartiality, or reasonableness of his action, since the individual Commissioners' determinations were based on the distinct facts related to each domestic industry.[4684]

(ii) Stainless steel wire

7.1972 Japan argues that the President decided to impose separate safeguard measures on stainless steel wire products based on his treatment of these products as subject to USITC's tie-vote injury determinations. Japan submits that, the Commission's decisions on these products, however, should not have been treated as equally divided, and do not support the measures. Japan argues that for stainless wire products, two commissioners considered these products as part of a combined stainless wire and wire rope like product and issued an affirmative determination on these products. The other four commissioners considered them separate like products. All four voted in the negative for stainless wire rope, resulting in a majority negative determination for this product. One of the four, however, made an affirmative determination for stainless wire; the other three voted in the negative for stainless wire. Overall, therefore, the vote was tied at three-to-three for stainless wire; but for stainless wire as a separate like product, the vote was three-to-one negative.[4685]

7.1973 Japan argues that the WTO Agreements, particularly Article X:3(a) of the GATT 1994, require the President to administer the safeguard law in a uniform, impartial and reasonable manner. According to Japan, the rights of other WTO Members' to fundamental fairness and due process envisioned under Article X:3(a) were breached when the President treated the USITC votes on stainless steel products as "evenly divided" based on an inappropriate integration of affirmative votes premised on different like product definitions.[4686]

7.1974 In response, the United States argues that the USITC and the President permissibly exercised their authority under US law in their treatment of divided votes. Although two of the Commissioners based their analyses on like product definitions different from those adopted by the remaining four Commissioners, all six of them rendered a determination that included imported tin mill and stainless steel wire. According to the United States, US legislation permitted the USITC to count each of these individual determinations in deciding whether the determination of the USITC was affirmative,

[4682] Brazil's first written submission, para. 251; Japan's first written submission, para. 150.
[4683] Korea's first written submission, para. 170.
[4684] United States' first written submission, para. 1306.
[4685] Japan's first written submission, para. 149.
[4686] Japan's first written submission, para. 150.

negative, or divided. The legislation also permitted the President to accept the determination of the USITC as reported to him. For the divided votes, the President also had the authority to consider the Commission determination to be affirmative or negative. That he made different designations with regard to the four divided votes does not call into question the uniformity, impartiality, or reasonableness of his action, since the individual Commissioners' determinations were based on the distinct facts related to each domestic industry.[4687]

(c) Exclusion of NAFTA imports

7.1975 Korea notes that the USITC found that, under Section 311(a) of the US NAFTA Implementing Legislation, imports of other welded pipe (among other products) from Canada accounted "for a substantial share of total imports and contribute importantly to the threat of serious injury caused by the imports".[4688] According to Korea, the USITC also found that, under Section 311(a) of the US NAFTA Implementing Legislation, imports of CCFRS (among other products) from Mexico accounted for a substantial share of total imports and contributed importantly to the serious injury.[4689] [4690] [4691]

7.1976 Korea states that irrespective of the finding of the USITC, the President of the United States determined that imports from Canada and Mexico did not account for a substantial share of total imports nor did they contribute importantly to the serious injury for any product that was subject to a safeguard measure.[4692] Korea argues that in reversing the determination of the USITC, the President of the United States did not provide any explanation for the manifest discrepancy between the USITC determination and the determination of the President. Indeed, the President made a blanket exemption for all products subjected to safeguard measures regardless of the determination by the USITC. It was on the basis of such a determination by the President that the United States excluded imports from Canada and Mexico.[4693]

7.1977 Korea argues that although the USITC and the President should administer the same legal standard under sections 311(a) and 312(b) of the US NAFTA Implementing Legislation[4694] when assessing the same factual situation, the two authorities came to totally different decisions with respect to flat steel products and other welded pipe. If the two authorities' application of the same legal standard to the same set of facts had been uniform, impartial and reasonable, they would have come to the same conclusion. In Korea's view, since the two authorities' decisions were contradictory, the United States is in violation of Article X:3(a) of the GATT 1994.[4695]

7.1978 In response, the United States submits that the USITC's findings are not subject to Article X:3 since, under Section 311, they have no legal effect and they do not change any party's legal rights, impose or remove any burden on imports, or require any other agency or government officer to take action. Therefore, according to the United States, they are not a law, regulation, judicial decision or

[4687] United States' first written submission, para. 1306.
[4688] USITC Report, Vol. I, p. 166 (Exhibit CC-6). The Commission was evenly divided on whether those imports contributed importantly to the threat of serious injury.
[4689] USITC Report, Vol. I, pp. 66-67 (Exhibit CC-6).
[4690] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4691] Korea's first written submission, para. 175.
[4692] Proclamation 7529, 67 Fed. Reg. 10553, 10555-56 (2002), para. 8 and clause (2) (Exhibit CC-13).
[4693] Korea's first written submission, para. 176.
[4694] Codified at 19 U.S.C. §§ 3371-3372, Implementing Chapter 8, Article 801 of the North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of Mexico (Exhibit CC-47).
[4695] Korea's first written submission, para. 177.

administrative ruling of general application. The United States submits that, similarly, their lack of effectiveness means that the USITC findings with respect to Canada and Mexico are not part of the "administration" of such measures. Since the USITC findings on "substantial share" and "contribute importantly" have no legal effect, any difference between them and the Presidential determination would not represent a legally cognizable lack of uniformity, impartiality, or reasonableness in the "administration" of a measure.[4696]

7.1979 The United States argues that, in any event the President did not, as Korea alleges, apply "the same legal standard to the same set of facts". The United States submits that, unlike the USITC, the President based his determination on the original report and the supplemental responses, which were not available when the USITC made its findings. In addition, although the USITC is subject to a statutory standard almost identical to the one applicable to the President, nothing required the USITC and the President to reach identical results in applying that statutory standard. Reasonable minds may differ in applying the law to the same set of facts. Thus, even if it were assumed that different levels of government reached different results, that difference does not implicate Article X.[4697]

7.1980 In counter-response, Korea notes the following facts that it considers to be salient:[4698] In relation to CCFRS products, Korea notes that Mexico was one of the top five sources of CCFRS; Mexico's import volume increased 26.9% during the 1996-2000 period; Mexico's rate of increase of imports was higher than the rate of increase of non-NAFTA imports; and Mexico's AUV for CCFRS was consistently below the AUVs of other imports.[4699] In relation to pipe and tube, Korea notes that Canada was the largest single supplier for the three most recent years in the period examined; the quantity of imports from Canada between 1998-2000 was 141% greater than the quantity from the second largest supplier; between 1998-2000, Canada accounted for at least 35% of the imports; and imports from Canada increased their market share from 10.8% in 1999 to 14.2% in 2000.[4700]Korea states that the evidence concerning the significance of NAFTA imports of CCFRS and pipe and tube calls into question whether, indeed, the President's decision to exclude imports from these sources was reasonable and not arbitrary, when the United States itself admits that the decision was based on the USITC Report.[4701] [4702]

(d) Explanation/publication

7.1981 Brazil and Japan note that the President provided no explanation for why he treated these purported "tie votes" as affirmative determinations for tin mill products and stainless steel products while treating tie votes on two other products – tool steel and stainless flanges/fittings – as negative determinations.[4703] Brazil and Japan argue that with no explanation of his decision to treat some tie votes as affirmative and some as negative, the President's decisions in this regard are inconsistent with one another. They, therefore, violate the requirement under Article X:3(a) of the GATT that each Member must administer its laws in a uniform, impartial, and reasonable manner.[4704] [4705]

[4696] United States' first written submission, para. 1319.
[4697] United States' first written submission, para. 1320.
[4698] Korea's second written submission, para. 235.
[4699] USITC Report, Vol. I, p. 66-67 (Exhibit CC-6).
[4700] USITC Report, Vol. I, pp. 166-167 (Exhibit CC-6).
[4701] United States' first written submission, para. 1320.
[4702] Korea's second written submission, para. 236.
[4703] Brazil's first written submission, para. 249; Japan's first written submission, paras. 152 and 166.
[4704] *Argentina –Hides and Leather*, paras. 11.78-11.101.

7.1982 According to Japan, the decisions here are not uniform for the obvious reason that they are inconsistent: two tie votes are treated as affirmative; two are treated as negative. This is not a uniform administration of US law. Absent the required explanation for the President's decision, one can only surmise that the decisions are also not impartial. Finally, the decisions are by nature unreasonable because, as discussed above, they were not supported by the requisite reports and analyses. It is not a reasonable administration of US law to make a decision without explaining the basis for that decision. The decisions are therefore inconsistent with the requirements of Article X:3(a).[4706]

7.1983 The United States argues that there is no reason in the text (or even in the "spirit") of Article X to support Japan's conclusion that "impartial" and "reasonable" administration of measures listed in Article X:1 requires the publication of "principled reasons" for reaching a decision. Article X explicitly requires publication only in paragraph 1, which is limited to regulations, rulings, judicial decisions and administrative rulings of general application. Even this explicit obligation only requires publication "in such a manner as to enable governments and traders to become acquainted with" the measures. In other words, as long as the measure explains what it does, a Member need not explain why it was adopted. In contrast, Article X:3 contains no reference to publication, suggesting that the words that are actually there – "administer in a uniform, impartial and reasonable manner" – do not require publication. Moreover, a Member can meet the Article X:1 publication requirement by indicating what the measure does, without describing why it took the measure. Thus, if any publication requirement can be read into Article X:3, it would seem to involve only the description of action taken by a Member, and not an explanation of how the measure complies with municipal or WTO rules.[4707]

7.1984 Korea asserts that the President ignored the findings of the USITC with respect to Mexico and Canada and rendered a conclusion that imports from Canada and Mexico did not account for a substantial share of total imports nor contribute importantly to the serious injury.[4708] However, the United States failed to provide any explanation of how it reached this directly contrary conclusion on this important and pertinent issue of fact and law. Thus the determination is in violation of Articles 3 and 4.2(c) of the Agreement on Safeguards as well as Article X:3(a) of the GATT 1994.[4709]

7.1985 The United States argues that Article X:3 does not oblige a Member to "explain" the reasons for administering a law, regulation, judicial decision, or administrative ruling in a particular manner. Thus, the absence of such an explanation for the President's decision on the application of the substantial share and contribute importantly standards cannot establish the existence of an inconsistency with Article X:3.[4710]

(e) Scope of the obligations imposed by Article X:3(a) of GATT 1994

7.1986 Japan argues that unlike most provisions of GATT 1994, which are concerned with the content of a government's laws, regulations, decisions and rulings, Article X of GATT 1994 focuses

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[4705] Brazil's first written submission, para. 253; Japan's first written submission, para. 173. Japan claimed GATT 1994 Article X:3(a) violations as well as Articles 3.1 and 4.2(c) violation for the lack of explanation. Ibid. para. 166. See also paras. 7.1996-7.2018.

[4706] Japan's first written submission, para. 174.

[4707] United States' first written submission, para. 1294.

[4708] Proclamation 7529, 67 Fed. Reg. 10553, 10555 (2002), para. 8 (Exhibit CC-13).

[4709] Korea's first written submission, para. 180.

[4710] United States' first written submission, para. 1321.

on the administration of those laws, regulations, decisions, and rulings.[4711] According to Japan, Article X articulates the basic principles of what is widely known as due process or fundamental fairness.[4712] [4713] Japan further argues that the words "uniform", "impartial", and "reasonable" form the essence of the Article X:3(a) obligations.[4714] They are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context of its object and purpose".[4715] Japan submits that with respect to the administration of laws which Article X:3(a) governs, "impartial" ensures that authorities do not favor particular parties over others[4716]; "reasonable" is directed at the nature of the administration itself and ensures that authorities do not administer a law in an inappropriate manner, such as applying a penalty in a disproportionate manner[4717]; and "uniform" ensures that authorities do not administer laws in different ways under similar circumstances.[4718] Collectively, these obligations ensure due process.[4719] Based on the Appellate Body's interpretation of Article X:3 in *US – Shrimp*[4720], Japan argues that the Appellate Body considers the standards contained in Article X:3 to represent in one sense the notion of good faith and in another sense the "fundamental requirements of due process".[4721]

7.1987 Japan further agues that the Article X:3(a) due process rights may be viewed as a specific incorporation of the fundamental international legal principle of *abus de droit.* Japan submits that

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[4711] The Appellate Body referenced this distinction in *EC – Bananas III*, at para. 200 ("Article X applies to the *administration* of laws, regulations, decisions and rulings." (emphasis in original)).

[4712] The term "due process" has been used extensively in WTO dispute settlement proceedings. *See, e.g.*, Appellate Body Report, *India – Patents (US)*, at para. 94; and Panel Report, *US – FSC*, at para. 6.3.

[4713] Japan's first written submission, para. 126.

[4714] The *New Shorter Oxford Dictionary* defines these important terms as:

"impartial" — Not partial; not favouring one party or side more than another; unprejudiced, unbiased; fair, at 1318;

"reasonable" — 1. Endowed with the faculty of reason, rational. 2. In accordance with reason; not irrational or absurd. 3. Proportionate. 4. Having sound judgment; ready to listen to reason, sensible. Also, not asking for too much. 5. Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate, at 2496;

"uniform" — "1. Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times, . . . 4. Of the same form, character, or kind as another or others; conforming to one standard, rule, or pattern; alike, similar" at 3488.

[4715] Vienna Convention, art. 31.1. Article 26 also establishes the concept of *pacta sunt servanda* stating "Every treaty in force is binding upon the parties to it and must be performed by them in good faith", and it appears in Part III of the Vienna Convention titled, "Observance, Application and Interpretation of Treaties." Ibid. The Vienna Convention governs the interpretation of the provisions of the WTO Agreements, including GATT 1994. *See* DSU Article 3.2; *see also* AD Agreement, Article 17.6 (i) (requiring Members' authorities to evaluate facts in "an unbiased and objective manner"); Article 17.6(ii) (directing Panels interpreting the Agreement to use "customary rules of interpretation of public international law", *i.e.*, the Vienna Convention). Most recently, the Panel in *Korea – Procurement* recognized the implicit development of Vienna Convention Article 26 *pacta sunt servanda* in respect of the GATT 1947 and the WTO Agreements, at para. 7.93.

[4716] *Argentina – Hides and Leather*, para. 11.95, 11.100 (noting that "impartiality" prohibits an authority from giving unfair advantage to one party).

[4717] *Argentina – Hides and Leather*, para. 11.86 (holding that the meaning of "reasonableness" relates to how a law or regulation is actually administered). Panel Report, *US – Stainless Steel*, para. 6.51 ("the requirement of uniform application of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situation").

[4718] Ibid.

[4719] Japan's first written submission, paras. 127-131.

[4720] Appellate Body Report, *US – Shrimp*, (emphasis in original), at para. 182.

[4721] Japan's first written submission, para. 128.

abus de droit, or abuse of law, prohibits a state from engaging in an abusive exercise of its rights.[4722] According to Japan, this principle was recognized by the Appellate Body in the *US – Shrimp* case. "It noted that good faith" is a "general principle of law and a general principle of international law [that] controls the exercise of rights by states"[4723] and that *abus de droit* is one application of this general principle.[4724] [4725] Japan asserts that in this way, the Appellate Body adopted the concept of good faith as a tool for interpreting WTO provisions so as to guarantee the due process rights of WTO Members. Specifically, good faith precludes unreasonable, abusive, or discriminatory interpretation of WTO rights and obligations. These principles prove even more crucial when a particular law endows a national authority with discretion.[4726] An exercise of discretion in good faith must include a consideration of the parties' interests. In this way, the concept of good faith imposes a duty upon Members to implement the provisions in a reasonable and equitable manner.[4727]

7.1988 In response, the United States argues that Japan's analysis omits a key aspect of the reasoning in *US – Shrimp*. According to the United States, the Appellate Body cited Article X:3 not in response to a claimed inconsistency with that Article, but as context for the interpretation of Article XX(g). The United States submits that the Appellate Body appears to have distinguished between "certain minimum standards" that Article X:3 actually "establishes" and other due process ideals that are part of the "spirit, if not the letter" of that Article. According to the United States, the Appellate Body did not have to clarify this distinction, as consistency with Article X was not subject to the appeal.[4728] The United States further submits that in line with the Appellate Body's repeated cautions against reading into the Agreement words that are not there, a panel cannot add new terms or change the meaning of existing terms. Accordingly, the United States reads the Appellate Body's guidance in *US – Shrimp* as a recognition that Article X provides only "certain minimum standards of transparency and procedural fairness" – namely, those expressly provided by its terms. The United States submits that it does read the Appellate Body's reference to the "spirit" of Article X – a "spirit" not found in the "letter" (i.e., the text) – as justifying the importation into Article X of alleged due process concepts that are not expressly provided. "[4729]

7.1989 The United States further submits that there is nothing in Article X to suggest that it incorporates international law principles of *abus de droit* or "good faith". According to the United States, as a general matter, the DSU is specific when it incorporates customary rules of international law, which it does only in Article 3.2, and only with regard to rules of interpretation. *Abus de droit*

[4722] Sir Robert Jennings, *Oppenheim's International Law*, Vol. I, p. 407 (9th ed. 1992) (an abuse of right occurs when a state avails itself of a right in an arbitrary manner).

[4723] *US – Shrimp*, at para. 158; *see also US – FSC*, at para. 166; *US – Gasoline*, at 18. This principle is set out at Article 26 ("pacta sunt servanda") of the Vienna Convention, which requires states bound by treaties to perform them in good faith.

[4724] As the Appellate Body concluded, "(a)n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the Treaty obligation of the Member so acting." *US – Shrimp*, at para. 158.

[4725] Japan' first written submission, para. 129.

[4726] The same leading treatise used by the Appellate Body in *US – Shrimp* explains, "wherever the law leaves a matter to the judgement of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused … Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others." *B. Cheng, General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, p. 133, (Exhibit CC-48).

[4727] Japan's first written submission, para. 130.

[4728] United States' first written submission, para. 1292.

[4729] United States' first written submission, para. 1293.

does not fall into that category. Moreover, the Appellate Body noted in *US – Shrimp* that this concept "enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'" However, Article X applies to any measure described in its first paragraph – including a measure that liberalizes trade. Thus, according to the United States, it cannot be understood as the incorporation of a legal principle directed exclusively at measures that prejudice other signatories to an Agreement.[4730]

7.1990 Japan argues that the Agreement on Safeguards requires the competent authority to determine whether or not increased imports cause serious injury to the domestic industry before taking a safeguard measure. Under US law, the USITC is responsible for the injury determination. Thus, the USITC determination falls under the scope of Article X:3, since the administration of the laws, regulations, decisions and rulings related to the United States' safeguard system mainly consists of the USITC determination based on its investigation as well as the subsequent decision on the application of the measure by the President.[4731]

7.1991 The United States argues that Article X:3 does not apply to the substantive content of laws, regulations, judicial decisions and administrative rulings of general application. More particularly, the United States argues that none of the claims raised in relation to Article X:3(a) is implicated by Article X:3(a), as they involve substantive findings or determinations, and not the administration of laws, regulations, judicial decisions or administrative rulings of general application.[4732] The United States submits that the Panel should not even reach the complainants' factual allegations that specific decisions by the President and the USITC were not uniform, impartial, and reasonable. It further submits that should the Panel decide to reach that question, the facts show that with regard to each of these claims, the complainants have failed to meet their burden of proof to establish an inconsistency with Article X:3(a).[4733]

7.1992 According to the United States, the argument that some of the decisions by the USITC or the President under Section 201 or Section 312 are not "uniform", "impartial", or "reasonable" and, consequently, are inconsistent with Article X:3(a) are based on the mistaken view that Article X:3(a) requires "decisions" to be uniform and ignores the text of Article X:3(a) which applies to "administering" laws relating to international trade. According to the United States, panels and the Appellate Body have made clear that Article X:3 applies exclusively to the administration – in the sense of procedures applied – of the laws, regulations, judicial decisions, and administrative rulings of general application described in Article X:1.[4734] The United States relies upon comments made by the Appellate Body in *EC – Poultry* and the panel in *Argentina – Hides and Leather* to argue that the Article X obligations are of a limited nature. On the basis of those decisions, it argues that, Article X:1 covers only certain "laws, regulations, judicial decisions and administrative rulings of general application", generally those pertaining to international trade. With regard to these measures, the only obligations are that a Member publish them promptly and, for certain of them, not enforce the measure until after its official publication. Article X:3(a) applies not to the measures described in Article X:1 themselves, but to their administration, which must be "uniform, impartial and reasonable".

7.1993 Relying upon the Appellate Body's decision in *US – Shrimp*, the United States further argues that Article X:3 does not require substantive decisions to be uniform. Indeed, a uniform, impartial,

[4730] United States' first written submission, para. 1295.
[4731] Japan's first written submission, para. 131.
[4732] United States' first written submission, para. 1296.
[4733] United States' first written submission, para. 1297.
[4734] United States' first written submission, para. 1287.

and reasonable administration of laws will often require different outcomes because of different facts or other circumstances.[4735] According to the United States, other provisions of the covered agreements specify the substantive requirements, and these must be the basis for a claim that the substantive aspects of a Member's actions are inconsistent with WTO obligations. To the extent that the complainants are complaining that a particular outcome is inconsistent with a provision of a covered agreement, they have the burden of proof in establishing that breach, and that would not be a claim under Article X:3(a).[4736]

7.1994 In counter-response, Japan argues that to the extent that the *Argentina – Hides and Leather* Panel implied that a measure was either administrative (procedural) or substantive, Japan believes this to be erroneous and unsupported by any Appellate Body precedent. That a substantive measure can be administered in a manner that is not uniform, impartial and reasonable is self-evident. According to Japan, GATT Article X:3(a) is meant to address and prevent precisely this type of procedural protectionism.[4737] [4738] Japan also submits that the United States' contention that the customary international law principles of good faith and *abus de droit* are not applicable to GATT Article X:3(a)[4739] is expressly contradicted by the declaration of the panel in *Korea – Procurement* that principles of customary international law apply to WTO provisions unless they are explicitly excluded by the text of a WTO Agreement.[4740] Japan argues that, moreover, in its prior decisions, the Appellate Body has declared both that the demands of due process are implicit in the DSU[4741] and that the principle of good faith indeed informs the WTO Agreement in general.[4742] [4743] Japan concludes that, in light of the foregoing, it is indisputable that the international law principles of due process and good faith are embedded in GATT Article X:3(a). Thus, in analysing how the US administered its safeguard law in this dispute, the Panel should examine the US conduct closely, with an eye to whether the United States administered its law in a way that respected its due process and good faith obligations.[4744]

7.1995 Japan argues that the United States must administer its safeguard law in a uniform, impartial and reasonable manner. The same standards must be applied in every instance. When applied to different facts, the outcome may differ. However, different outcomes when faced with the same or highly similar facts do not meet the requirements of Article X:3(a).[4745] Similarly, Korea argues that

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[4735] United States' first written submission, para. 1290.

[4736] United States' first written submission, para. 1287.

[4737] The erroneous nature of the US argument is also illustrated by the Panel and Appellate Body reports in *US – Underwear*. There, the Panel and Appellate Body said that the administrative (procedural) obligations of GATT Articles X:1 and X:2 applied in the context of a textile safeguard restraint measure (a substantive measure). Appellate Body Report, *US – Underwear*, at pp. 20-21 and Panel Report, *US – Underwear*, at paras. 7.64-7.66. Though Article X:3(a) embodies a different administrative (procedural) obligation than Articles X:1 and X:2, like them it applies that administrative (procedural) obligation to substantive measures of general application.

[4738] Japan's second written submission, paras. 65-67.

[4739] United States' first written submission, at para. 1295.

[4740] Panel Report, *Korea – Procurement*, at para. 7.97 (decision not appealed).

[4741] Appellate Body Report, *India – Patents (US)*, at para. 94.

[4742] Appellate Body Report, *US – Hot-Rolled Steel*, at para. 101; Appellate Body Report, *US – FSC*, at para. 166.

[4743] Japan's second written submission, para. 68.

[4744] Japan's second written submission, para. 69.

[4745] Japan's written reply to Panel question No. 134 at the first substantive meeting.

while Article X:3(a) does not require uniformity in outcome in every case there, nevertheless, has to be consistency in administration so that the results are also consistent.[4746]

3. Articles 3.1 and 4.2(c) of the Agreement on Safeguards

(a) Treatment of affirmative votes

7.1996 Brazil, Norway and Japan argue that even assuming that the President's reliance on three affirmative votes based on differing like product definitions for tin mill products and stainless steel wire was legitimate, the decision was inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards because the President failed to identify which determinations "set[s] forth the findings and reasoned conclusions reached on all pertinent issues of law and fact". He, therefore, also failed, as required by Article 4.2(c), to provide "a detailed analysis of the case under investigation as well as a demonstration of the factors examined".[4747] Japan argues that anytime the President makes a decision that departs from or lacks an USITC majority – which applies with respect to the tin mill and stainless wire products – then he must provide an explanation for the decision. Japan submits that, in this case, the President provided no explanation as to why he agreed with those Commissioners voting in the affirmative for tin mill and stainless wire, while agreeing with those voting in the negative for tool steel and stainless flanges and fittings.[4748]

7.1997 Referring to relevant parts of the USITC Report, the United States argues that the determinations of the three USITC Commissioners who made affirmative determinations on tin mill products[4749] and stainless steel wire[4750] are supported by findings and conclusions and a detailed analysis that fully meets the requirements of Articles 3.1 and 4.2(c) of the Agreement on Safeguards. More particularly, the United States argues that the competent authorities (i.e., the USITC) made an affirmative determination with regard to tin mill and stainless steel wire under US law and fully complied with Article 3.1 by publishing "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". The report addressed all of the factors necessary for an affirmative determination consistent with Articles 2.1 and 4. Since the views of the Commissioners and data in the USITC Report provided findings and reasoned conclusions in support of the affirmative determinations, Article 3.1 did not require further explanation by the President. This, says the United States, is in keeping with the President's role in the US statutory process – not to make a separate determination, but to decide on which of the determinations already made by the Commissioners to rely as the determination of the USITC as a whole.[4751]

7.1998 In addition, the United States submits that the President did not make a decision that "departs from" the USITC's decision. Instead, he simply identified which votes constituted the determination of the USITC. Further, in deciding that an affirmative determination constitutes the determination of the USITC, the President decides which of two determinations – one negative and one affirmative, each of them potentially consistent with US law – shall be the collective determination of the USITC. He does not pick and choose among the Commissioners who supported that determination, adopt one set of views, or adopt one set of conclusions as his own. The United States submits that this is entirely consistent with the Agreement on Safeguards, provided that the Commissioners' written

[4746] Korea's written reply to Panel question No. 134 at the first substantive meeting.
[4747] Brazil's first written submission, para. 252; Japan's first written submission, paras. 166 and 167. For Japan's related argument for the United States' violation of Articles X:3(a), see 7.1981-7.1983 and *supra*. footnote 4705
[4748] Japan's oral statement for the first substantive meeting, para. 12.
[4749] United States' first written submission, paras. 982-989.
[4750] United States' first written submission, paras. 990-997.
[4751] United States' first written submission, para. 1017.

views provide explanations (albeit alternative explanations) demonstrating the legal sufficiency of the determination that the President selected.[4752]

7.1999 Japan and Norway assert that a question arises in this case as to who is the "competent authority" in the United States in safeguard investigations. Although the USITC conducts the injury investigation, the President makes the ultimate decision on whether and how to impose the measure. This distinction will sometimes not matter if the President agrees with the USITC and imposes the remedy they recommend he impose. However, anytime the President makes a decision that departs from or lacks an USITC majority – which applies with respect to the tin mill and stainless wire products, and his choice of remedy for all products – then he must provide an explanation for the decision. Japan submits that the US law construct that the President rather than the competent authority, i.e., the USITC, makes the final decision in safeguards cases does not absolve the United States Government of the obligation to abide by Articles 3.1 and 4.2(c). If the President chooses a course unsupported by an USITC majority, he must issue his own report or, at least, provide a reasoned analysis or identify whose reports and analysis he is adopting. Otherwise, as here, the measure is unsupported and violates Articles 3.1 and 4.2(c).[4753] More particularly, Japan argues that, under the WTO Agreement, if the President disagrees with the USITC's analysis, then he effectively takes the role of the competent authority within the meaning of Article 3.1 of the Agreement on Safeguards, because his decision becomes the injury determination of the United States. Therefore, under such circumstances, the President must abide by Articles 3.1 and 4.2(c) and any other obligations applicable to competent authorities.[4754]

7.2000 Japan submits that the crux of its argument on this point is that the requirements of the Agreement on Safeguards must be followed by each Member regardless of the internal decision-making process for the Member. According to Japan, if the President disagrees with the USITC analysis, then he effectively takes the role of the competent authority within the meaning of Article 3.1 of the Agreement on Safeguards, because his decision becomes the injury determination of the United States.[4755] Furthermore, Article 2.1 provides that "a Member may apply a safeguard measure only if that Member has determined" which makes clear that a measure can only be taken after an investigation is performed pursuant to Article 3.1, and consistent with the result of that investigation. Japan submits that it is not sufficient for the President to point his finger at the USITC and say "they're the competent authority, not me". This approach, submits Japan, would apply to all cases in which the President's measure lacks support in the USITC's explanation.[4756]

7.2001 Similarly, Korea argues that it is not relevant how the internal decision-making process is organized by a Member. However, there must be a determination that meets all the requirements of the Agreement on Safeguards and compliance must be judged by reference to the authorities' published report. If that decision contains internal inconsistencies which are not resolved within the report, or legally inconsistent findings, then the requisite legal basis for a safeguard measure has not been met. Korea submits that, for this reason, when there are conflicting legal recommendations and even inconsistent factual findings, the President may not simply pick out any of the findings that support serious injury, causation, etc. If not even a majority of the Commission agrees that serious injury, causation, or increased imports exists then there are questions raised as to the existence of the necessary pre-conditions for safeguard relief. The failure of the President to either seek a clarification from his authorities or otherwise explain the decision to nonetheless find serious injury, causation, etc.

[4752] United States' written reply to Panel question No. 93 at the second substantive meeting.
[4753] Japan's first written submission, para. 168; Norway's first written submission, para. 342.
[4754] Japan's oral statement for the second substantive meeting, para. 27.
[4755] Japan's second written submission, paras. 59-61.
[4756] Japan's written reply to Panel question No. 69 at the second substantive meeting.

renders the decision-making process not in accord with the Agreement on Safeguards. The necessary prerequisites for safeguard relief have not been met.[4757]

7.2002 China argues that, pursuant to Article 3.1 of the Agreement on Safeguards, the competent authorities are required to provide a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. These findings represent the legitimate basis for the imposition of a safeguard measure. Thus, the Agreement on Safeguards requires that the reasons why a measure is applied be adequately explained and transparent. According to China, if the authority applying the measure (in this case the President) decides to depart from the findings of the investigating authority by imposing a higher remedy, it has to provide an adequate explanation. Such an explanation is necessary in order to provide a legitimate basis for its decision, and in order to ensure transparency. China submits that the absence of explanation would allow the authority to arbitrarily modify the outcome of the investigation and impose remedies of higher extent than necessary. [4758]

7.2003 Norway submits that it is the United States that is the Member of the WTO, not the USITC nor the President. The United States has an obligation to ensure that Articles 3.1 and 4.2(c) is adhered to. Any decision must be supported, as required by the Agreement on Safeguards, and that support must be published as required by Articles 3.1 and 4.2(c). Internal US legislation on "bifurcation" of decision making power or on confidentiality of commissioner's recommendations are irrelevant, and cannot override the obligations of the US as a Member of the WTO.[4759]

7.2004 In response, the United States submits that the Appellate Body in *US – Line Pipe* made it clear that the internal decision making process of a Member is entirely within the discretion of that Member and an exercise of its sovereignty. The United States argues that, on the basis of that decision, the Agreement leaves the decision-making process to the Members, including the identification of what constitutes a decision under its municipal law, provided that the determination, "however it is decided domestically", meets the requirements of the Agreement.[4760] The United States argues that the United States implementing legislation provides for the USITC to conduct investigations and make injury determinations and for the President to make the decision on remedy and certain other matters. It provides that when the USITC is equally divided in its injury determination, the President may consider as the USITC determination either the determination of the Commissioners voting in the affirmative or those voting in the negative.[4761]

7.2005 The United States also argues that the President is not a "competent authority" for purposes of Articles 3 and 4. He does not participate in the investigatory process or cast a vote. He merely decides which explanation by those who did participate in the investigation carries the greater weight.[4762] The United States further argues that even if the President were a "competent authority", the Agreement on Safeguards does not require a report, or even written views, from each member of a competent authority. Thus, even if the President facing a tie vote of the USITC could be treated as a competent authority under Articles 3 and 4, he would bear no obligation to explain his views separately.[4763]

[4757] Korea's written reply to Panel question No. 69 at the second substantive meeting.
[4758] China's written reply to Panel question No. 69 at the second substantive meeting.
[4759] Norway's written reply to Panel question No. 69 at the second substantive meeting.
[4760] United States' first written submission, para. 980.
[4761] United States' first written submission, para. 981.
[4762] United States' oral statement for the second substantive meeting, para. 136.
[4763] United States' oral statement for the second substantive meeting, para. 137.

7.2006 The European Communities and Korea agree that it is of no matter whether the determination results from a decision by one or one hundred, individual decision-makers under the municipal law of that WTO Member. However, the European Communities and Korea submit that, in accordance, with the Appellate Body decision in *US – Line Pipe*, what matters is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards.[4764] The European Communities submits that one of the requirements of the Agreement on Safeguards is the provision of a reasoned and adequate explanation in a report. If having a bifurcated or any other system makes compliance more difficult with this obligation, then that is the problem of the Member imposing the safeguard measures and cannot be used as an excuse to lower the standards contained in the Agreement on Safeguards.[4765]

7.2007 The United States argues that it has never asserted that the "bifurcation" of the process allows the President to escape responsibility under the Agreement on Safeguards. The Agreement on Safeguards itself divides the process into two stages: (a) the investigation (Article 3) and the determination of serious injury or threat thereof (Article 4); and (b) application of the safeguard measure (Article 5). The United States submits that with respect to the investigation, Article 3.1 states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions". With respect to the determination of serious injury, Article 4.2(c) states that "[t]he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". As the competent authority, the USITC must comply with these requirements. However, the United States submits that there is no analogous provision applicable to step two, i.e., application of the safeguard measure, except with respect to certain types of quantitative restrictions that were not used in the steel case. Thus, the President, who administers this second step, was under no obligation to provide such an explanation. The United States further argues that the bifurcation of the proceedings between the USITC and the President is not pertinent. In fact, even if the USITC administered both stages of the process, the Agreement on Safeguards still would not require an explanation, at the time a safeguard measure was imposed, of how that measure was only to the extent necessary to remedy or prevent injury and to facilitate adjustment.[4766]

7.2008 The United States submits that the complainants fail to address or even acknowledge the recent finding of the Appellate Body in *US – Line Pipe*, in which the Appellate Body both confirmed that the decision-making process is left to the discretion of the Members and found no inconsistency between the requirements of the Agreement and the manner in which the USITC counts votes, at least in the instance of its present injury and threat of injury determinations.[4767] According to the United States, in that case, the Appellate Body said that if a Member has taken a safeguard action that satisfies the requirements of the Agreement, the particular manner in which the decision is reached by the competent authorities is of no consequence.[4768]

7.2009 The United States argues that that decision is instructive in relation to stainless steel wire insofar as it indicates that the fact that Commissioner Bragg found that increased imports constituted a threat of serious injury while Commissioner Devaney determined that such imports cause serious injury does not in any way diminish the sufficiency of their findings for purposes of Article 2.1.[4769]

[4764] European Communities' written reply to Panel question No. 128 at the first substantive meeting; Korea's written reply to Panel question No. 128 at the first substantive meeting

[4765] European Communities' written reply to Panel question No. 128 at the first substantive meeting

[4766] United States' written reply to Panel question No. 128 at the first substantive meeting.

[4767] United States' first written submission, para. 1002.

[4768] United States' first written submission, para. 1005.

[4769] United States' first written submission, para. 1005.

According to the United States, the Appellate Body's conclusion is also instructive with regard to the affirmative votes made by those Commissioners whose respective starting point for their assessment of serious injury began with a different definition of the relevant like products, as in the case of tin mill products.[4770] The United States submits that since each Commissioner's determination fulfilled the requirements of Articles 2 and 4, each provides a valid basis under both US law and the Agreement for determining whether increased imports are a cause of serious injury to a domestic industry. Accordingly, the USITC was warranted in combining all of the affirmative votes and all of the negative votes to determine the collective decision of the agency. In the case of both tin mill steel and stainless steel wire, this process resulted in an evenly divided Commission with each grouping of Commissioners, consisting of three votes.[4771]

7.2010 The United States submits that, as in *US – Line Pipe*, a multiple number of USITC Commissioners reached the same conclusion that domestic producers of tin mill and domestic producers of stainless steel wire, either by themselves or as part of a larger group of producers, are seriously injured or threatened with serious injury by increased imports. As in *US – Line Pipe*, they reached the same result, albeit based on different findings on certain discrete subject matter. Each group of three determined, based on the facts in the case, that the right to apply a safeguard measure on imports of tin mill and stainless steel wire had been established.[4772] The United States asserts that the essence of what has been argued is that the USITC should hold two votes – one on the definition of industry and the other on whether the industry as defined by the majority is seriously injured or threatened with serious injury by increased imports. The United States submits that this is not how the USITC votes or counts votes or a subject to which the Agreement speaks. Moreover, the vote-counting methodology they appear to advocate could have the unintended consequence, in other cases, of changing the USITC's decision from a negative one to an affirmative one.[4773]

7.2011 Japan also agrees with the Appellate Body that the Agreement on Safeguards is silent regarding how a Member must undertake its decision-making process. However, Japan submits that this case presents new and different facts. First, there was only one decision that appears to have supported each of the President's decisions on tin mill and stainless wire products (Commissioner Miller for the first and Commissioner Koplan for the second) since these are the only Commissioners who agreed with the President on both the like product definition and affirmative injury. Japan questions whether a reasoned and adequate analysis could exist when the decision of only one of six Commissioners provides the basis on which the President imposes a measure. Japan states, secondly, that even if this were deemed sufficient, it is still required, when the Commission is split among themselves, that the President indicate which explanation he has adopted as his own. Otherwise, his decision is not supported by the report required by Article 3.1. In this regard, it is instructive that the United States does not appear to know itself which decision the President relies upon, as it defends in its first submission the views of all the Commissioners voting in the affirmative for these products.[4774]

7.2012 Further, Japan argues that the US attempt to analogize these facts to the *US – Line Pipe* case is inapt. In that case, the question was whether a current injury finding by some Commissioners and a threat of injury finding by others could be viewed as being consistent with one another. The Appellate Body decided that they could. Actual "serious injury" and "threat" may be "distinct concepts" under the Agreement, but if the competent authority appropriately determines that an import increase of the same particular product is causing either of these distinct effects to the

[4770] United States' first written submission, para. 1006.
[4771] United States' first written submission, para. 1008.
[4772] United States' first written submission, para. 1009.
[4773] United States' first written submission, para. 1010.
[4774] Japan's written reply to Panel question No. 128 at the first substantive meeting.

domestic industry producing like or directly competitive products, both determinations would be supportive of a measure on that product. Japan argues that the question in the present case, in stark contrast, is whether an affirmative decision based on one like product definition can be viewed as consistent with an affirmative decision based on another like product definition where these distinct decisions consist of only three affirmative votes altogether out of six. Japan submits that they cannot. This is because like product definitions alter all subsequent analyses – the increased imports analysis, the serious injury analysis, and the causation analysis. Thus, aggregation of the results of these analyses based on differing like product definitions would affect the ultimate result on whether a safeguard measure should be applied on a particular product.[4775]

7.2013 In counter-response, the United States submits that the Appellate Body in *US – Line Pipe* concluded that findings of "serious injury" and "threat of serious injury" are "two distinct concepts that must be given distinctive meanings in interpreting the Agreement on Safeguards".[4776] In particular, these concepts "refer to different moments in time"[4777] – "[p]resent serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury".[4778] Accordingly, the Appellate Body expressed no disagreement with the *US – Line Pipe* panel's finding that the concepts are "mutually exclusive".[4779] Nevertheless, the Appellate Body stated that it does not matter whether the decision is based upon "serious injury" or "threat" because either finding supports the right to apply safeguard measures.[4780] [4781] The United States submits that *US – Line Pipe* clearly establishes that individual decision-makers within the competent authorities need not agree on whether there is "serious injury" or "threat" – even though these are distinct concepts with distinct meanings – because either finding supports application of a safeguard measure. Together, the decision-makers need only agree that there is *either* serious injury or threat thereof. By analogy, when the decision-makers agree that increased imports caused serious injury, but differ on the rationale for that conclusion, the question for the Panel is not whether the individual conclusions are the same, but whether each conclusion supports application of a safeguard measure. As long as the conclusions of each decision-maker supporting an affirmative determination are consistent with the Agreement on Safeguards, as was the case for tin mill steel and stainless steel wire, the overall determination of the competent authorities is valid.[4782]

7.2014 Japan notes that the Commission in this case was equally divided in its injury determination with respect to four products: tin mill, stainless steel wire, tool steel, and stainless flanges/fittings. On the first two – tin mill and stainless wire – the President sided with the affirmative votes. On the third and fourth – tool steel and stainless flanges/fittings – the President agreed with the negative votes.[4783] Japan and Norway argue that no explanation was provided at all by the President, in his proclamation or elsewhere, as to why he agreed with one or the other side of these tie votes.[4784] Japan postulates that perhaps it could be inferred in some cases that the President agreed with one side or the other because of the existence of just two reports – one signed by three Commissioners, the other signed by the other three. In such instances, one could say that he implicitly adopted the report of the

[4775] Japan's oral statement for the second substantive meeting, para. 23.
[4776] Appellate Body Report, *US – Line Pipe*, para. 167.
[4777] Ibid., para. 166.
[4778] Ibid., para. 168.
[4779] Ibid., paras. 162 and 164 ("This is not to say that we believe that 'serious injury' and 'threat of serious injury' are the same thing, or that competent authorities may make a finding that both exist at the same time").
[4780] Ibid., para. 171.
[4781] United States' second written submission, para. 234.
[4782] United States' second written submission, para. 235.
[4783] Japan's first written submission, para. 169.
[4784] Japan's first written submission, para. 170; Norway's first written submission, para. 344.

side with which he agrees. Japan submits, however, that here, there were more than two reports. Japan and Norway note, however, that for tin mill and stainless wire products there were four different reports, three of which supported affirmative decisions[4785] and the reports address different combinations of like product categories.[4786] [4787] Japan argues that, it is impossible, therefore, to know with which Commissioner's or Commissioners' analysis the President agreed. The President failed to state which of the multiple reports issued by the Commission he adopted. Thus, it is impossible to know the basis for his decision. In the parlance of Article 3.1, the President failed to identify which report "set[s] forth the findings and reasoned conclusions reached on all pertinent issues of law and fact". He has therefore also failed, as required by Article 4.2(c) to provide "a detailed analysis of the case under investigation as well as a demonstration of the factors examined".[4788]

7.2015 In response to a question from the Panel as to whether it is possible to satisfy the requirements for reasoned and adequate explanations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards with a report that is comprised of individual determinations of multiple decision-makers that are divergent, the European Communities states that it would not exclude that this is possible provided that the prevailing determination and reasoned and adequate explanation can be determined with certainty.[4789] However, Japan argues that where the individual determinations are based on different like products, as in this proceeding with respect to tin mill and stainless wire, the answer is no. The ultimate question, as the Appellate Body found in *US – Line Pipe*, is whether the decisions are inconsistent with one another. When they involve serious injury versus threat, as in *US – Line Pipe*, they are not inconsistent. When they involve affirmative versus negative determinations or differences of opinion as to a critical threshold question such as like product, then such inconsistencies matter and therefore require additional consideration and reasoned and adequate explanations.[4790] Similarly, Korea argues that the answer to this question depends upon whether the divergent opinions are legally consistent. If they are legally consistent, as the Appellate Body held in *US – Line Pipe* with respect to serious injury and threat of serious injury, then the decisions are legally sufficient. However, to the extent that the opinions reached are not legally consistent, such as a finding of serious injury and a finding of no serious injury or distinct like product determinations, they cannot be reconciled nor do they meet the requirements of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[4791]

7.2016 In response to the same question, the United States argues that it is possible to satisfy the requirements for reasoned and adequate explanations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards with a report that is comprised of individual determinations of multiple decision-makers that are divergent. First, as indicated by the Appellate Body's decision in *US – Line Pipe*, the Agreement on Safeguards allows multiple decision-makers to be involved in an investigation and determination of injury. Second, the fact that certain decision-makers may have issued dissenting views is not pertinent. For purposes of determining compliance with the Agreement on Safeguards, the Panel need only examine the views of the Commissioners that support the determination of the competent authorities. The United States submits that the dissenting views that are not part of these

[4785] USITC Report at 269 (Bragg's separate views), 307 (Miller's separate views), 311 (Devaney's separate views, 256 (Koplan's separate views) (Exhibit CC-6). Together, four separate reports comprised the reasoning of the marginal 3-3 affirmative determinations in the tin mill and stainless wire products.

[4786] Ibid. at 36 (identifying tin mill as a separate product from the flat products category), and 190 (identifying ten domestic industries producing stainless steel articles of which stainless wire was distinguished as a separate industry).

[4787] Japan's first written submission, para. 171; Norway's first written submission, para. 344.

[4788] Japan's first written submission, para. 172; Norway's first written submission, paras. 344-345.

[4789] European Communities' written reply to Panel question No. 130 at the first substantive meeting.

[4790] Japan's written reply to Panel question No. 130 at the first substantive meeting.

[4791] Korea's written reply to Panel question No. 130 at the first substantive meeting.

determinations are not relevant for determining consistency of the US measures with the Agreement on Safeguards. Third, the fact that a single determination may be comprised of the views of multiple concurring decisions does not in itself mean that the determination in its entirety is not reasoned or that it does not provide an adequate explanation. Given the complexity of this case, opinions may reasonably differ as to how the facts and relevant legal requirements should be interpreted and applied. As long as each of the opinions comprising the determination, standing on their own, is consistent with the Agreement on Safeguards including Article 3.1 and 4.2(c), then the determination as a whole is consistent with the Agreement. Finally, the mere existence of dissenting or concurring opinions should have no bearing on the question of whether the overall determination of a competent authority was properly reasoned or explained. The United States submits that it is common in domestic and international court systems for judges to render dissenting or concurring views, but this does not in itself call into question the reasoning of the official decision of the court. Dissenting views have even been rendered by WTO panels, but this in itself does not mean that the adopted reports reflecting the conclusions of the majority of the panel did not properly "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations" as required by Article 12.7 of the Dispute Settlement Understanding.[4792]

7.2017 The United States also argues that Articles 3.1 and 4.2(c) do not require the President to issue a report explaining the basis for his decision to treat certain tie votes as affirmative determinations. The United States notes that section 330 of the *Tariff Act* allows the President, when faced with a divided vote, to consider the vote to be either an affirmative or negative determination by the USITC as a whole. He does not conduct his own investigation, or render his own determination. Instead, he chooses whether the negative or affirmative determinations and their supporting views – each side complete and potentially valid under US law – will be the determination of the USITC. In this case, Proclamation 7529 states that he considered "the determinations of the Commissioners with regard to tin mill products and stainless steel wire", and refers to no other factors.[4793] The United States submits that permitting the President to designate the determination of the USITC in the case of a divided vote is part of the US internal process for deciding what is the determination of the competent authorities. The Agreement on Safeguards does not contain an obligation on this process.[4794]

7.2018 With respect to arguments that the President acted impermissibly when he "considered" or "treated" these votes as divided votes, the United States submits that it was the USITC that decided that the votes were equally divided. Proclamation 7529 indicates that the President recited this characterization by the USITC, and did not make an independent decision as to whether the vote was divided.[4795]

(b) Treatment of NAFTA imports

7.2019 Korea further argues that in making his determination, the President declared that with respect to imports of every product subject to the safeguard measures, imports from Canada and Mexico "do not account for a substantial share of total imports or do not contribute importantly to the serious injury or threat of serious injury found by the USITC".[4796] In fact, however, there is nothing in either

[4792] United States' written reply to Panel question No. 130 at the first substantive meeting.
[4793] United States' first written submission, para. 1012.
[4794] United States' first written submission, para. 1013.
[4795] United States' first written submission, para. 1014.
[4796] Proclamation 7529, 67 Fed. Reg. 10553, 10555-56 (2002), para. 8 and clause 2 (Exhibit CC-13).

the USITC determination or the supplementary report to support this conclusion. It was simply a blanket conclusion that was applied to every product subject to a safeguard measure.[4797]

7.2020 Korea asserts that the President ignored the findings of the USITC with respect to Mexico and Canada and rendered a conclusion that imports from Canada and Mexico do not account for a substantial share of total imports nor contribute importantly to the serious injury.[4798] However, the United States failed to provide any explanation of how it reached this directly contrary conclusion on this important and pertinent issue of fact and law. Thus the determination is in violation of Articles 3 and 4.2(c) of the Agreement on Safeguards.[4799]

7.2021 In response, the United States argues that Korea fails to recognize that findings related to the NAFTA, unlike findings under the Agreement on Safeguards, are not "pertinent" issues within the meaning of Article 3.1 or part of the "case under analysis" within the meaning of Article 4.2(c).[4800]

VIII. ARGUMENTS OF THE THIRD PARTIES

A. CANADA

8.1 The only question Canada addresses is whether the exclusion of imports originating in Canada from the scope of application of the challenged safeguard measures conforms to WTO law. Canada fully supports the United States' submission on parallelism and on Article XXIV of the GATT 1994.[4801]

8.2 With regard to parallelism, Canada asserts that: (i) there is no requirement to use a particular structure or format or a particular analysis for the report of the competent authority; (ii) the USITC Report, when viewed in its entirety, contains an analysis of non-NAFTA imports; and (iii) there is no requirement to conduct a separate analysis of injury caused by NAFTA imports as an "other" cause of injury.[4802]

8.3 With regard to Article XXIV of the GATT 1994, Canada asserts that this provision creates an exception to the most-favoured-nation treatment obligation, allowing parties to a free-trade agreement to terminate duties and other restrictive regulations of commerce, including safeguard measures. NAFTA meets the requirements of Article XXIV, and Article XXIV:5 in principle authorizes the exclusion of imports from within free-trade areas from Safeguard measures. Given that Article XIX is not enumerated in Article XXIV:8(b), safeguard measures must generally be eliminated in a free-trade area.[4803]

8.4 Canada submits that the last sentence of footnote 1 to Article 2 of the Agreement on Safeguards confirms the availability of Article XXIV of the GATT 1994 against claims under Article 2.2 of the Agreement on Safeguards. The President's decision to exclude imports from Canada (and Mexico) because of the requirements of Article 802 of NAFTA is not within the

[4797] Korea's first written submission, paras. 178-179.
[4798] Proclamation 7529, 67 Fed. Reg. 10553, 10555 (2002), para. 8 (Exhibit CC-13).
[4799] Korea's first written submission, para. 180.
[4800] United States' oral statement at the second substantive meeting, para. 138.
[4801] Canada's third party submission, para. 6.
[4802] Canada's third party submission, paras. 13-14.
[4803] Canada's third party submission, paras. 15-21, 24.

jurisdiction of a WTO panel. The exclusion is not a "pertinent issue of fact or law" pursuant to Articles 3.1 and 4.2(c) of the Agreement on Safeguards.[4804]

8.5 Canada adds that the President, in making his determination under the NAFTA Implementation Act, was not required to follow the USITC or to explain his reasons for not doing so.[4805]

B. CUBA

8.6 Cuba asserts that the safeguard measures imposed by the United States are completely incompatible with the Agreement on Safeguards and have caused distortions in the steel market. As a result, Cuba has to pay higher prices on its steel imports because several steel-producing countries have reduced their production. Due to increased tariffs in countries that used to purchase Cuban steel bar, these exports have come to a halt.[4806]

8.7 Cuba considers that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 because the USITC Report contained no demonstration concerning the existence of unforeseen developments. The United States also acted inconsistently with the obligation stipulated in Article 3.1 of the Agreement on Safeguards to publish findings and conclusions regarding unforeseen developments.[4807]

8.8 In relation to serious injury or threat of serious injury to the United States' steel industry, Cuba claims that the explanation given by the USITC is neither reasoned nor adequate. The USITC Report does not contain sufficient data to perform a correct evaluation of the domestic industry's situation.[4808] According to Cuba, the USITC Report does not demonstrate that the USITC has ensured non-attribution of injury or threat of injury caused by factors other than increased imports. Although the United States recognized that other factors have contributed to the injury suffered by the domestic industry, the USITC does not touch upon these factors in its report.[4809]

8.9 According to Cuba, the USITC has not correctly determined which is the domestic industry manufacturing products that are like or directly competitive to increased imported products. An incorrect industry definition results in an incorrect determination of serious injury and in the application of an unjustified safeguard measure. Firstly, the imports being imported in increased quantities must be clearly identified, rather than taking as a starting-point the four product categories identified in the Presidential request. The USITC's subsequent formation of groups of different individual products potentially masks the lack of increased imports for a specific product. Rather than relying on the characteristics of the product itself, the USITC assumed that all products produced with the same production process could be considered to be like.[4810]

8.10 Cuba also submits that the United States' safeguard measures show a lack of parallelism. The USITC evaluated imports from NAFTA countries in its investigation. Despite the finding that in several cases these imports significantly contributed to the serious injury caused to the domestic

[4804] Canada's third party submission, paras. 23-25, 7.
[4805] Canada's third party submission, para. 10.
[4806] Cuba's third party submission, pp. 4-5.
[4807] Cuba's third party submission, pp. 5-7.
[4808] Cuba's third party submission, p. 8.
[4809] Cuba's third party submission, pp. 8-9.
[4810] Cuba's third party submission, pp. 9-10.

industry, the USITC concluded that the exclusion of NAFTA imports does not affect the determination on injury and causality.[4811]

8.11 Finally, Cuba submits that the United States has violated its obligation under Article 5.1 of the Agreement on Safeguards by not demonstrating that the safeguard measure was imposed only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[4812]

C. CHINESE TAIPEI

8.12 With regard to unforeseen developments, Chinese Taipei argues that the circumstances described in the first clause of Article XIX:1(a) of the GATT 1994 must be demonstrated in the same report, together with the fulfilment of the three conditions set out in Article 2.1 of the Agreement on Safeguards. Otherwise, the first clause of Article XIX:1(a) would become an additional condition and the required logical connection to the conditions of Article 2.1 of the Agreement on Safeguards could not be established. For the same reasons, the demonstration of unforeseen developments must also be made on a product-by-product basis. Since the USITC did not do this, it severed the required logical connection between the first clause of Article XIX:1(a) and the conditions of Article 2.1 of he Agreement on Safeguards. According to Chinese Taipei, this required logical connection also prevents Members from simply relying on any macroeconomic factor which affects all products that are part of macroeconomics. In any event, the 2nd Supplementary Report cannot change the fact that the USITC consider the existence of unforeseen developments when it was striving to fulfill the three conditions. The Russian crisis could not be regarded as an unforeseen development, given that the increase in imports from Russia was significantly higher in the years preceding the conclusion of the Uruguay Round than thereafter. Contrary to the United States' allegation, a mere sequential relationship does not qualify as logical connection. According to Chinese Taipei, there should at least be a demonstration that "unforeseen developments" have caused increased imports for each product or group of products to enter "under such conditions" and to such an extent as to cause serious injury or threat thereof. Finally, it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. The USITC failed to demonstrate, product by product, how such concessions were logically connected to the three conditions identified in Article 2.1 of the Agreement on Safeguards.[4813]

8.13 Chinese Taipei also argues that the USITC failed to identify the producers of the like products in order to define the domestic industry and failed to publish its findings in this regard and therefore acted inconsistently with Articles 3.1 and 4.1(c) of the Agreement on Safeguards. Article 4.1(c) of the Agreement on Safeguards provides that the "domestic industry" is the totality of the national producers of the like or directly competitive products, or those whose collective output of those products constitutes a major proportion of the total domestic production. The Member applying a safeguard measure needs to specify in the report of its competent authorities the finding and reasoned conclusion that the aggregated production of the producers suffering serious injury exceeds the percentage representing the major proportion of the total domestic production. Since "a major proportion" of the industry is within the scope of "all pertinent issues of fact and law" in Article 3.1, there is no apparent reason to exclude from the published findings and conclusions the information relating to the proportional level of production forming "a major proportion". From the number of the firms being sent questionnaires and the much lower number of the firms responding to the questionnaires, there is no reasonable basis for other Members to make any proper judgment on whether those responding producers constitute a "majority" or a major proportion of the national

[4811] Cuba's third party submission, p. 11.
[4812] Cuba's third party submission, p. 12.
[4813] Chinese Taipei's third party submission, paras. 4-18.

production. Chinese Taipei argues that statements made in the USITC Report are inconsistent with Article 2.1 of the Agreement on Safeguards because they specify only percentage ranges, rather than precise percentages, which, according to Chinese Taipei, makes the USITC Report untrustworthy. The percentages of several products also exceed 100%. Finally, the USITC Report bases itself on "domestic shipments" rather than "total production", which is the concept stipulated in Article 4.1(c) and which is different from "total shipments".[4814]

8.14 Chinese Taipei further submits that the "substantial cause" test applied by the United States and thus its findings are not in accordance with the Agreement. Article 4.2(b) of the Agreement on Safeguards makes clear that there are two basic requirements: first, to establish the causal link between increased imports and serious injury and, second, when there are other factors causing injury, not to attribute such injury to increased imports. As the Appellate Body has further explained, it is through distinguishing the injurious effects caused, respectively, by increased imports and other factors that "the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury". The application of the substantial cause test by the USITC itself is not in line with the required approach specified in Article 4.2(b). In a case where there are ten equally important causes of serious injury, one of them being increased imports, the United States would find a causal link. However, under Article 4.2(b), the competent authority should find no link between increase and injury because 10% should in no way be considered as serious enough to apply a safeguard measure. In the present case, one cannot see that the USITC has separated and distinguished the factors other than increased imports. One can also not find the method that ensures non-attribution of these other factors to increased imports. The USITC only conducted a relative comparison of these other factors with increased imports and ignored the fact that such other factors still contributed cumulatively to the said serious injury.[4815]

8.15 According to Chinese Taipei, the United States' safeguard measures have gone beyond the extent necessary to remedy serious injury and thus violate Article 5.1 of the Agreement on Safeguards. Given that the terms "serious injury" in Article 5.1 should bear the same meaning as those in other provisions in the same Agreement, the factors listed in Article 4.2(a) must also be those applied for the purpose of the Article 5.1 evaluation. In addition, when deciding whether the safeguard measure is within the extent necessary to remedy serious injury, the competent authorities need to review the same factors that had contributed to the serious injury. However, in its economic model, the USITC generally limits itself to three factors when evaluating the remedy, namely quantity, price, and revenue. It did not consider the factors identified in the investigation. In addition, the tariff measures in the said model cover the entirety of the injury caused by increased imports and by other factors, since those other factors are not separated and distinguished in this model. As a result, it cannot be verified whether the remedy measure is within the necessary extent.[4816]

8.16 Finally, Chinese Taipei recalls that, in *US – Line Pipe*[4817], the Appellate Body interpreted Article 3.1 by ruling that the Member imposing a safeguard measure must provide sufficient motivation for that measure. There is a violation of that provision in the present case where the President imposed a more restrictive tariff than that recommended by the USITC without any reasoning or explanation on the necessary extent of the measure.[4818]

[4814] Chinese Taipei's third party submission, paras. 19-24.
[4815] Chinese Taipei's third party submission, paras. 25-30.
[4816] Chinese Taipei's third party submission, paras. 31-36.
[4817] Appellate Body Report, *US – Line Pipe*, para. 260.
[4818] Chinese Taipei's third party submission, paras. 37-38.

D. MEXICO

8.17 Mexico expresses its interest in the correct interpretation of the rules governing the imposition of safeguard measures, in particular those referring to the special situation of Members party to a free-trade area. Article XXIV of the GATT 1994 clearly permits Mexico to be excluded from the application of a safeguard measure imposed by the United States, its NAFTA partner. This Article is a clear exception to the principle of most-favoured-nation treatment and has clearly been recognized as such by the Agreement on Safeguards.[4819]

8.18 Mexico notes that the complainants (with two exceptions) neither argue that NAFTA is questionable in the light of Article XXIV, nor that it confers the right to be excluded from a safeguard measure. Mexico also notes with satisfaction that Norway recognizes that neither the Agreement on Safeguards nor Article XIX of the GATT 1994 prevent the exclusion of imports from free-trade partners. The Reports of the Appellate Body in *US – Wheat Gluten* and *US – Line Pipe* were clear in not questioning this right. Mexico trusts that the Panel will follow that same line of thinking.

8.19 In relation to the claims that the principle of most-favoured-nation has been violated, Mexico refers to the arguments submitted by the United States and Canada, as well as to Mexico's statement before the Panel in *US – Line Pipe*. According to Mexico, it is well established that the non-application of safeguards to products from the constituents of a free-trade area is not only compatible with Article XXIV:8(b), but also faithful to the finality of this Article, which is to "facilitate trade". This was the focus supported by the Appellate Body in *Turkey – Textiles*. Mexico notes that Article XXIV:8(b) of the GATT 1994 contemplates the exclusion of safeguard measures as part of the "other restrictive trade regulations" that must be eliminated in the formation of a free-trade area.[4820]

8.20 Mexico further argues that the complainants who allege a violation of the principle of most-favoured-nation treatment completely ignore the last sentence of footnote 1 to the Agreement on Safeguards. This footnote clearly establishes that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". A simple interpretation of the terms of this provision removes any doubt about the nature of Article XXIV as an exception. Mexico agrees with the United States that this footnote purports to maintain the previous balance between Articles XXIV and other provisions of the GATT 1994, particularly Article XIX, bearing in mind that this balance existed prior to the implementation of the the Agreement on Safeguards.[4821]

8.21 With regard to parallelism, Mexico recalls the findings of the panel in *US – Line Pipe* that the principle of parallelism means that the United States had to establish explicitly that imports from sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure stipulated in Article 2.1 of the Agreement on Safeguards. 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* (emphasis added). In this regard the complainants limit their allegations to the fact that the United States has not given a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources satisfy the conditions for the application of a safeguard measure pursuant to Articles 2.1 and 4.2 of the Agreement on Safeguards. Mexico supports the response given by the United States that the Agreement on Safeguards does not prescribe the internal decision-making process for making a determination. In its response, the United States identifies the detailed analysis conducted by the USITC concerning imports from non-NAFTA sources, which makes the violation claims baseless.

[4819] Mexico's oral statement at the first substantive meeting, p. 1.
[4820] Mexico's oral statement at the first substantive meeting, pp. 1-2.
[4821] Mexico's oral statement at the first substantive meeting, p. 2.

Mexico also concurs with the United States that Article 4.2(b) does not provide for an obligation to examine NAFTA imports as a non-import "other factor".[4822]

8.22 Finally, Mexico supports the United States' arguments that the Presidential determinations relating to Article 802 of the NAFTA Agreement is not subject to the Articles 3.1 and 4.2(b) of the Agreement on Safeguards, but that this is a question exclusively related to NAFTA.[4823]

8.23 On the basis of the foregoing, Mexico requests the Panel to reject the claim that the exclusion of Mexico from the safeguard measure is incompatible with the GATT 1994 and the Agreement on Safeguards. In particular, Mexico requests that the Panel carefully examine the nature of the exclusion in the light of the object and purpose of Article XXIV and that, in consequence, it confirms the Members' interpretation that Article XXIV permits the exclusion of free-trade partners from the scope of safeguard measures, also with regard to the Agreement on Safeguards.[4824]

E. THAILAND

8.24 Thailand submits that the safeguard measures imposed on certain steel products by the United States have had a major impact on the industries and markets of Members. According to Thailand, the situation became worse when the European Communities followed suit with a view to protecting its domestic industry. This gives rise to a wide range of concerns of many, if not all, WTO Members to have recourse to panel so that negative effects of such measures, as applied, would be appropriately remedied. Thailand notes that under Proclamation No. 7529 of 5 March 2002, entitled "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", a total of seven steel imports from Thailand were investigated by the USITC.[4825] Thailand appreciates the fact that five products out of seven are presently excluded from the application of such safeguard measures in accordance with Article 9.1 of the Agreement on Safeguards as a result of their share of imports not exceeding 3% as required by this Article. Nonetheless, two imports from Thailand, namely, welded carbon steel pipes and tubes (HS 7306), and carbon steel butt-welded pipe fittings (HS 7307), are still subject to definitive safeguard measures imposed by the United States. According to Thailand, the Thai steel industry has been adversely affected as a result thereof.[4826]

8.25 Thailand agrees with the legal arguments made by the complainants and some third parties that the United States has failed to justify adequately that the conditions set forth in Article 2 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994 have been met in applying definitive safeguard measures, this is especially so for arguments relating to the issue of lack of causal link. Thailand notes that the Appellate Body ruled in *US – Lamb* and *Argentina – Footwear (EC)* cases that "serious injury" is set at a higher threshold standard in the Agreement on Safeguards than those envisaged in the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.[4827] It could be concluded, based on the reasoning in *US – Wheat Gluten* and *US – Line Pipe*, that the conditions whereby safeguard measures are applied under Article 2 and the definition of the term "serious injury" under Article 4.1(a) shall be met at all times, thus triggering the application of Article 3 on investigations to be followed by Article 5 on safeguard measures.

[4822] Mexico's oral statement at the first substantive meeting, pp. 2-3.
[4823] Mexico's oral statement at the first substantive meeting, p. 3.
[4824] Mexico's oral statement at the first substantive meeting, p. 3.
[4825] USITC Report.
[4826] Thailand's oral statement at the first substantive meeting, p. 1.
[4827] Appellate Body Report, *US – Lamb*, para. 124; Appellate Body Report, *Argentina – Footwear (EC)*, para. 94.

8.26 Thailand's major concern is that the Proclamation, by its non-application of the above measures on steel products from the free-trade area partners of the United States despite the USITC's finding of their significant contribution to serious injury, or threat thereof, to the domestic industry, would be WTO-inconsistent, in particular with the GATT 1994 and the Agreement on Safeguards. Thailand believes that WTO Members can impose safeguard measures only if they have demonstrated that subject imports from non-free trade partners satisfy the conditions for the application of a safeguard measure. In addition, Thailand states that from a reading of the Marrakesh Agreement Establishing the WTO, of which the GATT 1994 forms an integral part, Thailand remains to be convinced how and why elimination of duties, inclusive of other restrictive regulations of commerce, would imply or indicate non-application of safeguard measures which differ in their nature of application and characteristics. Thailand submits that, so far, there is no jurisprudence established that the interpretation to exclude members in a free trade area is consistent with the GATT 1994 and the Agreement on Safeguards, bearing in mind *Argentina – Footwear (EC)* and *US – Wheat Gluten* cases. Thus, according to Thailand, this line of argument means that the issue of whether GATT Article XXIV permits an imposing Member to exclude imports originating in its free-trade area partners from the scope of a safeguard measure in departure from Article 2.2 has not yet been clarified.[4828] The Appellate Body in *US – Line Pipe* held that investigating authorities, such as the USITC in this case, must, at the very least, "provide in its determination a reasoned and adequate explanation that 'establish[es] explicitly' " that imports from non-free trade area partners satisfied the conditions for the application of a safeguard measure, as set forth in Article 2.1 and elaborated in Article 4.2 of the Safeguard Agreement.[4829] [4830]

8.27 According to Thailand, the United States did not clearly demonstrate how imports from its non-free trade area partners, including Thailand, have independently satisfied the conditions permitting the application of definitive safeguard measures. Therefore, Thailand concurs with the point raised by the complainants in general, that the USITC analysis of certain tubular products is unclear because the investigating authorities reached different conclusions as to the injurious effects of the imports from free-trade area partners, and the Proclamation excluded these imports without explication.[4831] Thailand submits that it is, therefore, questionable whether a causal link between imports of said products from Thailand and other non-free trade area partners on the one hand, and serious injury or threat thereof on the other hand, does exist. The lack of causal link is a systemic issue and is of particular concern to Thailand because it is highly likely that, had USITC authorities excluded said imports from the free-trade area partners of the United States in its investigation, they would not have reached the conclusion that imports from Thailand caused serious injury or threat thereof. Thailand submits that because the USITC in its report, and subsequently the President of the United States in the Proclamation, failed to explicitly establish that imports from non-free trade area partners satisfied the conditions under Articles 2 and 4 of the Agreement on Safeguards, perhaps, the injurious effects of these imports to the United States might have been mistakenly attributed to imports from non-free trade area partners such as Thailand.[4832]

8.28 Thailand also submits that it is not convinced that the United States has satisfied the condition of "unforeseen developments". On this point, Thailand notes that the USITC referred to the devaluations in five Asian countries as the "Asian Financial Crisis" and the dissolution of the former Soviet Union as constituting unforeseen developments and that the USITC concluded that "[a]s

[4828] Appellate Body Report, *US – Line Pipe*, para. 198.
[4829] Appellate Body Report, *US – Line Pipe*, para. 198.
[4830] Thailand's oral statement at the first substantive meeting, pp. 2-3.
[4831] *US – Definitive Safeguard Measures on Imports of Certain Steel Products*, European Communities' first written submission, para. 529.
[4832] Thailand's oral statement at the first substantive meeting, p. 3.

currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined".[4833] In addition, it is the USITC that admitted that demand in the United States remained strong. Thailand submits that if this was the case, the United States is required to prove that such unforeseen developments led to imports being increased in such quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.[4834]

8.29 In conclusion, Thailand submits that the current situation with respect to trade in steel has led several Members to apply safeguard measures to protect their domestic industries. Thailand is no exception. Thailand asserts that should this situation be prolonged, it would inevitably cause a chilling effect thereby resulting in an abusive application of safeguard measures. Thailand considers that safeguard measures cannot be regarded as beneficial to any Member, and developing country Members will have to bear the costs of their imposition unless such Members receive due consideration. Therefore, Thailand strongly believes that such measures should be used with prudence, and most importantly, in compliance with the WTO Agreement and GATT/WTO jurisprudence.[4835]

F. TURKEY

8.30 Turkey claims that the USITC failed to examine whether the import trends of the products under investigation were the result of "unforeseen developments" as provided for in Article XIX:1(a) of the GATT 1994. Turkey considers that, in a rapidly changing world, these types of events should be considered as foreseeable developments, occurring as the state of economies differs from one country to another. It was clear that the integration of the former Soviet Republics into world markets would have some effects on the world economy. The depreciation of the currencies of these republics was the natural result of that integration. The United States could have protected its industry against competing steel products from these non-WTO countries by raising its tariff levels. The effects of the unforeseen developments alleged by the United States were not restricted to the market of the United States, and they were also not country specific and product specific.[4836]

8.31 Turkey further argues that the United States has also violated its obligations under Article 2.1 of the Agreement on Safeguards by taking safeguard measures concerning rebar without demonstrating a sharp, sudden and significant increase in rebar imports. Based on Appellate Body jurisprudence, the USITC's safeguard investigation had to establish that the increase in imports has been recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively to cause or threaten to cause serious injury or threat thereof to the domestic industry. The USITC's end-point-to-end-point comparison of the import figures of 1996 and 1998 with figures of 2000 fails to evaluate the trend or general direction of recent imports and to provide that increases in imports were recent, sudden, sharp and significant enough. On the basis of the data contained in the USITC Report, Turkey claims that the quantity of rebar imports declined in 2000 compared to 1999 and again in interim 2001 compared to interim 2000. Therefore, according to Turkey, the USITC's findings do not justify a determination that rebar is being imported at recently, sharply and significantly increased quantities. As a result, Turkey asserts that the United States has violated Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of Agreement on Safeguards.[4837]

[4833] New Zealand's first written submission, para. 4.12
[4834] Thailand's oral statement at the first substantive meeting, pp. 3-4.
[4835] Thailand's oral statement at the first substantive meeting, p. 4.
[4836] Turkey's third party submission, paras. 13-17.
[4837] Turkey's third party submission, paras. 23-27.

8.32 According to Turkey, the United States has further failed to provide an adequate and reasoned explanation of the existence of serious injury and therefore violated Article 4.2(a) of the Agreement on Safeguards. The USITC based a number of its injury determinations (capacity utilization, average unit values, productivity) on an end-point-to-end-point comparison (1996 against 2000), which does not give any information about the trends of the injury indicators over the investigation period. The USITC's conclusion is also contrary to its statistical evaluation which shows an increase of the domestic rebar production, capacity, capacity utilization, employment, domestic demand and domestic shipments. Turkey submits that the problem facing rebar manufacturers is of a financial nature (such as the massive increase in selling, general and administrative expenses) and cannot be attributed to imports. The USITC Report does not provide information regarding the aggregated size and production capacity of the companies taking different positions in response to the USITC's questionnaire. Turkey therefore concludes that the domestic rebar industry did not suffer serious injury or threat of serious injury as stated in the USITC Report.[4838]

8.33 Turkey further submits that by failing to demonstrate the existence of a causal link between the serious injury and increased imports, the United States has violated Article 4.2(b) of the Agreement on Safeguards. Turkey argues that the determination requires analysing the existence of a coincidence between the trends of increased imports and injury indicators. In addition, the United States has failed to separate the effects of injury caused by other factors through a reasoned and adequate explanation that injury caused by factors other than increased imports is not attributed to allegedly increased imports. Turkey observes that the actual figures give information about the failure of the United States' approach in the evaluation of a causal link between increase in imports and serious injury. There is no coincidence between the movements in imports and injury factors. The domestic rebar industry made substantial profits in spite of increases in imports between 1996 and 1999. Imports increased in 1997 (by 21%), 1998 (by 75%) and 1999 (by 49%), but the domestic industry had a positive operating income in each year. The industry had an operating loss in 1996, which was the year of the lowest rebar imports during the period of investigation. As rebar imports declined in 2000, total profit of domestic producers declined dramatically. Turkey asserts that the price declines were in fact linked to falling costs of raw materials. Turkey submits that this aforementioned information indicates that the USITC has failed to provide a detailed analysis demonstrating the existence of a causal link.[4839]

8.34 In Turkey's view, the United States has also failed to ensure that its safeguard measures on rebar are applied only to the extent necessary to prevent or remedy serious injury caused by increased imports and has therefore violated Articles 3.1 and 5.1 of the Agreement on Safeguards. The USITC has failed to tailor the measure by distinguishing and separating the injurious effects of other factors. The United States also ignored the substantial degree of import protection already afforded by anti-dumping or countervailing duty actions since 1997 against Turkey, Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine. The share and the trend of the share of these nine countries in the total rebar imports show that these actions are highly effective in protecting the domestic rebar industry against import competition. The safeguard measures on certain steel products also violates Articles 3.1 and 5.1 of the Agreement on Safeguards because, in the absence of an explanation, there are dissimilarities between the USITC Report and the Presidential Proclamation in terms of the level of protection provided.[4840]

[4838] Turkey's third party submission, paras. 28-35.
[4839] Turkey's third party submission, paras. 36-50.
[4840] Turkey's third party submission, paras. 55-61.

G. VENEZUELA

8.35 Venezuela claims that the safeguard measures imposed by the United States are incompatible with the GATT 1994 and the Agreement on Safeguards because:

(a) the condition of unforeseen developments under Article XIX of the GATT 1994 has not been fulfilled;

(b) with regard to many of the products subject to the investigation, there were no increased imports, as required by Article 2.1 of the Agreement on Safeguards;

(c) an incorrect definition of the relevant domestic industries was used, according to that stipulated in Articles 2.1, 4.2(a) and 4.1(c) of the Agreement on Safeguards;

(d) the relevant domestic industries did not suffer serious injury or the threat of serious injury, as required by Articles 2 and 4.2(a) of the Agreement on Safeguards;

(e) the possible increase in imports has not caused or threatened to cause serious injury to the domestic industry in the sense of Articles 2.1 and 4.2(b) of the Agreement on Safeguards, in particular because the domestic industry did not suffer serious injury and because the injury or threat of injury caused by other factors was attributed to imports;

(f) the safeguard measures do not apply only to the extent necessary to prevent or remedy serious injury, as required by Article 5.1 of the Agreement on Safeguards;

(g) there is no parallelism between the products alleged to have been imported in increased quantities and the products subject to the safeguard measures;

(h) Article 9.1 of the Agreement on Safeguards has not been observed;

(i) the report of the investigation and the other documents do not correctly establish the findings and conclusions on all pertinent issues of law and of fact, including the required justification of the safeguard measures ultimately applied, as required by Article 3.1 of the Agreement on Safeguards.[4841]

8.36 Venezuela further argues that no basis was shown for the exclusions of imports from Mexico, Canada, Israel and Jordan from the measures.[4842]

8.37 Although Venezuela is a developing country and does not pose any commercial threat to the steel industry of the United States, it was not taken into account for the exclusions, but its exports of rebar are subject to the safeguard measures. According to Venezuela, its inclusion among the origins covered by the measures amounts to a violation of the following Articles of the Agreement on Safeguards: Article 2.1 on increased imports; Article 2.2 on the application of the measure on products irrespective of their origin; and Articles 3.1, 4, 5.1, 8.1, 9.1, 12.2 and 12.3 on the adequate opportunity for interested parties.[4843]

[4841] Venezuela's third party submission, paras. 2-3.
[4842] Venezuela's third party submission, para. 10.
[4843] Venezuela's third party submission, paras. 11 and 15.

8.38 Venezuela draws particular attention to Article 9.1 of the Agreement on Safeguards, under which Venezuela should have been exempted from the application of the safeguard measures with regard to rebar. In June 2001, an anti-dumping investigation against Venezuelan imports was terminated precisely because the Venezuelan participation in the imports to the United States turned out to be "insignificant" under the Anti-Dumping and SCM Agreements. Venezuela submits that, indeed, in all the product categories subject to the present safeguard measures, imports from Venezuela are insignificant, and therefore incapable of causing injury to the domestic industry of the United States. Venezuela also observes that sources of rebar with a significantly higher import volume than Venezuela have been excluded from the measures at issue.[4844]

8.39 Venezuela also argues that the United States failed to provide reasoned and adequate explanations about how it made its determination on Article 9.1 of the Agreement on Safeguards and about why Venezuelan rebar exports did not satisfy the conditions of that Article. In 2001, imports from developing country Members affected by the measure amounted to only 15%, with Venezuelan exports representing 3.08%. In addition, the majority of Venezuelan exports were destined for Puerto Rico, a market not regularly supplied by producers from the United States. Venezuela asserts that, thus, the measure does not really protect steel manufacturers in the United States but, rather, it unduly penalizes Venezuelan exports, whose market share will go to third countries which have even contributed more to the rebar imports during the period of investigation. While Venezuela has been a reliable supplier of the United States' market, its rebar exporters have always been careful not to cause injury to the domestic industry. Since sales to the United States have represented over 50% of Venezuelan rebar exports, the current safeguard measures have the potential to reduce the exports of rebar very significantly, to cut the revenue of the Venezuelan industry and to increase idle capacity. Venezuela states that it hopes that the Panel will recommend that the DSB request the United States to abolish its safeguard measures, as required by the WTO Agreement.[4845]

IX. INTERIM REVIEW

9.1 On 6 February 2003, pursuant to Article 15.1 of the DSU, Article 16 of the Panel's working procedures and the revised timetable at paragraph 3(h), the Panel issued a single draft Descriptive Part for its Reports. Pursuant to the revised timetable, on 19 February 2003, the parties provided their comments on the draft Descriptive Part. The Panel issued its Interim Report on 27 March 2003. On 9 April 2003, pursuant to Article 15.2 of the DSU, Article 16 of the Panel's working procedures and the revised timetable at paragraphs 3(j) and (k), the parties provided their comments on the Interim Report. None of the parties requested that the Panel hold a further meeting with the parties to review part(s) of the Panel's Reports. Pursuant to the revised timetable at paragraph 3(l), on 16 April 2003, the parties submitted further written comments on the comments that had already been provided on the Panel's Interim Reports on 9 April 2003.

9.2 Pursuant to Article 15.3 of the DSU, this section of the Panel's Reports contains the Panel's response to the comments made by the parties in relation to both the draft Descriptive Part and the Interim Reports, and forms part of the Findings of the Panel's Reports.

A. DESCRIPTIVE PART

9.3 With respect to the draft Descriptive Part, the Panel reviewed all comments made by the parties on 19 February 2003. The complainants provided additional comments on the draft Descriptive Part in their comments of 9 April 2003 and 16 April 2003 on the Interim Findings. A

[4844] Venezuela's third party submission, paras. 15-16.
[4845] Venezuela's third party submission, paras. 17-18.

number of the comments made by the parties suggested insertion of text of the parties' submissions. The Panel accepted all such suggestions except those for which sources for such text were not indicated by the parties in their comments and could not be located by the Panel. A number of the comments made by the parties suggested insertion of footnote references or changes to the existing footnote references. These suggestions were largely accepted except those which the Panel considered to be erroneous or in cases where the Panel considered that the suggested footnote did not support the text to which the footnote related. Some of the comments contained suggested changes to, or insertions of, headings in the draft Descriptive Part. Again, the Panel accepted these suggestions unless it considered that the insertions or changes were not appropriate. The parties suggested re-ordering of the text in a number of sections of the draft Descriptive Part. The Panel accepted these changes where it considered it appropriate. Finally, the parties also suggested corrections to typographical and editorial errors which were accepted by the Panel. The Panel also made additional typographical and editorial changes to the Descriptive Part. Finally, the Panel recalls that in its cover letter dated 19 February 2003 attaching comments on the draft Descriptive Part, the complainants noted that they "have not insisted on systematically assuring that every argument is attributed to every complainant who made it (often in rather different contexts). The important point is that the arguments be present somewhere in the common descriptive part." We note, in this regard, in the Descriptive Part for our Reports, we made reference to specific complainants when indicating arguments that had been advanced. This was done not to attribute the argumentation exclusively to the identified complainants but, rather, to facilitate the review of the Descriptive Part by the parties.

B. PANEL'S FINDINGS AND CONCLUSIONS

9.4 In addition to comments on the draft Descriptive Part, the parties' provided comments on the Panel's findings and conclusions in their comments of 9 April 2003 and 16 April 2003. In summary, the parties' comments can be divided into a number of categories, which have been listed and dealt with below.

1. Typographical and editorial changes

9.5 The parties have suggested a number of editorial changes to the Panel's Interim Reports and corrections of typographical errors. The Panel has accepted all of these suggestions (sometimes with some minor additional amendments), except those for which the suggested changes appear to be erroneous (for example, in cases where a change has been suggested to a footnote reference but the source to which that reference pertains does not support the relevant text). The Panel notes in this regard that it has amended cross-references to the Descriptive Part of its Reports as well as cross-references within the section of the Panel's Reports containing its findings. The Panel has also corrected other typographical errors and made some additional editorial changes. The suggestions for editorial changes made by the parties that have been accepted by the Panel include those pertaining to paragraphs 10.1, 10.18, 10.20, 10.131, 10.370, 10.398, 10.444, 10.702 and 10.711 of the Panel's Interim Reports.

2. Graphs generated by the Panel and the data used as basis for graphs

9.6 With respect to graphs that were generated by the Panel on the basis of USITC data and which are contained in its Reports, the Panel notes that, at the suggestion of the complainants, it has included footnote references indicating the source(s) of data used for all such graphs. It has also clarified the units for the productivity graphs that are contained in the Panel's findings on causation. The United States noted that the productivity graph following paragraph 10.367 of the Panel's Interim Reports reflected incorrect data. The Panel has re-generated this graph using the correct productivity data.

3. Ways in which facts and parties' arguments are reported

9.7 A number of the comments made by the parties suggested changes to the way in which the facts, the parties' arguments and the USITC's findings had been reported in the Reports.

9.8 In particular, the parties suggested changes to paragraph 10.1 of the Panel's Interim Reports to clarify that the DSB did not establish five different panels that were conducted through a single panel process but, rather, it accepted eight requests for the establishment of a panel and referred them all to a single panel pursuant to Article 9.1 of the DSU. The complainants also argued that paragraph 10.213 of the Panel's Interim Reports should be modified so as to fully reflect the European Communities' arguments that there had not been an adequate explanation by the USITC for a sufficient increase in imports of cold-finished bar. China also requested clarification of paragraph 10.157 of the Panel's Interim Reports to make it clear that China has not challenged the USITC's choice of a five-year period of investigation *per se*. The Panel has accepted, at least partially, these suggested amendments and revised its findings accordingly.

9.9 The United States requested amendment to paragraph 10.357 of the Panel's Interim Reports to make it clear that the USITC findings that had been excerpted in that paragraph were not complete (although they had been cited elsewhere in the Panel's causation findings). The Panel has accepted this suggestion and made all the necessary consequential changes to accommodate this request. The United States also requested changes to paragraphs 10.639 and 10.676 of the Panel's Interim Reports to ensure that they correctly reflect the USITC findings. These suggested changes were accepted by the Panel and we have revised our findings accordingly.

4. Clarifications of certain aspects of the Interim Findings

9.10 The parties have also made suggestions to clarify certain aspects of the Interim Reports.

9.11 In particular, the Panel agreed with the complainants that the Panel's increased imports finding for "welded pipe" is without prejudice to the question of the product definition. However, the Panel rejected the complainants' requests that paragraph 10.595 of the Panel's Interim Reports be amended and agreed with the United States that the pre-existing order of the Panel's findings was logical.

9.12 The Panel also accepted the United States' request in relation to paragraphs 10.291-10.292 of the Panel's Interim Reports to make it clear that it was the Panel and not the USITC that characterized the USITC's causation analysis as a "coincidence" or "conditions of competition" analysis. In requesting this amendment, the United States noted that the USITC does not segregate its causal link analysis into two forms of analysis – that is, a "coincidence" analysis or a "conditions of competition" analysis. In accepting the suggestion made by the United States, the Panel notes that it considered it necessary to develop an analytical framework to assess the USITC's findings on causal link for each of the safeguard measures for the following reasons. First, the Agreement on Safeguards does not prescribe how causal link should be demonstrated. At the same time, WTO jurisprudence indicates that coincidence is central to a causation analysis. In this regard, a number of complainants have argued that the failure by the USITC to undertake a coincidence analysis in relation to some of the safeguard measures was fatal. Finally, the Panel is of the view that tools other than a coincidence analysis, such as a conditions of competition analysis, could be used to establish or support causal link findings under Article 4.2(b) of the Agreement on Safeguards. The analytical framework developed in paragraphs 10.306-10.308 takes the above-mentioned consideration into account.

9.13 The Panel notes that the United States has requested a number of additional changes in the Panel's measure-by-measure analysis to reflect the fact that the Panel, rather than the USITC, categorized the USITC analysis as a coincidence or conditions of competition analysis. In light of the Panel's changes to paragraphs 10.291 and 10.292 of the Panel's Interim Reports, the Panel does not consider that the majority of these additional changes are necessary. However, in its measure-by-measure analysis, the Panel has, despite the changes made to paragraphs 10.291 and 10.292 of the Panel's Interim Reports**,** made the additional changes where confusion might exist.

9.14 In addition, the United States notes that in paragraph 10.375 of the Panel's Interim Reports, the Panel states that the sources for domestic and import average values for CCFRS are unclear. The United States has in its review comments provided clarification of the source for these values. On the basis of this clarification, the Panel has deleted its statement that the source for such data is unclear, despite arguments by the complainants in their comments of 16 April 2003 of the continuing lack of clarity concerning the source for such data. Nevertheless, in light of the United States' explanation of the basis for calculation of the average unit values for domestic CCFRS together with comments made by the United States in relation to paragraph 10.421 of the Panel's Interim Reports dealing with the relevance of the product definition of CCFRS in the context of the USITC's causation analysis, the Panel has added to what was paragraph 10.375 of its Interim Reports to note the difficulties associated with the aggregation of data by the USITC, which were acknowledged by the USITC itself in its Report.

9.15 Linked to the comments made by the United States regarding the availability of data in the USITC report on CCFRS as a single product, the United States argues that paragraph 10.421 of the Panel's Interim Reports mistakenly states that "on a number of occasions, the USITC failed to produce necessary data for CCFRS as a whole and/or it relied upon data for the items that comprised CCFRS rather than for CCFRS without explaining why and how such specific data on such items related to the determination concerning CCFRS as a whole". In light of the data that was pointed to by the United States above in relation to paragraph 10.375 of the Panel's Interim Reports, the Panel has made the necessary changes to paragraph 10.421 of the Interim Reports.

9.16 The United States has also requested, in relation to paragraph 10.421 of the Panel's Interim Reports, that the Panel confirm that in its view the USITC's exclusive reliance upon sub-category data and failure to produce or consider aggregate data was the *sole* basis for the Panel to conclude that the USITC admitted that CCFRS could not be subjected to the application of the causation requirement and that that, in turn,it was also the sole basis for the Panel to conclude that the CCFRS grouping is inconsistent with the requirements of Article 4.2(b) of the Agreement on Safeguards. The Panel has clarified paragraph 10.421 of the Panel's Interim Reports. As stated, there were a *number* of bases upon which the Panel considered that the product definition for CCFRS was such that it could not properly be subjected to the requirements of Article 4.2(b) of the Agreement on Safeguards. In this regard, the Panel notes that the clarificatory amendments that have been made by the Panel to the paragraph take account of the concerns raised by the complainants in their comments of 16 April 2003. The Panel has also taken into account the United States' comment that the conclusion of violation with Article 4.2(b) on the basis of the product definition of CCFRS is not necessary to the Panel's overall conclusions on causation with respect to CCFRS.

9.17 The United States has made a number of comments that essentially request clarification of the distinction between "average unit values" and "prices". In particular, the United States has requested the Panel to modify the language contained in paragraph 10.432 of the Panel's Interim Reports and the accompanying graph to make it clear that the Panel is referencing "average unit values" rather than "prices". Similar requests were made by the United States in relation to paragraphs 10.456, 10.477 and 10.521 of the Panel's Interim Reports and their accompanying graphs. The Panel has made the

requested changes. In addition, the Panel has amended the Reports to make it clear that in reviewing pricing analyses undertaken by the USITC as part of its causal link analysis, the Panel treated unit values as a proxy for prices. As noted in our findings below, we consider that this is acceptable given that this is apparently what the USITC itself did. Further, we understand that price trends mirror unit value trends. As a related point which appears to be raised by the requests for amendments made by the United States, in our reports, we do not consider that any distinction exists between "unit values" on the one hand and "average unit values" on the other hand. More particularly, in the context of this case, we consider that unit values for a particular year are implicitly averages.

9.18 The complainants requested the Panel to clarify that it did not find that there was any USITC determination other than that made on 22 October 2001 and that the Supplementary Reports were only part of the explanation of that determination. The Panel agrees that, for each imported product, the USITC made, on 22 October 2001, one determination for the purposes of Articles 2 and 4 of the Agreement on Safeguards. However, the Panel is of the view that the requirement to demonstrate the cirumstances of unforeseen developments pursuant to Article XIX of GATT 1994 is additional to the requirement to provide a determination indicating compliance with the conditions of Articles 2 and 4 of the Agreement on Safeguards. Indeed, the Panel notes that none of the complainants have claimed that the requirement to demonstrate unforeseen developments is one of the conditions for imposition of a safeguard measure pursuant to Articles 2 and 4 of the Agreement on Safeguards.[4846] The WTO jurisprudence explictly states that the WTO pre-requisites for the imposition of a WTO-compatible safeguard include both the factual demonstration of unforeseen developments pursuant to Article XIX of GATT 1994 and the determination that the conditions of Articles 2 and 4 of the Agreement on Safeguards have been fulfilled.[4847] A coherent, reasoned and adequate explanation that all such requirements have been respected must be included in the report of the competent authority, as required by Article 3.1 of the Agreement on Safeguards and before a safeguard measure is applied.

9.19 The Panel has also clarified other aspects of its Interim Findings, including paragraphs 10.13, 10.17, 10.29, 10.48, 10.74 (footnote 4924), 10.122, 10.132, 10.143, 10.148, 10.149, 10.406-10.411, 10.419, 10.445, 10.448, 10.471, 10.489, 10.505, 10.538, 10.567, 10.617, 10.623, 10.630, 10.641 and 10.668.

5. The Panel's appraisal of the parties' arguments and facts

9.20 The United States has challenged the Panel's appraisal of arguments and facts in relation to a number of the measures at issue. In particular, the United States challenges the basis for the Panel's conclusions in paragraph 10.401 of the Panel's Interim Reports arguing that the USITC did not state that legacy costs had caused any of the declines in the condition of the CCFRS industry during the period of investigation because legacy costs actually declined during the period of investigation. The United States continues by arguing that the fact that legacy costs had been a burden on the industry prior to the period of investigation or that they might present difficulties to the industry in the future says nothing about whether legacy costs caused declines in the industry's condition during the period of investigation. On the basis of the foregoing, the United States requests the Panel to remove its finding that the USITC's analysis of legacy costs failed to establish that the injury caused by this factor together with other factors was not attributed to increased imports. The complainants oppose this request.

[4846] None of the complainants have suggested that the basis for their unforeseen developments claims were found in Articles 2 or 4 of the Agreement on Safeguards. See in this regard the content of the complainants' requests for establishment of a panel in Articles 3.1 to 3.8 of the Descriptive Part.

[4847] Appellate Body Report, *US – Lamb*, para. 72.

9.21 The Panel has decided to reject the United States' requested amendment. The Panel has reviewed the USITC's findings and the arguments made in relation to legacy costs and remains of the view that the USITC failed to ensure that injury caused by legacy costs, together with other factors, was not attributed to increased imports when assessing whether increased imports of CCFRS were causing injury to the relevant domestic producers. However, in light of comments made by the United States in this regard, the Panel has elaborated upon its findings to highlight the absence of an adequate explanation by the USITC and to emphasize that the mere fact that the issue of legacy costs pre-dated the period of investigation and may have decreased during the period of investigation does not necessarily mean that they did not play a role in causing injury to the domestic industry.

9.22 The United States has also challenged the Panel's conclusion in paragraph 10.440 of the Panel's Interim Reports that the USITC acknowledged that inefficient producers were a possible cause of injury to the hot-rolled bar industry. In light of the United States' comments, the Panel has reviewed the USITC's findings and the claims and arguments made by the parties on this issue and has revised its findings to reflect its agreement with the United States. Necessary consequential changes have also been made to our Reports.

9.23 With respect to paragraph 10.455 of the Panel's Interim Reports, the United States argues that there is no basis for the Panel to be unclear regarding the USITC's reasons for using quarterly data for individual cold-finished bar products when average data was available. The United States points in this regard to note 627 on page 105 of the USITC Report. The Panel has examined the cited note and is of the view that it relates to the relative merits of pricing data for specific products within the cold-finished bar product category. The Panel does not consider that this note contains a discussion of the relative merits of quarterly versus (annual) average unit values and, therefore, does not provide any justification for the use of quarterly data by the USITC in the absence of a reasoned and adequate explanation as to why the available annual data had not been used on this occasion while such data had been used for a number of the other measures at issue. We note that the quarterly data upon which the USITC relied suggested underselling whereas the annual average data did not.

9.24 The United States has also challenged the Panel's review of the USITC's assessment of domestic capacity increases for FFTJ contained in paragraph 10.527 of the Panel's Interim Reports. As a first point, the United States argues that the Panel misunderstood the reference to "substantial" to mean "enormous" when interpreting the USITC comment that "the increase in capacity would not be expected to place substantial pressure on domestic prices". The Panel was under no such misunderstanding. The USITC Report indicates that downward pressure *was* exerted by capacity on prices, however one interprets "substantial". The Panel is of the view that all relevant "other factors" – even those with limited injurious effects on the domestic industry – must be, together with other relevant factors, identified, distinguished and assessed with a view to reaching an overall conclusion on whether or not increased imports had a genuine and substantial relationship of cause and effect with the injury suffered by the relevant domestic industry.

9.25 The United States also requested the Panel to explain why it concluded that the USITC acknowledged that domestic capacity increases played a role in causing the injury that was suffered by the domestic industry. The Panel notes that in paragraphs 10.527-10.531 of the Panel's Interim Reports, it explained why it considered that the USITC conceded that increases in capacity lead, at least in part, to downward pressure on domestic prices which, in turn, impacted upon the state of the domestic industry.

9.26 The United States has also requested the Panel to revise its findings in paragraphs 10.559 and 10.563 of the Interim Reports that the USITC could have provided a reasoned and adequate non-attribution analysis for demand declines by explaining that operating margin declined irrespective of

demand trends. In making this request, the United States submits that the very analysis sought by the Panel was provided on page 212 of the USITC Report. The Panel has considered the mentioned page of the USITC report and is of the view that it confirms the Panel's conclusion, which is challenged by the United States. The relevant page states clearly that demand declined *in late 2000 and interim 2001* whereas substantial declines in the situation of the domestic industry occurred *prior to 2000 and 2001*. The fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that the factor may still play a role in causing injury beyond that point in time. We have elaborated our findings to make this clear.

6. Omissions

9.27 The parties have also raised what they consider to be omissions from the Panel's Interim Reports. The Panel agreed with the following suggestions made by the parties. The complainants requested elaboration of paragraph 10.370 of the Panel's Interim Reports to correctly sum up all the reasons why the Panel considered the USITC's finding to be inadequate. The complainants also suggested that the Panel's Interim Reports should indicate that the Panel did not consider it necessary to specifically address the argument made by a number of complainants that a gap between the range of products for which increased imports and serious injury were allegedly found and those on which safeguard measures were finally imposed also constituted a violation of the principle of parallelism.

9.28 However, there were a number of instances where the Panel did not agree either fully or partly that an omission existed and, in those circumstances, declined to make any amendment or, at least, declined to make the requested amendment. In particular, in their comments, the complainants note that Japan had included a claim under Article XIX:1 of GATT 1994 concerning the United States' failure to abide by the increased imports, causation and parallelism standards. The complainants further noted that although the Panel addressed this claim in its findings on increased imports, it failed to include a reference to Article XIX in its summary findings on increased imports. According to the complainants, nor did the Panel address this claim in its findings on causation and parallelism. The United States did not agree with the complainants' comments in this regard.

9.29 The Panel is well aware of the claims made by Japan and other complainants under Article XIX of GATT 1994. However, the Panel does not consider that a specific finding on Article XIX in relation to increased imports, causation and parallelism would enhance the complainants' rights . The Panel notes that Article XIX was not much argued by most parties other than in the context of unforeseen developments. Accordingly, the Panel has decided to reject the request made by the complainants to add a reference to Article XIX in its findings on causation and parallelism. In addition, the Panel does not consider that a reference to Article XIX is necessary in relation to its findings on increased imports. Accordingly, consistent with its approach in relation to the other sections of its Reports, the Panel has revised its findings on increased imports to remove references to Article XIX. In our view, the removal of such references will not in any way diminish the complainants' rights with reference to their claims on increased imports in the present dispute.

9.30 Similarly, the complainants note that Japan and Norway included a claim under Article 4.2(c) of the Agreement on Safeguards concerning the US decision-making process for tin mill products and stainless wire products. The complainants note that although this claim is a part of the Panel's findings on causation, Article 4.2(c) is not listed in the summary findings on causation. They also argue that the Article 4.2(c) claim should also have been addressed by the Panel in its findings on increased imports. They argue that given that the Panel found a violation of Article 3.1 with respect to increased imports for tin mill products and stainless steel wire, a violation of Article 4.2(c) should have been found to exist. The United States did not agree with the complainants' comments in this regard.

9.31 With respect to the first point, namely whether a finding of violation of Article 4.2(c) is necessary in relation to the issue of causation, the Panel considers that such a reference would not enhance the complainants' rights. In addition, the Panel observes that Article 4.2(c) was not extensively addressed by the parties as a discrete basis for violation of the causation requirements. Accordingly, consistent with its approach in relation to the other sections of its Reports, the Panel has revised its findings on causation to remove references to Article 4.2(c) in its discussion on the claims of violation of the causation requirements for tin mill products and stainless steel wire. In our view, the removal of such references will not diminish the parties' rights with regard to causation matters in the present dispute.

9.32 As for the second point, the Panel agrees that certain parallels can be drawn between Article 4.2(c) and Article 3.1 of the Agreement on Safeguards. However, the Panel does not consider that an additional reference to Article 4.2(c) in relation to the Panel's findings on increased imports or causation would enhance the complainants' rights. Accordingly, the Panel has decided to reject the suggestion made by the complainants to add a reference to Article 4.2(c) to its summary findings on causation and in its findings on increased imports for tin mill products and stainless steel wire.

7. Confidentialization of data

9.33 The United States has raised a number of concerns regarding comments made by the Panel in its Interim Reports in relation to the confidentialization of data. The Panel agrees that, in some circumstances, Members have the obligation to confidentialize certain information and this obligation should not reduce Members' right to take safeguard actions. The Panel also accepts that the United States should not be held responsible for having confidentialized certain data. To the extent that a reasoned and adequate alternative means of supporting its conclusions were provided by the USITC, the Panel has made the necessary changes to paragraph 10.455 (dealing with cold-finished bar), paragraph 10.552 (dealing with stainless steel bar) and 10.577 and 10.583 (dealing with stainless steel rod) of the Panel's Interim Reports.

9.34 With respect to paragraph 10.455 of the Panel's Interim Reports, the United States challenges the Panel's statement that "difficulties with data call into question whether 'underselling' actually existed" on the basis, *inter alia*, that the Panel had questioned the confidentialization of certain relevant data. We have reviewed our findings in light of our comments above with respect to data or information that can be used in substitution for redacted data. Nevertheless, the Panel maintains its findings in this regard with respect to cold-finished bar in light of the absence of explanation regarding the data relied upon by the USITC, which calls into question whether "underselling" actually existed.[4848]

9.35 With respect to paragraph 10.552 of the Panel's Interim Reports (dealing with stainless steel bar) which states that the Panel was unable to assess whether significant import underselling occurred during the period of investigation due to the confidentialization of relevant information, the United States notes that while domestic prices were redacted from the price comparisons contained in a number of tables to which the Panel had referred, the USITC Report contained another table, Table STAINLESS-99, in which it summarized the instances of underselling by Canadian, Mexican and non-NAFTA imports.

9.36 The Panel has examined that table and considers that it is sufficient to indicate that import underselling occurred. In particular, as indicated in our revised findings, Table STAINLESS-99 refers to 40 instances of underselling by non-NAFTA imports and provides a range of the margins of

[4848] See para. 9.23 above.

underselling of 0.1 to 51.8 % that applied for all of those instances. As indicated in our findings, this fact – that there were 40 instances of underselling by non-NAFTA imports – has not been contested by the complainants and we consider that it is contrary to our standard of review to reassess the quality of this evidence in the absence of any prima facie challenge. In our view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information that sought to substitute the redacted data. We have revised our findings accordingly to reflect our conclusions in this regard.

9.37 The United States has challenged the basis for the Panel's comments in paragraphs 10.578-10.579 of the Panel's Interim Reports that the USITC's analysis with respect to stainless steel rod does not contain any comparison between import and domestic prices. The United States points to note 1419 on page 220 of the USITC Report together with Table STAINLESS-100 and Table STAINLESS-C-5 to indicate that such a price comparison was undertaken. While Table STAINLESS-C-5 does not contain any public data, the Panel accepts that Table STAINLESS-100 does contain relevant information and has revised its findings accordingly.

9.38 The complainants have also suggested that paragraph 10.559 of the Interim Reports be amended to indicate that, when information has been confidentialized, in order for an explanation to be reasoned and adequate, there should be an indication of the applicable trends sufficient to substantiate the investigating authority's findings. As discussed in paragraphs 10.272-10.275 of our findings, we consider that, in some circumstances, Members have the obligation pursuant to Article 3.2 of the Agreement on Safeguards to confidentialize certain information although they can base their determination on such confidentialized information. Such an obligation should not reduce Members' rights to take safeguard actions. In cases where information has been confidentialized, the Panel has examined whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data. In our view, trends derived from data that has been redacted may provide sufficient evidence that the relevant explanation is reasoned and adequate. However, the Panel considers that trends are not the only way in which to support allegations based upon confidentialized data.

8. Request for separate panel reports

9.39 With regard to the United States' request for separate panel reports, the United States requested the Panel to clarify in paragraph 10.728 of the Interim Reports its statement that the issuance of a single consolidated Descriptive Part reflected the fact that "each of the complainants relied upon arguments made and evidence adduced by other complainants in relation to their respective claims ...". According to the United States, this statement could mistakenly be read to entitle a complainant to rely on another Member's arguments and evidence in order to satisfy that complaining party's burden of proof.

9.40 The Panel agrees with the United States that a complaining party bears the burden of establishing a prima facie case for each of the claims it makes and it may not rely on the other complaining parties to make its prima facie case, if they had litigated their respective disputes independently. The Panel recalls that the complainants made common claims for all measures and all these common claims are properly before the Panel. The Panel notes that in the present dispute, with the apparent agreement of the United States, the co-complainants referred to and relied upon each other's arguments and demonstrations and explicitly stated as much.[4849] From the initiation of the

[4849] See for example, European Communities' first written submission, paras. 16-17; Switzerland's first written submission, para. 10; Norway's first written submission, para. 8; Brazil's first written submission, para. 3; New Zealand's first written submission, para. 1.5; China's first written submission, para. 8; Japan's first

panel process, parties have recognized[4850] that the complainants would act together on some common claims and the United States would respond to such common claims while responding as well to claims specific to some of the complainants. The complainants often cross-referenced each others' written submissions, they coordinated their presentations to the Panel and divided among themselves the argumentation on common claims, often explicitly stating that they were speaking on behalf of all complainants. The complainants submitted common comments on the Descriptive Part, common comments on the Interim Findings as well as a common response to the United States' comments on the Interim Findings. At all these stages, the United States provided one response addressing collectively the arguments made by the complainants. We are aware that Panels are not entitled to make the case for the complainants.[4851] WTO jurisprudence recognizes that panels may, after an assessment of the evidence and argumentation made by complainants, reach a conclusion as to whether, overall, the complainants made their prima facie case.[4852] We believe that in the present case, each of the complainants has made a prima facie case that the safeguard measures at issue were inconsistent with the WTO provisions listed in our Recommendations, through their own and with each other's demonstration. We have revised our findings to clarify this point.

9. Release of the confidential Interim Reports

9.41 Finally, we would like to address the issue of confidentiality of the Interim Reports. When, on 26 March 2002, we transmitted our Interim Reports to the parties, we clearly indicated that such Reports were confidential. Indeed, pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. We had also explicitly emphasized at all our meetings with the parties that the panel proceedings were confidential. This was accepted by the parties and reflected in the Panel's working procedures and in all our relevant correspondance with the parties. Therefore, we are concerned to discover that parties have not respected this confidentiality obligation and have disclosed aspects of the Panel's Interim Reports. We consider that this lack of respect of a specific requirement imposed by the DSU and the Panel's working procedures is regrettable and should not remain unmentioned.

X. FINDINGS

A. INTRODUCTION

1. Panel's terms of reference – a single panel established

10.1 In accordance with Article 6 of the DSU, eight requests for the establishment of a panel were filed with the DSB in relation to the present dispute. The DSB accepted these requests and, pursuant to Article 9, we were ultimately given the mandate to examine the eight requests for the establishment of a panel, through a single panel process.[4853]

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written submission, para. 5; Korea's first written submission, para. 7. Throughout their written and oral submissions the complainants refered to each other's allegations and arguments. See also the oral statements of the complainants (before the Panel) stating that each of the comlainant was speaking on a specific matter on behalf of the other complainants.

[4850] See para. 5 of the Panel's working procedures quoted in para. 6.1 of the Descriptive Part

[4851] Appellate Body Report, *Japan – Agricultural Products II*, paras. 126-130.

[4852] Appellate Body Report, *Korea – Dairy*, para. 145. The Appellate Body confirmed this view in *Thailand – H-Beams*, para. 134. See also the Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.50.

[4853] The first panel request (European Communities – WT/DS248/6) was accepted on 3 June 2002; the second and third (Japan – WT/DS249/6; Korea – WT/DS251/7) on 14 June 2002 the fourth, fifth and sixth

10.2 On 29 July 2002, the Panel met with the parties for its organizational meeting. On 31 July 2002, the Panel wrote to the parties issuing some preliminary and organizational rulings including its timetable and working procedures.[4854] The Panel notes, at this early stage, that its Working Procedures do not make reference to a "single" or "multiple" panel report(s). The working procedures refer to "interim report" (in paragraph 16). The timetable only refers to various aspects of the "report" (again in singular) in paragraphs 3(h), (i), (m) and (n) of the timetable. The timetable as well as the size and content of the executive summaries of the United States reflected the fact that the United States would have to reply to common claims and claims specific to some of the complainants.

10.3 The Panel met with the parties for the first substantive meeting on 29, 30 and 31 October 2002. With a view to ensuring an efficient process for this single panel, the complainants coordinated their oral presentations. The Panel met with the parties for the second substantive meeting on 10, 11 and 12 December 2002; once again the complainants coordinated their presentations to the Panel. Numerous questions to the parties were asked by the Panel and the parties. The complainants often responded individually to the Panel's and the United States' questions. On 28 January 2003, the United States requested the issuance of separate panel reports instead of a single report. We address the United States' request in paragraphs 10.716 ff.

2. Claims

10.4 The complainants claim that the United States' safeguard measures do not satisfy the WTO prerequisites for taking such action, including those mentioned in Articles 2, 3, 4, 5, 7, 8, 9 and 12 of the Agreement on Safeguards and Articles X and XIX of GATT 1994. All complainants are challenging all safeguard measures but not all their claims are the same. All complainants have raised some common claims in respect of all of the measures. Some complainants have raised specific claims in respect of all or some of the measures. The detailed claims of the complainants are listed in Section III *supra*.

3. The measures at issue

10.5 By Proclamation No. 7529 of 5 March 2002, bearing the title "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", accompanied by a Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR, the US President imposed on 20 March 2002 definitive safeguard measures on imports of the following steel products:[4855]

– A tariff of 30% imposed on imports of "Certain Flat Steel other than Slabs", that is: (i) Plate[4856]; (ii) Hot-Rolled Steel[4857]; (iii) Cold-Rolled Steel[4858]; (iv) Coated Steel.[4859]

(China – WT/DS252/5; Switzerland – WT/DS253/5; Norway – WT/DS254/5) on 24 June, the seventh (New Zealand – WT/DS258/9) on 8 July and finally the eighth (Brazil – WT/DS/259/10) on 29 July 2002. The content of the panel requests can be found in paras. 3.1 to 3.8 of the Descritive Part. See also the following minutes of the DSB: WT/DSB/M/125, WT/DSB/M/127, WT/DSB/M/128, WT/DSB/M/129 and WT/DSB/M/130.

[4854] The Panel's working procedures are contained in para. 6.1 of the Descriptive Part of the present Reports.

[4855] Proclamation No. 7529 of 5 March 2002, "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products", Federal Register, Vol. 67, No. 45, 7 March 2002, p. 10553; Memorandum for the Secretary of Treasury, the Secretary of Commerce and the USTR of 5 March 2002 on the "Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America", Federal Register Vol. 67, No. 45 of 7 March 2002, p. 10593, Exhibit CC-13.

[4856] As defined in the superior text to subheadings 9903.72.50 through 9903.72.60 in the Annex to the Proclamation.

A tariff rate quota on the fifth product of the product group "Certain Flat Steel", that is Slabs.[4860] The out-of-quota tariff (applicable beyond 5.4 million short tons) is 30%.

– A tariff of 30% imposed on imports of tin mill products[4861];

– A tariff of 30% imposed on imports of hot-rolled bar[4862];

– A tariff of 30% imposed on imports of cold-finished bar[4863];

– A tariff of 15% imposed on imports of rebar[4864];

– A tariff of 15% imposed on imports of certain tubular products[4865];

– A tariff of 13% imposed on imports of carbon and alloy fittings and flanges[4866];

– A tariff of 15% imposed on imports of stainless steel bar[4867];

– A tariff of 8% imposed on imports of stainless steel wire[4868];

– A tariff of 15% imposed on imports of stainless steel rod.[4869]

10.6 From its examination of the complainants' requests for establishment of a panel, the Panel notes first, that *all* complainants have challenged *all* the safeguard measures imposed by the United States pursuant to Proclamation No. 7529 of 5 March 2002. The Panel also notes that the complainants are challenging the *application* of the United States' safeguard measures but none of the

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[4857] As defined in the superior text to subheadings 9903.72.62 through 9903.72.77 in the Annex to the Proclamation.
[4858] As defined in the superior text to subheadings 9903.72.80 through 9903.72.98 in the Annex to the Proclamation.
[4859] As defined in the superior text to subheadings 9903.72.99 through 9903.73.14 in the Annex to the Proclamation.
[4860] As defined in the superior text to subheadings 9903.72.30 through 9903.72.48 in the Annex to the Proclamation.
[4861] As defined in the superior text to subheadings 9903.73.15 through 9903.73.27 in the Annex to the Proclamation.
[4862] As defined in the superior text to subheadings 9903.73.28 through 9903.73.38 in the Annex to the Proclamation.
[4863] As defined in the superior text to subheadings 9903.73.39 through 9903.73.44 in the Annex to the Proclamation.
[4864] As defined in the superior text to subheadings 9903.73.45 through 9903.73.50 in the Annex to the Proclamation.
[4865] As defined in the superior text to subheadings 9903.73.51 through 9903.73.62 in the Annex to the Proclamation.
[4866] As defined in the superior text to subheadings 9903.73.66 through 9903.73.72 in the Annex to the Proclamation.
[4867] As defined in the superior text to subheadings 9903.73.74 through 9903.73.81 in the Annex to the Proclamation.
[4868] As defined in the superior text to subheadings 9903.73.91 through 9903.73.96 in the Annex to the Proclamation
[4869] As defined in the superior text to subheadings 9903.73.83 through 9903.73.89 in the Annex to the Proclamation.

complainant is challenging the United States' statute on safeguards *per se*, nor are the complainants challenging the practices of the USITC *per se*.

10.7 However, the complainants in their argumentation have discussed and challenged what they call the "methodologies" used by the USITC when making its determinations for those safeguard measures. Nevertheless, as noted by the European Communities in its oral statement to the second substantive meeting, "complainants have not chosen in this case to request any findings relating to US safeguards law or general practice. … When we say that the complainants are not attacking the methodologies of the USITC *per se* we mean that we are simply attacking the methods of analysis actually *used in this case* – not necessarily the methodologies that the USITC traditionally uses, as the US seems to believe. … I repeat again – our complaint is with the steps that the USITC actually took – or failed to take – in this case."[4870]

10.8 The Panel believes, therefore, that the complainants' reference(s) to the USITC methodologies or practices in their argumentation may be helpful to its understanding of the way in which the United States actually made its determination for each of the safeguard measures at issue.

B. GENERAL CONSIDERATIONS FOR THIS DISPUTE

1. Interpretation of the Agreement on Safeguards and Article XIX of GATT 1994

10.9 Article XIX of GATT 1994 and the Agreement on Safeguards provide WTO Members with the conditional right to limit market access (and take measures that would otherwise be inconsistent with incurred obligations) and obtain temporary relief when unforeseen developments have resulted in increased imports (absolute or relative) that are causing or threatening to cause serious injury to the relevant domestic producers.

10.10 Safeguard actions may be needed for the very reason that a Member has incurred obligations (namely, market-access commitments) which prohibit that Member from taking any measure that is inconsistent with its bindings or the GATT prohibition of quantitative restrictions, for instance. In this sense, Article XIX of GATT 1994 and the Agreement on Safeguards operate as exceptions, particularly to Articles II and XI of GATT 1994.

10.11 Article XIX of GATT and the Agreement on Safeguards provide for exceptions to general GATT market access rules in situations of emergency. In *US – Line Pipe*, the Appellate Body reiterated the following statement that it had made in *Argentina – Footwear (EC)* :

> "As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: '*Emergency Action on Imports of Particular Products*'. The words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported '*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers'. (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of 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 of 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

[4870] European Communities' oral statement on behalf of all complainants to the second substantive meeting, paras. 5-6.

> under GATT 1994, a Member finds itself confronted *with developments it had not 'foreseen' or 'expected' when it incurred that obligation*. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.
>
> This reading of these phrases is also confirmed by the object and purpose of Article XIX of GATT 1994. *The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. …*
>
> … In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of GATT 1994, which are fundamental to the *WTO Agreement*. …"[4871] (emphasis added)

10.12 In *US – Line Pipe*, the Appellate Body also emphasized that:

> "[P]art of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of *giving a WTO Member the possibility*, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation *that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily*.[4872] (emphasis added)
>
> There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. *The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the Agreement on Safeguards.*" (emphasis added)[4873]

10.13 Moreover, the Panel, when interpreting Article XIX of GATT 1994 and the Agreement on Safeguards, must bear in mind that exceptions under WTO law are not to be interpreted narrowly[4874]

[4871] Appellate Body Report, *Argentina – Footwear* (*EC)*, paras. 93–95. See also, Appellate Body Report, *Korea – Dairy*, paras. 86-88.

[4872] Appellate Body Report, *US – Line Pipe*, para 82.

[4873] Appellate Body Report, *US – Line Pipe*, para. 83.

[4874] This principle of interpretation in WTO law was first established by the Appellate Body in *EC – Hormones* (para. 104) for the SPS Agreement. It was reiterated recently in the Appellate Body Report in *EC – Sardines* (para. 271), when discussing Article 2.4 of the TBT Agreement; in the Panel Report in *US – Carbon Steel* (para. 8.45, upheld by the Appellate Body) when discussing Article 21.3 of the SCM Agreement; in the

but rather in light of the ordinary meaning of the terms of such exception provisions taking into account the object and purpose of the Agreement on Safeguards, including the need to maintain a balance between market access and safeguards rights and obligations. Since the Agreement on Safeguards itself would have been drafted so as to recognize its exceptional nature and the emergency character of safeguard measures, the Agreement on Safeguards does not call for any especially restrictive interpretation.

2. The two fundamental enquiries under the Agreement on Safeguards: the (conditional) *right* to take a safeguard measure and the *application* of a chosen measure

10.14 The distinction between the (conditional) right to take a safeguard measure and the application of a specific measure was clearly recognized by the Appellate Body in *US – Line Pipe*:

> "This natural tension is likewise inherent in two basic inquiries that are conducted in interpreting the *Agreement on Safeguards*. *These two basic inquiries are: first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercized, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct.* They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. *First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. *Second*, if this first inquiry leads to the conclusion that there *is* a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', as required by Article 5.1, first sentence, of the *Agreement on Safeguards*. Thus, the right to apply a safeguard measure—even where it has been found to exist in a particular case and thus can be exercised—is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so 'only to the extent necessary'." (emphasis added)[4875]

10.15 Throughout its examination, this Panel has kept the two enquiries distinct. The Panel is of the view that, first, it must examine whether the United States had the *right* to take the safeguard measures. Second, should the Panel consider that the United States had the right to take such safeguard measures, the Panel would then assess whether the measures were applied (as regards the type of measure, their level and duration) only to the extent necessary to remedy or prevent serious injury and allow for readjustment.

10.16 In examining whether the United States had a right to impose the specific safeguard measures at issue, the Panel will concern itself with the application of Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 (the latter being relevant in particular for the assessment

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Article 21.5 Appellate Body Report in *US – FSC* (para. 127) when discussing the scope and meaning of footnote 59 of the SCM Agreement; and in the Appellate Body Report in *Brazil – Aircraft* (para. 137) when dealing with the scope of the provisions on developing countries.

[4875] Appellate Body Report, *US – Line Pipe*, para. 84.

of whether the United States was faced with unforeseen developments) in reviewing the report of the competent authority. In relation to the second enquiry, when assessing the appropriateness of such safeguards measures, the importing Member is obliged, when challenged by a WTO Member who has made a prima facie case of inconsistency with Article 5.1 of the Agreement on Safeguards, to justify before the Panel that the safeguard measures were imposed only to the extent necessary to prevent or remedy injury and allow for readjustment. Reversals of this burden of proof may take place.

3. The Agreement on Safeguards is concerned with the "determination"

10.17 The Panel recalls that the Agreement on Safeguards is concerned with the ultimate determination made and reflected in the Member's report of investigation. There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at. What matters is that, ultimately, there is a reported determination of the right to take a safeguards measure (pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994) and that, if, and when, challenged *prima facie* before a WTO panel, the choice of safeguard measure (Articles 5, 7 and 9) can be justified. The Appellate Body made that clear in *US – Line Pipe*:

> "We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. *We are concerned only with the determination itself*, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member. *What matters to us is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards*."[4876]
>
> "Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."[4877] (emphasis added)

10.18 The Panel recalls that, in the present dispute, the United States explained that the USITC made its determination on 22 October 2001 pursuant to Articles 2 and 4 and that it was contained in a report published in December 2001 (the "initial USITC Report"). The USITC provided Supplementary Reports in February 2002. The complainants in the present dispute have challenged the findings supporting the October determination on the basis of the data and evidence contained in the Report published in December 2001. The Panel has thus examined the December 2001 Report when assessing the complainants' claims and arguments relating to increased imports in Section X.D of the present Panel Reports as well as complainants' claims on causation, in Section X.E of the present Panel Reports.

10.19 The United States, following its October determination, decided to exclude all imports from Canada, Mexico, Jordan and Israel from the application of its safeguard measures. Seemingly, in an attempt to comply with the United States' parallelism obligations, USTR requested, *inter alia*, additional information from USITC on the impact of the exclusions from the measure of imports from

[4876] Appellate Body Report, *US – Line Pipe*, para. 158.
[4877] Appellate Body Report, *US – Line Pipe*, paras. 233-234.

Israel and Jordan, and for certain steel products from Canada and Mexico. This was (partly) the subject of the February Second Supplementary Report. The complainants have challenged whether the October and February reports satisfy the requirements of parallelism, on the basis of the data contained in those reports. The Panel has examined the complainants' claims and arguments relating to parallelism in Section X.F of the present Panel Reports and has reviewed both reports.

10.20 The February Second Supplementary Report also contains information relating to "unforeseen developments". For the reasons mentioned in paragraphs 10.55-10.58 below, we have decided to assume, *arguendo*, for the purposes of reviewing the unforeseen developments' demonstration under Article XIX of the GATT 1994 in the present dispute that the February Second Supplementary Report was part of the "report of the competent authority" . We have, therefore, decided that when assessing the complainants' claims relating to unforeseen developments, in Section X.C, we will examine the USITC's initial report as well as its explanations relating to unforeseen developments contained in the February Second Supplementary Report.

4. Standard of review

10.21 The Panel discusses specific applications of its standard of review throughout its Reports. The Panel would like to recall at this early stage that the general standard of review contained in Article 11 of the DSU[4878] is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of GATT 1994.

10.22 The jurisprudence has examined the application of such general standard of review in the specific context of the Agreement on Safeguards. In *Argentina – Footwear (EC)*, the Appellate Body stated that, pursuant to Article 4, a Panel cannot conduct a *de novo* review of the evidence or substitute its analysis and judgment for that of the importing Member, but "[t]o determine whether the safeguard investigation and the resulting safeguard measure applied by [a Member] were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the [Member's] authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[4879]

10.23 The panels in *US – Wheat Gluten* and in *US – Line Pipe* concluded that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination[4880]. In *US – Lamb*, the Appellate Body added that "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 particular, that an explanation is not reasoned, or is not adequate, if some

[4878] Article 11 of the DSU reads as follows: "Function of Panels: The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

[4879] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 118 and 121.

[4880] Panel Report, *US – Wheat Gluten*, para. 8.5; Panel Report, *US – Line Pipe*, para. 7.194

alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[4881]

10.24 In *US – Cotton Yarn*, the Appellate Body referred to its jurisprudence developed under the Agreement on Safeguards and relied upon it for a dispute under the Agreement on Textiles and Clothing:

> "Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."[4882]

10.25 The Panel is of the view that the standard of review applicable in the present dispute must be seen in light of the distinction between the first and second enquiry that the Panel must perform when assessing a Member's compliance with the requirements of the Agreement on Safeguards and Article XIX of GATT 1994. When assessing a Member's compliance with its obligations pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT, the Panel is *not* the initial fact-finder. Rather, the role of the Panel is to "review" determinations and demonstrations made and reported by an investigating authority.

10.26 The situation is different in the context of the second enquiry when assessing whether the measures were applied only to the extent necessary to prevent the serious injury caused by increased imports. In that situation, it is before the Panel, during the WTO dispute settlement process, that the importing Member is forced for the first time to respond to allegations relating to the level and extent of its safeguard measures. For us, this is clear from the following statement of the Appellate Body in *US – Line Pipe*:

> "[I]t is clear, therefore, that, […] Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary.
>
> Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied."[4883]

10.27 In that second enquiry, the Panel is thus reviewing whether the measures "as applied" comply with the requirements of Articles 5, 7, 8 and 9 of the Agreement on Safeguards on the basis of the evidence and arguments put forward by the parties during the WTO dispute settlement process.

[4881] Appellate Body Report, *US – Lamb*, para. 106.
[4882] Appellate Body Report, *US – Cotton Yarn*, para. 74
[4883] Appellate Body Report, *US – Line Pipe*, paras. 233-234.

5. Burden of proof

10.28 In general, under WTO law, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption (or prima facie case) that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence and arguments to rebut the presumption. Therefore, it is for the complainants to convince the Panel that the United States did not comply with the provisions of the Agreement on Safeguards when it imposed its safeguards measures.

10.29 As discussed above, in the context of the Panel's first enquiry, it is for the complainants to convince the Panel that, in its Report, the United States failed to provide a reasoned and adequate explanation that the WTO pre-requisites for the imposition of safeguard measures were satisfied. In practice, before the WTO panel, the United States will defend USITC's demonstrations and determinations, and the complainants will challenge their WTO-compatibility. In the context of the Panel's second enquiry – when assessing whether the safeguard measures were imposed only to the extent necessary – the Appellate Body has ruled that when the panel concludes, at the end of its first enquiry, that the safeguard measures were imposed in violation of Article 4.2(b), a reversal of the burden of proof occurs so that there is a presumption that the safeguard measures were applied in a manner inconsistent with Article 5.1.[4884]

6. USITC data

10.30 As noted throughout our Reports, all data that has been relied upon by the Panel has been obtained directly from the USITC Report or from the various tables and annexes to which that report refers. In a number of sections in our Reports, we have represented USITC data in graphical form. In cases where data was available for interim 2001, the relevant graphs plot interim 2000 data together with interim 2001 data. We have indicated the USITC Report references to the sources for graphs contained in the Panel's Reports.

C. CLAIMS RELATING TO UNFORESEEN DEVELOPMENTS

1. Claims and arguments of the parties

10.31 The arguments of the parties can be found in Section VII.C.1 *supra*.

10.32 The European Communities, China, Switzerland, Norway and New Zealand claim that the USITC Report was issued without examining the issue of unforeseen developments, and/or that it did not provide an adequate and reasoned explanation of those developments and the manner in which they resulted in increased imports.[4885] New Zealand adds that the competent authority has failed to demonstrate the existence of unforeseen developments as a matter of fact.[4886] Moreover, the European Communities, China, Norway and New Zealand claim that no opportunity was provided by the USITC to interested parties to present evidence and their views on the issue of unforeseen developments.[4887] For all of these reasons, they claim that the United States has failed to comply with

[4884] See Appellate Body Report, *US – Line Pipe*, paras. 261-262.

[4885] European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; Switzerland's first written submission, paras. 109-110; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11.

[4886] New Zealand's first written submission, para. 4.29

[4887] European Communities' first written submission, para. 178; China's first written submission, para. 125; Norway's first written submission, paras. 166; New Zealand's first written submission, para. 4.30; see also their respective written replies to Panel question No. 1 at the first substantive meeting.

the provisions of both Article 3.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994.

10.33 The United States responds that the USITC identified the unforeseen developments that resulted in increased imports of certain steel products in a manner that was consistent with the United States' obligations under Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards.[4888]

2. Relevant WTO provisions

10.34 Article XIX:1(a) of GATT 1994 provides as follows:

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

10.35 Article 3.1 of the Agreement on Safeguards provides:

> "A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

3. Analysis by the Panel

(a) The cumulative application of Article XIX of GATT 1994 and the Agreement on Safeguards

10.36 Article XIX of GATT 1994 provides that a Member is entitled to impose a safeguard measure "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products". There is no reference to unforeseen developments in the Agreement on Safeguards. However, as repeatedly affirmed by the Appellate Body, Articles 1 and 11.1(a) of the Agreement on Safeguards express the continuing applicability of Article XIX of GATT which has been clarified and reinforced by the Agreement on Safeguards.[4889] This interpretation ensures that the provisions of the

[4888] United States' first written submission, para. 925.

[4889] See for instance the Appellate Body Report in *Korea – Dairy* at para. 74: "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a "Single Undertaking" and

Agreement on Safeguards and those of Article XIX are given their full meaning and their full legal effect within the context of the WTO Agreement.[4890]

10.37 It is now clear that the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.[4891]

(b) Standard of review

10.38 As mentioned in paragraphs 10.21-10.24 above, the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination.[4892] Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.[4893]

10.39 In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made."[4894]

(c) What can constitute an unforeseen development?

10.40 An unforeseen development, pursuant to Article XIX:1(a) GATT 1994, is an unexpected circumstance which has led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to relevant domestic producers.[4895] In the current dispute, the United States argues that the USITC identified the financial crises that engulfed Southeast Asia (Asian crisis) and the former USSR (Russian crisis), the continued strength of the United States' market and persistent appreciation of the US dollar, and the confluence of all of these events as unforeseen developments.[4896] The European Communities, China, Switzerland and Norway contend that none of these events constituted unforeseen developments, nor did any combination of

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therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously …" and para. 78: "Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure taken under the *WTO Agreement* ".

[4890] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 95; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71.

[4891] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Korea – Dairy*, para. 85.

[4892] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 116-117; Appellate Body Report, *US – Lamb*, para. 97.

[4893] Appellate Body Report, *US – Lamb*, paras. 103-106.

[4894] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121; Appellate Body Report, *US – Lamb*, para. 102.

[4895] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[4896] United States' first oral statement, para. 72.

them.[4897] The same four complainants as well as New Zealand argue that the developments mentioned by the United States were not unforeseen because they were not unexpected.[4898]

10.41 The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea – Dairy* that safeguard measures "are to be invoked only in situations when … an importing Member finds itself confronted with developments *it had not 'foreseen' or 'expected'* when it incurred [its] obligation [under GATT 1994]." (emphasis added)[4899]

10.42 What was "unforeseen" when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Futher, what constitutes "unforeseen developments" for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development[4900] for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

10.43 In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind. This was recognized early in GATT by the *US – Fur Felt Hats* decision, which characterized unforeseen developments as "developments […] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[4901]

10.44 Moreover, since all the WTO prerequisites, including the demonstration of unforeseen developments, must be satisfied by each safeguard measure, the Panel believes that the factual demonstration of unforeseen developments[4902] must also relate to the specific product(s) covered by the specific measure(s) at issue. Therefore the reasoned and adequate explanation relating to unforeseen developments must contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue.

10.45 In assessing whether the USITC provided a reasoned and adequate explanation of unforeseen developments that resulted in increased imports causing serious injury, it is logical to consider whether the USITC addressed unforeseen developments at all in its published reports, as required by Article 3.1 of the Agreement on Safeguards and Article XIX of GATT 1994, which has been challenged by the complainants.

[4897] European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

[4898] Switzerland's first oral statement on behalf of the complainants, para. 15.

[4899] Appellate Body Report, *Korea – Dairy*, para. 86 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 93 (emphasis added).

[4900] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[4901] *US – Fur Felt Hats*, para. 9, cited with approval in Appellate Body Report, *Argentina – Footwear (EC)*, para. 96; Appellate Body Report, *Korea – Dairy*, para. 89.

[4902] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85.

(d) Demonstration of "unforeseen developments" as a matter of fact: when, where and how to demonstrate unforeseen developments

(i) Claims and arguments of the parties

10.46 The arguments of the parties can be found in Sections VII.C.1; C.2(f) *supra*.

(ii) Analysis by the Panel

10.47 The Panel recalls that the complainants first raised issues relating to the format and timing of the demonstration of unforeseen developments. The complainants argue that the USITC Report was issued without examining the issue of unforeseen development. They submit that the initial USITC Report, with the exception of a discussion on the Asian and Russian crises, never addressed the requirement of unforeseen developments. They add that the Second Supplementary Report does not form part of the USITC Report and is an *ex post* attempt to demonstrate the existence of unforeseen developments, which did not feature in the same report as the USITC's determination. They argue, therefore, that the Second Supplementary Report should be disregarded. The United States responds that it is perfectly acceptable to issue separate reports, as there is no express guidance on "when, where and how" a demonstration of unforeseen developments must be made. According to the United States, the choice of whether the components of the report are issued at the same time or over a period of time is left to the discretion of the individual Member.[4903] The Panel will deal with the issues of the form and timing of the competent authorities' report in turn.

The "form" of the demonstration of unforeseen developments in relation to the decision to apply safeguard measures

10.48 In *US – Lamb*, the Appellate Body made it clear that the demonstration of unforeseen developments must be found in the report of the competent authority.[4904] As the parties have pointed out, the requirement to publish a report is a necessary step in conducting an investigation consistent with Article 3.1. However, Switzerland argues that the demonstration of unforeseen developments must be found in the same report as the one containing the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards and seems to imply that these elements should be contained in a single document.

10.49 The Panel agrees with the United States that nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

10.50 The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, including the demonstration that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers. Whether a report drafted in different parts or a multi-stage report constitutes "the report of the competent authority" is to be determined on a

[4903] United States' first written submission, para. 952.
[4904] Appellate Body Report, *US – Lamb*, para. 72; Appellate Body Report, *Korea – Dairy*, para. 85.

case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. If separate parts of the report are issued at different times, the discussion relating to unforeseen developments must, in all cases, be integrated logically in the overall explanation as to how the importing Member's safeguard measures satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards. The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner.

10.51 The complainants have also argued that the timing of the USITC's demonstration is not in accordance with the requirements of Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as articulated by the Appellate Body. We deal with this issue below

> The timing of the demonstration of unforeseen developments: before the application of the measure

10.52 Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure[4905], it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *US – Lamb*, that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and "it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed."[4906] Any demonstration made after the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure.

10.53 Article 3.1 of the Agreement on Safeguards requires *inter alia* that Members apply a safeguard measure only after competent authorities set forth "their findings and reasoned conclusions reached on all pertinent issues of fact and law." Accordingly, the Appellate Body Report in *US – Lamb* stated that since the demonstration of unforeseen developments is a pertinent issue of fact and law for the application of a safeguard measure, "it follows that the published report of the competent authorities … must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."[4907] Such a reasoned and adequate explanation of how unforeseen developments resulted in increased imports causing serious injury must form part of the overall reported explanation by the competent authority that it has satisfied all the WTO prerequisites for the imposition of a safeguard measure. Since the demonstration of unforeseen developments must be included in the published report of the competent authorities it is necessary to look for the demonstration of unforeseen developments in the "report of the competent authority", completed and published prior to the application of the safeguard measures.

10.54 The Panel notes that, according to the United States, 22 October 2001 was the date of the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards.[4908] This determination was included in the USITC's Report published in December 2001. On 22 October 2001, the USITC had not completed its demonstration relating to unforeseen developments. In the Second Supplementary Report of 4 February 2002, findings were made principally with respect to the issues of "unforeseen developments" and potential exclusions of certain

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[4905] Appellate Body Report in *Korea – Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

[4906] Appellate Body Report, *US – Lamb*, para. 72 (emphasis in original); see also Panel Report, *US – Line Pipe*, para. 7.296.

[4907] Appellate Body Report, *US – Lamb*, para. 76.

[4908] United States' written reply to Panel question No. 15 at the first substantive meeting.

countries from the application of the safeguard measures. The safeguard measures came into effect on 20 March 2002, pursuant to a proclamation by the President on 5 March 2002.[4909] We recall that the demonstration of unforeseen developments must be made in the report of the competent authority and before the measure is applied. To the extent that the February Second Supplementary Report formed part of the competent authority' report – an issue which we will ultimately not need to decide for reasons explained below – the demonstration of unforeseen developments was not necessarily made in an untimely fashion, since this later report was published before the measure was applied.

Conclusion

10.55 Before a decision to apply a safeguard measure can be made in accordance with Article 2 of the Agreement on Safeguards and Article XIX of GATT, a number of conditions must be fulfilled, and certain circumstances must be demonstrated. It is only once all of these prerequisites or requirements are fulfilled, including the completion of the investigation and the issuance of a report containing findings and reasoned conclusions, that a Member is entitled to impose a WTO-compatible safeguard measure.

10.56 The United States refers to 22 October 2001 as the date of the determination pursuant to Articles 2 and 4 of theAgreement on Safeguards. In the Panel's opinion that date cannot constitute the time at which full compliance was achieved with the requirements of Article XIX of GATT and the Agreement on Safeguards, since the USITC could only have completed its demonstration of unforeseen developments on 4 February 2002.

10.57 The Panel is of the view that the determination of satisfaction with the conditions mentioned in Articles 2 and 4 of the Agreement on Safeguards, as well as the factual demonstration of unforeseen developments required by Article XIX of GATT 1994, are distinct elements for which specific findings can be made by the competent authorities at different moments, as long as all such findings are logically and coherently integrated in a report published before the safeguard measure is applied.

10.58 For the purpose of the present review, the Panel will assume, *arguendo,* that the USITC Second Supplementary Report of February 2002 is part of the "USITC Report" for the purposes of Article 3.1 of the Agreement on Safeguards (and XIX of GATT 1994 relating to unforeseen developments). Therefore, any demonstration of unforeseen developments which must take place before the measure is applied must also be found in the USITC multi-stage report. The Second Supplementary Report was the last document published by the competent authority before the application of the safeguards measure, that could be said to form part of the "report of the competent authority". Since the Second Supplementary Report is the last pronouncement with regard to "unforeseen developments" before the application of the measures, the findings contained within it are the latest the Panel will take into consideration.

(e) The conduct of the investigation – the obligation to consult interested parties

(i) Claims and arguments of the parties

10.59 The arguments of the parties can be found in Section VII.C.2.(f)(iii) *supra*.

[4909] Proclamation 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, 7 March 2002.

(ii) Analysis by the Panel

10.60 The Panel recalls that the European Communities, China, Norway and New Zealand argue that, because the issue of unforeseen developments was only discussed in the Second Supplementary Report which came out after the conclusion of the investigation, the interested parties were not given an opportunity to comment on the discussion. This, they argue, is contrary to Article 3.1 of the Agreement on Safeguards, which contains a general obligation to allow interested parties to express their views and comment on the views and evidence of other parties concerning all pertinent issues of law and fact, including the issue of unforeseen developments.[4910] The United States responds that the USITC Report shows that the unforeseen conditions, which are demonstrated in the USITC Second Supplementary Report, informed its injury determination.[4911] Moreover, the USITC specifically sought information on unforeseen developments in the course of its investigation. Accordingly, argues the United States, the allegation that interested parties had no opportunity to present evidence and their views on this issue is patently incorrect.[4912]

10.61 The Panel recognizes that Article 3.1 of the Agreement on Safeguards provides certain procedural guarantees to interested parties, such as "reasonable public notice" and "public hearings or other appropriate means [to] present evidence and their views". The important role of interested parties was recognized by the Appellate Body in *US – Wheat Gluten*, when it stated as follows:

> "The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities."[4913]

10.62 Since the opportunity of interested parties to present evidence and their views is a necessary part of the investigation, it must be reflected in the published report. The United States does not dispute this, but argues instead that the interested parties were given multiple opportunities to present evidence and the USITC actively sought their input.[4914] According to the United States, this is reflected in the USITC Report.[4915]

[4910] European Communities' first written submission, para. 177; China's first written submission, para. 124; Norway's first written submission, para.165; New Zealand's first written submission, para. 4.29; European Communities', China's and Norway's written replies to Panel question No. 1 at the first substantive meeting.

[4911] USITC Report, pp. OVERVIEW-17, OVERVIEW-18, OVERVIEW-57.

[4912] United States' first written submission, para. 954; United States' written reply to Panel question No. 1 at the first substantive meeting.

[4913] Appellate Body Report, *US – Wheat Gluten*, para. 54.

[4914] In response to the Panel's question No.1 at the first substantive meeting, the United States replied: "In this investigation, the ITC gave public notice of its institution of the steel investigation. (66 Fed. Reg. 35267 (3 July 2001)). The ITC invited public comments and suggestions regarding the content of its questionnaires, which included a question regarding unforeseen developments. (66 Fed. Reg. 34717 (29 June 2001)). The ITC received extensive responses to that public request, including one 110-page submission from respondents from a variety of countries, including Japan, Korea, Brazil, and New Zealand. (Joint Comments of Respondents on Draft Questionnaires, 2 July 2001, Exhibit US-67.) The ITC accepted prehearing written submissions with no page limits, and several of those initial written submissions discussed unforeseen developments. (*E.g.*, Respondents' Joint Prehearing Framework Brief, 12 Sept. 2001 (Joint filing from 40 companies in 25 countries,

10.63 In particular, the USITC requested, by way of questionnaires to be returned by 30 July 2001, that the importers, producers and purchasers:

> "[P]lease identify any developments during the last ten years that resulted in certain steel products under investigation being imported into the United States in such increased quantities as to have an adverse impact on the domestic industry[ies] during the period January 1996-June 2001. For each development, please describe the development, when it occurred, and whether it was unexpected."[4916]

10.64 Based on the above questions, it is clear that the issue of unforeseen developments was part of the investigation. By inviting comments in response to the questionnaires, and addressing the issue during its public hearings[4917], the Panel is of the view that the United States has complied with its Article 3.1 obligation to provide "appropriate means in which importers, exporters and other interested parties [can] present evidence and their views".

10.65 The European Communities complains that "there was no provisional reasoning on or explanation of unforeseen developments on which interested parties could comment".[4918] The Panel does not believe that Article 3 of the Agreement on Safeguards requires the competent authority to send to interested parties "draft findings" of its demonstration relating to unforeseen developments in order to allow them to comment prior to the publication of the competent authority's report.

10.66 We, therefore, reject the European Communities, China, Norway and New Zealand 's claims that the United States violated Article 3.1 in refusing to provide to interested parties an opportunity to present evidence and share their views on unforeseen developments.

(f) Reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury

10.67 Following the approach suggested by the Appellate Body in *US – Lamb*[4919], the Panel will now consider whether the USITC offered a reasoned and adequate explanation as to why and how the cited unforeseen developments could be so regarded. This requires, at a minimum, some discussion by the competent authority as to how the developments were unforeseen at the appropriate time, and

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including Japan, Brazil, Thailand, Korea, the European Communities, Venezuela, Norway, India, New Zealand, and China), pp. 106-109 (Exhibit US-68); Prehearing Submission of the European Commission, 10 Sep. 2001, pp. 4-5 (Exhibit US-69); AK Steel Prehearing Brief, 11 Sep. 2001, pp. 60-63 (Exhibit US-70); Prehearing Brief of United Steelworkers of America, 11 Sep. 2001, pp. 129-131 (Exhibit US-71); Prehearing Brief of Domestic Carbon Flat Steel Producers, 11 Sep. 2001, pp. 31-36 (Exhibit US-72); Respondents' Joint Prehearing Brief for Product #18, Seamless Tubular Products other than OCTG, 10 Sep. 2001, pp. 11-13 (Exhibit US-73); Minimill Coalition (Long Products) Prehearing Brief, 11 Sep. 2001, pp. 18-22 (Exhibit US-74).) The ITC's prehearing Staff Report included information on the Asian economic crisis, continuing post-dissolution difficulties in the former USSR republics, and the appreciation of the US dollar. (Prehearing Staff Report at OVERVIEW-22-24 and OVERVIEW-70-71 (Exhibit US-75)). The ITC held a series of public hearings at which various Commissioners directly solicited comments from the parties on unforeseen developments. (Tr., pp. 326-327 (Chairman Koplan) (Exhibit US-44); 343 (Commissioner Hillman) (Exhibit US-45); 1445 (Vice Chairman Okun) (Exhibit US-46); and 2626 (Vice Chairman Okun) (Exhibit US-47)). The ITC accepted post-hearing written submissions with no page limits, several of which also discussed the issue of unforeseen developments."

[4915] United States' second written submission, para. 168.

[4916] Domestic Producer's Questionnaire, question I-7 (US-41); Importer's Questionnaire, question I-6 (US-42); Purchaser's Questionnaire, question I-6 (US-43).

[4917] United States' first written submission, para. 954.

[4918] European Communities' second written submission, para. 85.

[4919] Appellate Body Report, *US – Lamb*, para. 73.

why conditions in the second clause of Article XIX:1(a) occurred as a result of circumstances in the first clause.

(i) Unforeseen developments

Claims and arguments of the parties

10.68 The arguments of the parties can be found in Section VII.C.1 *supra*.

Analysis by the Panel

10.69 We will begin our assessment of the USITC's explanation of the unforeseen developments by considering the competent authority's explanation of why they were unforeseen. The Panel will then move on to consider the explanation of how the unforeseen developments "resulted in" increased imports. In order to answer these questions, it is necessary to ask what the alleged unforeseen developments were and as of when they must have been unforeseen.

10.70 The Appellate Body in both *Argentina – Footwear (EC)* and *Korea – Dairy* quoted the following statement from the *US – Fur Felt Hats* GATT Working Party report of 1951:

> " '[U]nforeseen developments' should be interpreted to mean *developments occurring after the negotiation of the relevant tariff concession* which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."[4920]

10.71 In its report in *Korea – Dairy*, the Appellate Body made the following finding:

> "And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."[4921]

10.72 The United States argues that the four factors cited by the USITC, namely the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar, each constituted unforeseen developments. It also argues that the confluence, or simultaneous occurrence, of these three events amounted to an unforeseen development.[4922]

10.73 The complainants argue that none of the above events constituted unforeseen developments, nor did any combination of them.[4923] Moreover, they argue that the explanation of how the above events have resulted in increased imports has not been performed in a manner that is reasoned and adequate.

10.74 Parties agree that, in the present dispute, the point in time at which developments should have been unforeseen is that of the completion of the Uruguay Round. The Panel will apply the above

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[4920] *See* Appellate Body Reports, *Argentina – Footwear (EC)*, para. 96, and *Korea – Dairy*, para. 89, citing *US – Fur Felt Hats* , adopted 22 October 1951.

[4921] *See* Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93, and *Korea – Dairy*, para. 86.

[4922] United States' first oral statement, para. 72.

[4923] European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

interpretation to determine if the USITC assessed whether the developments which it identified were unforeseen as at the time that the Uruguay Round negotiations were concluded.

The Asian and Russian crises

10.75 The complainants argue that the Asian and Russian crises could not have been unforeseen because they were not unexpected.[4924] With respect to the Russian crisis, the dissolution of the USSR occurred in 1991. New Zealand argues that the United States' negotiators were fully aware of this when they agreed to tariff concessions during the Uruguay Round.[4925] The complainants contend that if a development had started before the concessions were granted, it could not be considered to have been unforeseen. For them, there is normally a close temporal connection between the unforeseen developments and the increased imports.[4926] Taking the figures from the USITC Report that show consumption drops and export increases, they argue that the changes in steel markets were much more pronounced after the dissolution of the former Soviet Union in 1991 than later on and could, therefore, not be unforeseen after 1994.[4927]

10.76 The United States responds that the Southeast Asia and former USSR crises were perhaps foreseeable in the general, hypothetical sense, but the timing, extent and ongoing effect on global steel trade were not foreseen by the United States until well after the conclusion of the Uruguay Round.[4928] It claims that the unforeseen developments that it is invoking took place after the Uruguay Round. The East Asian financial crisis began in mid-1997, and although the Soviet Union collapsed in 1991, with resulting dislocations in the successor states, these were not the developments that the USITC found to be unforeseen. Rather, the developments in question were such that those countries' conditions changed after 1996 from the condition prevalent at the time of the Uruguay Round negotiations.[4929]

10.77 The Panel will first consider the USITC's explanation of the Asian crisis as an unforeseen development before considering the Russian crisis, the invocation of the strength of the United States' economy and the appreciation of the US dollar, as well as the confluence of those factors.

Asian crisis

10.78 The USITC offered the following explanation in its initial report:

> "[S]ignificant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets."[4930]

10.79 For the Panel, this statement amounts to an identification of the depreciation of Asian currencies, which occurred in 1997 and 1998, and its effects on the steel world market, as unforeseen developments. Although it does not provide an explanation as to why the development was unforeseen, we can assume that, as the crisis began in 1997, it could not have been foreseen by the

[4924] Switzerland's first oral statement, delivered on behalf of the complainants, para. 15.
[4925] New Zealand's first written submission, paras. 4.25-4.27.
[4926] European Communities' first written submission, para 133; Norway's first written submission, para. 121; China's first written submission, para. 90.
[4927] Switzerland's first oral statement, delivered on behalf of the complainants, paras. 16-17.
[4928] United States' first written submission, para. 930.
[4929] United States' written reply to Panel question No. 11 at first substantive meeting.
[4930] USITC Report, p. 58 (footnotes omitted).

United States negotiators in 1994, when the Uruguay Round ended. Moreover, it is consistent with the following statement of the USITC, which was made in the Second Supplementary Report:

> "Growth rates in [South East Asian] countries exceeded eight percent per year in the first half of the 1990s. These high growth rates were supported by even sharper growth in exports. As late as the fall of 1997, economists projected continued growth at similarly impressive rates for these emerging markets. Despite this period of intense growth and generally optimistic predictions, the 'Asian Financial Crisis' began with the depreciation of the Thai baht in mid-1997. The depreciation of the baht and loss of investor confidence sparked a wider crisis that affected many developing markets. The crisis slowed economic growth and reduced demand for steel in many emerging country markets. Between 1997 and 1998, steel consumption in Indonesia, Korea, Malaysia, the Philippines, and Thailand fell by 29.6 million tons, a drop of 41.4 percent. In Korea alone finished steel consumption dropped by 14.5 million tons or 34.4 percent. The crisis also led to depreciations in the currencies of the Philippines, Indonesia, Malaysia, and Korea with respect to the US dollar. By January 1998, these currencies had declined between 38 and 76 percent in nominal terms."[4931]

10.80 Likewise, this statement identifies the Asian financial crisis as an unforeseen development, which began in 1997. It also explains that the development was not foreseen. Based on the USITC statements quoted above, the Panel concludes that the United States demonstrated that the Asian crisis and its effects on the steel world market could constitute an unforeseen development within the meaning of Article XIX of GATT 1994, since the Asian Crisis took place after the United States last negotiated its tariff concessions on the steel products covered by the investigation at issue. We explore in paragraphs 10.96-10.101 below, the USITC's explanation that the confluence of the Asian financial crisis, together with other factors (the Russian financial crisis, the strong United States' economy and the strong US dollar) constituted unforeseen developments that resulted in increased imports causing serious injury to the relevant domestic producers.

Russian crisis

10.81 With respect to the Russian crisis, the USITC stated, in its initial Report, that:

> "The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries."[4932]

10.82 Further, in the Second Supplementary Report, the USITC explains that:

> "Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.[4933] In particular, as Russia and other former republics experienced intense financial disruptions and currency

[4931] USITC Second Supplementary Report, p. 4 (footnotes omitted).
[4932] USITC Report, p. 58 (footnotes omitted).
[4933] (original footnote) Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

> fluctuations in this period, steel exports rose nearly 22 percent.[4934] Other Eastern European countries also emerged as net exporters of steel."[4935]

10.83 The unforeseen developments, as identified by the USITC, were the "unanticipated financial difficulties", which, in particular, were the "intense financial disruptions and currency fluctuations" between 1996 and 1999, resulting from the dissolution of the Soviet Union.

10.84 The Panel is of the view that this statement distinguishes between the foreseen financial difficulties that arose from the dissolution of the USSR, and the financial difficulties that were unforeseen. The Panel is also of the view that there may be instances when an event which is already known will develop into a situation initially unforeseen. Therefore, an unforeseen development may evolve from well-known prior facts. Nevertheless, the competent authority must provide a reasoned and adequate explanation as to how the later developments were unforeseen given the earlier known facts.

10.85 Therefore, the Panel will accept, *arguendo*, that there may have been, between 1996 and 1999, unforeseen financial disruptions and currency fluctuations linked to the USSR dissolution that were thus unforeseen at the conclusion of the Uruguay Round.

The strength of the US economy and the appreciation of the US dollar

10.86 The European Communities, Norway, Switzerland and China argue that the "robustness" of the United States' market cannot be considered an "unforeseen development" by the United States, because United States' economic policy was likely to have been conducted with this objective.[4936] These complainants argue that the growth of the United States' economy started in 1990, well before the Uruguay Round, so it must have been foreseen.[4937] The European Communities, Norway and Switzerland also challenge the notion that such favourable developments are capable of being considered unforeseen developments, since the term within the meaning of Article XIX is meant to cover unfavourable developments or shocks to the system that are susceptible to lead to adverse consequences. Such is not the case of the "robustness" of the United States' economy and the strength of the US dollar.[4938]

10.87 The United States responds that nothing in Article XIX prevents the continued strength of a market or the appreciation of a currency from constituting an unforeseen development.[4939] It argues that in *US – Fur Felt Hats*, the unforeseen development was a shift in fashion to a different sort of hat. That shift in fashion was presumably unfavourable to the industries making the less fashionable hats, but that shift could probably not be described as "unfavourable" in any broader sense. According to the United States, *US – Fur Felt Hats* supports the conclusion that an unforeseen development may be a development that could be described as neutral or even positive in general terms, but which results in a change in trade patterns that proves injurious to a particular industry.[4940]

[4934] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-19 and Table OVERVIEW-5.

[4935] USITC Second Supplementary Report, p. 4.

[4936] European Communities' first written submission, para. 150; Switzerland's first written submission, para. 136; Norway's first written submission, para. 138; China's first written submission, para. 100.

[4937] Switzerland's first oral statement, delivered on behalf of the complainants, para. 19.

[4938] European Communities' second written submission, para. 56; Norway's second written submission, para. 40; Switzerland's second written submission, para. 31.

[4939] United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[4940] United States' second oral statement, para. 106.

10.88 The Panel turns immediately to the explanation afforded by the USITC, which states that:

> "While other markets experienced significant turmoil and contraction after 1997, demand in the United States remained robust. Indeed, the US economy enjoyed an overall economic expansion in the 1990s of unprecedented length. Consequently, US demand for steel remained strong."

10.89 From the above statement, it seems that the competent authority did not interpret the robustness of the United States' economy to be an "unforeseen development" in and of itself[4941], but rather, it viewed the strength of the economy in the context of the turmoil in other markets. Therefore, the Panel is of the view that the strength of the United States' market was considered by the USITC along with the other alleged unforeseen developments and as part of a set of world events which *together* constituted unforeseen developments.

10.90 As regards the US dollar appreciation, the European Communities, Norway, China and Switzerland argue that a change in the value of a currency such as the US dollar cannot be accepted as an unforeseen development.[4942] According to the European Communities, China and Norway, exchange-rate developments are foreseeable in two main senses.[4943] First, it is foreseeable that the exchange rate between two currencies that are not fixed will change over time. Second, it is foreseeable that the exchange rate of a currency of a country with a robust economy and low inflation (such as the United States in the 1990s) will rise over time compared with the currency of a country with a weak economy and high inflation rate (such as Russia).[4944] For them, the value of the dollar in relation to other currencies has regularly changed by significant amounts since the collapse of the Bretton Woods system of fixed exchange rates in 1971. Such changes can no longer be considered to be "unforeseen", but it must, on the contrary, be considered to be quite expected that the dollar would not remain stable vis-à-vis other currencies.[4945]

[4941] However see at para. 976 of its first written submission, the United States argues that:

> "The ITC report cited a number of unforeseen developments that resulted in the ten steel products being imported into the United States in such increased quantities and under such conditions as to cause serious injury to the domestic industries. Each of those developments was unforeseen in and of itself. However, the confluence of this particular set of events can be described as an unforeseen development."

See also the United States' written reply to Panel question No. 18 at the first substantive meeting:

> "Are you relying/did the ITC rely on the robustness of the United States Dollar as an unforeseen development?
>
> The robustness of the United States dollar was a development which combined with the other developments, namely, the currency crises in Southeast Asia and the former USSR countries and the continued growth in steel demand in the US market as other markets declined, to produce the increased volume of imports."

[4942] European Communities' first written submission, para. 152; Switzerland's first written submission, para. 138; Norway's first written submission, para. 140; China's first written submission, para. 101.

[4943] European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

[4944] European Communities', China's, and Norway's written replies to Panel question No. 10 at the first substantive meeting.

[4945] Switzerland's first oral statement, delivered on behalf of the complainants, para. 20.

10.91 The United States responds that nothing in Article XIX prevents the appreciation of a currency from constituting an unforeseen development. The period under investigation saw persistent and widespread appreciation of the US dollar against virtually all other major currencies.[4946] The United States argues that the fact that exchange rates change over time could be described as foreseeable, but not necessarily foreseen. Particular exchange rate developments, such as an unusually rapid or severe change in rates, are not likely to have been foreseen at the time of a particular concession. It argues that the complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were in fact foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round.[4947]

10.92 Once again, the Panel turns immediately to the USITC explanation, which states that:

> "Continued growth in the US market, combined with uncertainty and contraction in other markets, led to significant upward pressure on the US dollar. The dollar appreciated significantly against many currencies during the period of investigation, and that appreciation became more notable after the foreign currency dislocations of 1997 and 1998. Between 1996 and the first quarter of 2001, many currencies experienced double-digit declines, in real terms, relative to the dollar.[4948] The high value of the US dollar made the US market an especially attractive market for steel products displaced from other markets."

10.93 Like the statement above regarding the strength of the United States' economy, this statement by the competent authority shows that the appreciation of the US dollar was not thought to be a stand-alone "unforeseen development". Instead, the USITC considered the relevance of the appreciation of the US dollar "after the foreign currency dislocations of 1997 and 1998". Presumably, it was the fact that the United States dollar remained high while the Thai baht, the Russian ruble and other Southeast Asian and Eastern European currencies became weak that allegedly resulted in increased imports. Moreover, the competent authority recognized the link between the upward pressure on the dollar and the combination of the growth in the United States' market with the contraction in other markets.

10.94 Since we believe the USITC did not regard the continued strength of the United States' market and appreciation of the US dollar as a distinct development, separate from the other alleged unforeseen developments, the Panel does not need to address the arguments of the complainants that such factors could not constitute unforeseen developments.

10.95 The Panel will thus review the explanation provided by the USITC which, in our view, treated the strength of the United States' market and the appreciation of the US dollar as factors that were part of a confluence of developments that together caused turmoil in these markets.

The confluence of developments

10.96 The European Communities, China, Switzerland and Norway argue that no combination of events cited by the USITC can constitute an unforeseen development.[4949]

[4946] United States' first written submission, paras. 972-973, citing USITC Second Supplementary Report, p.1; USITC Report, Table OVERVIEW-16.

[4947] United States' written reply to Panel question No. 10 at the first substantive meeting.

[4948] (original footnote) USITC Pub. 3479, Vol. II, Table OVERVIEW-16.

[4949] European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

10.97 The United States argues that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel demand in the United States' market as other markets declined, lead to increased imports.[4950]

10.98 The Panel has already accepted that the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round. We have also found that the USITC did not consider the strength of the United States' economy and the appreciation of the US dollar as unforeseen developments *per se;* it had referred to these factors in relation to other unforeseen developments, which *together* had resulted in increased imports causing or threatening to cause injury.

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

10.100 To the complainants' argument that the changes in steel markets were much more pronounced in 1991 following the dissolution of the former Soviet Union than later on and could not, therefore, be unforeseen after 1994, the Panel notes that the fact that the dissolution of the USSR and its overall effects may have constituted an unforeseen development in 1991 does not mean that a subsequent financial crisis also resulting somehow from the dissolution of the USSR, cannot, with other developments, be considered part of a "confluence of unforeseen developments" in 1997 for the purpose of Article XIX of GATT 1994.[4951]

10.101 The Panel will now proceed to an assessment of whether the USITC provided a reasoned and adequate explanation that the Asian and Russian crises taken together, alongside the additional factors of the strength of the United States' economy and the appreciation of the US dollar, and their effects on steel world markets, *resulted* in increased imports into the United States causing or threatening to cause serious injury to the relevant domestic producers.

(ii) " as a result of unforeseen developments and tariffs concessions"

Claims and arguments of the parties

10.102 The arguments of the parties can be found in Section VII.C.2.(d).

Analysis by the Panel

10.103 We recall that Article XIX of GATT 1994 reads as follows:

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

[4950] United States' written reply to Panel question No. 17 at the first substantive meeting.
[4951] Switzerland's first oral statement, delivered on behalf of the complainants, paras. 16-17.

10.104 The Appellate Body has interpreted the phrase "as a result of" in Article XIX:1(a) of GATT 1994 as a logical connection that exists between the first two clauses of that Article. In other words, a logical connection must be demonstrated to have existed between the elements of the first clause of 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" – and the conditions set forth in the second clause of that Article – "increased imports causing serious injury" – for the imposition of a safeguard measure.[4952]

> Logical connection between unforeseen developments and "increased imports so as to cause serious injury"

10.105 In the following paragraphs, we note some of the references to the Russian crisis, the Asian crisis and exchange rates in the initial USITC Report and the Second Supplementary Report including the separate views of Commissioners Okun and Bragg.

10.106 The USITC offered the following statements, in its initial Report, with respect to:

> "CCFRS:
>
> These significant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets.[4953] The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries.[4954] [4955]
>
> Hot-rolled bar:
>
> The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges. The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports. The largest increase in hot-rolled bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. Import volumes increased by 29.5 percent from 1997 to 1998.[4956] [4957]
>
> Cold-finished bar:
>
> A substantial increase in cold-finished bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.[4958]

[4952] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.
[4953] (original footnote) CR and PR, p. OVERVIEW-17.
[4954] (original footnote) CR and PR, p. OVERVIEW-18.
[4955] USITC Report, p. 58.
[4956] (original footnote) CR and PR, Table LONG-5.
[4957] USITC Report, p. 96.
[4958] USITC Report, p.106, fn. 630.

> Rebar:
>
> Rebar imports increased significantly in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.[4959]
>
> Stainless Steel Wire Rod:
>
> We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless rod in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, market conditions, and exchange rates."[4960]

10.107 In a separate decision, Commissioner Okun made the following remark with respect to the "Selection of Import Quotas" as part of a "Justification for Form of Relief":

> "[T]he record indicates that the currencies of selected countries, many of which export substantial amounts of steel to the United States, demonstrated substantial depreciations relative to the US dollar.[4961] Exchange rate fluctuations between the US dollar and foreign currencies can have a significant effect on the relative competitiveness of global steelmakers selling products in the US market. Quotas prevent a surge of low-priced imports from countries that have experienced currency depreciations."[4962]

10.108 The USITC also appended the following to its December 2001 Report:

> "THE ASIAN FINANCIAL CRISIS
>
> The 'Asian Financial Crisis' began with the depreciation of the Thai baht in mid-1997, followed by depreciations in the currencies of the Philippines, Indonesia, Malaysia and Korea. During January 1996-January 1998, the currencies of these five countries depreciated between 38 and 76% in nominal terms. As these economies slowed, their finished steel consumption fell significantly (figure OVERVIEW-7). Finished steel consumption in Indonesia, Korea, Malaysia, the Philippines and Thailand together fell by 29.6 million tons during 1997-98, with the largest decline occurring with respect to Korean finished steel consumption, 14.5 million tons.[4963]
>
> […]

[4959] USITC Report, p. 113.
[4960] USITC Report, p. 217.
[4961] (original footnote) CR/PR at Table OVERVIEW-16. All but two countries showed depreciations.
[4962] Views of Vice Chairman Deanna Tanner Okun on Remedy, USITC Report, p.437.
[4963] USITC Report, Vol. II, p. OVERVIEW-17; Followed this excerpt is Figure OVERVIEW-7, a graph entitled "Finished steel consumption in selected Asian countries, 1991-99", demonstrating the consumption trends for Indonesia, Korea, Malaysia, the Philippines and Thailand. Unfortunately, we are unable to reproduce the graph in the present Panel Reports because we do not have the data upon which the graph was based, p. OVERVIEW-18.

POST-USSR DEVELOPMENTS

Changes in Russia and other states formerly part of the USSR during 1991-2000 have had an impact on the global steel market. The shift in these states toward market forces in 1992 precipitated a drop in overall economic activity, especially in industrial output and investment such as machine building, which has been a major focus of the USSR steel industry. The problems in the overall post-USSR economy resulted in sharp declines in both steel production (table OVERVIEW-3) and steel consumption (table OVERVIEW-4).

Table OVERVIEW-3
Production of Crude Steel in Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(1)	73,902	64,329	53,817	56,879	54,303	53,475	48,315	56,792	65,160
Ukraine	(1)	46,041	35,953	26,550	24,596	24,622	28,257	26,951	30,268	34,620
Former USSR[2]	146,460	130,077	108,171	86,281	87,194	85,088	89,334	82,051	94,975	(1)

[1] Not available
[2] Includes all of the states of the former USSR. Virtually all of the steel production is in Russia, Ukraine and Kazakhstan (in order of the volume produced).

Source: IISI

Table OVERVIEW-4
Apparent Consumption of Finished Steel in Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(1)	50,539	34,026	21,904	20,728	18,082	17,200	16,979	18,633	25,358
Ukraine	(1)	27,901	16,510	7,718	6,505	6,946	9,041	5,954	9,592	10,695
Former USSR[2]	111,029	84,495	56,997	37,785	35,502	33,407	34,840	31,753	37,045	44,873

[1] Not available
[2] Includes all of the states of the former USSR.

Source: IISI

The movement toward a market economy also resulted in a disruption of traditional trade flows for steel within the former COMECON structure. COMECON was set up in 1949 to facilitate trade and economic cooperation between the USSR and certain communist countries. The organization attempted to integrate the economies of Eastern Europe with that of the USSR. From 1949 to 1991, USSR steel exports primarily went to COMECON members. With the breakup of the USSR and movement by the former USSR toward a market economy, COMECON became obsolete. The ending of COMECON in 1991 marked a loss to the former USSR of its traditional foreign buyers of its steel. The position of the former USSR in the global steel market changed from a minor player in 1991 to the largest steel exporter in the

world by 1999. These developments have resulted in trade frictions in many markets. Anti-dumping investigations or orders have been initiated against imports of Russian steel by 21 trading partners including Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Indonesia, Korea, Malaysia, Mexico, Peru, the Philippines, South Africa, Taiwan, Thailand, Turkey, the United States, Venezuela and Vietnam. In addition, both the EU and the United States have negotiated agreements setting quotas on imports of most Russian steel products. The United States also has two suspension agreements in place on imports of Russian hot-rolled steel and steel plate.

With the restructuring of the economy in the post-USSR period, energy and transportation costs are rising, resulting in a significant increase in production costs. Full restructuring and movement toward market relations is hindered in part because these mills continue to provide the entire wage base in some areas. Several also accounted for a sizable share of USSR regional agricultural production. Therefore, steel producers face decreased domestic demand and increased energy, transportation and input costs while lacking the ability to cut costs by substantially reducing the number of employees. One way steel producers have tried to resolve these problems is to substantially increase exports (table OVERVIEW-5).

Table OVERVIEW-5
Exports of Steel from Russia, Ukraine and the Former USSR, 1991-2000

Country	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Quantity (1,000 tons)										
Russia	(1)	7,912	18,388	28,275	30,178	29,762	28,798	27,377	30,313	(1)
Ukraine	(1)	8,580	12,083	12,831	12,848	13,387	17,803	17,583	20,896	(1)
Former USSR[2]	6,101	21,375	33,160	44,278	46,481	46,763	51,696	49,916	57,018	(1)

[1] Not available
[2] Includes all of the states of the former USSR.

Source: IISI

[…]

EXCHANGE RATES

Exchange rate fluctuations between the US dollar and foreign currencies can have a significant effect on the relative competitiveness of global steelmakers selling products in the US market. As shown in table OVERVIEW-16, the dollar has strengthened considerably against the currencies of many of the major import sources for subject steel products during the period examined. As a country's currency depreciates against the dollar, the foreign producer can lower product prices expressed in dollars in the US market while still receiving the same price expressed in its home currency. These shifts are mitigated somewhat in many countries as the major raw materials used in steelmaking, such as iron ore, scrap, and metallurgical coal and coke, are sold on a dollar-basis throughout the world. However, for

countries that purchase raw materials in the global market, an estimated two-thirds of the costs of steelmaking are still in local currencies.[4964]

[…]

Table OVERVIEW-16
Overall Appreciation and Depreciation Amounts for Currencies
of Selected Countries relative to the US dollar,
January-March 1996 through January-March 2001

Country	Nominal Exchange Rate		Real Exchange Rate	
	Appreciation	Depreciation	Appreciation	Depreciation
Argentina	–	–	–	11.5
Australia	43.4	–	48.1	–
Brazil	–	52.0	–	24.9
Canada	–	10.5	–	9.1
Germany	–	30.4	–	36.0
India	–	33.5	–	8.2
Indonesia	–	76.3	–	31.1
Italy	–	24.8	–	25.0
Japan	–	10.4	–	20.1
Korea	–	38.4	–	31.7
Latvia	–	11.3	–	13.8
Mexico	–	22.4	36.7	–
Netherlands	–	31.1	–	33.6
Poland	–	37.9	55.8	–
Romania	–	89.7	10.9	–
Russia	–	83.3	–	45.6
South Africa	–	51.9	–	37.1
Spain	–	31.2	–	31.2
Thailand	–	41.5	–	37.0
Turkey	–	91.9	–	19.2
United Kingdom	4.8	–	2.2	–
Source: International Monetary Fund, *International Financial Statistics*, December 1999 and July 2001.				

[4964](original footnote) Peter Marcus and Karlis Kirsis, *Steel in 2001: Constraints Unparalleled, Opportunities Unmatched*, presented to Steel Success Strategies XVI, World Steel Dynamics, 19 June 2001.

10.109 On 3 January 2002, the USTR asked the USITC to provide, *inter alia*, additional information on unforeseen developments. On 9 February 2002, the USITC responded to this request, submitting its Second Supplementary Report, which states by way of introduction:

> "We provide the following response to USTR's request that we identify any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. (…)
>
> To the extent that WTO panel decisions have suggested that the concept of 'unforeseen' developments relates to the expectations of negotiators of the relevant tariff concessions, we note that such an assessment is in many respects outside of the purview of this agency, since multilateral trade negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies."[4965]

10.110 The Second Supplementary Report then goes on to provide an explanation of "unforeseen developments". The USITC's explanation is rather brief:

> "At the time of the Uruguay Round negotiations, and for some time after its conclusion, there had been substantial overall economic growth in a number of emerging markets, most notably those in southeast Asia. Growth rates in those countries exceeded eight percent per year in the first half of the 1990s.[4966] These high growth rates were supported by even sharper growth in exports.[4967] As late as the fall of 1997, economists projected continued growth at similarly impressive rates for these emerging markets.[4968] Despite this period of intense growth and generally optimistic predictions, the "Asian Financial Crisis" began with the depreciation of the Thai baht in mid-1997.[4969] The depreciation of the baht and loss of investor confidence sparked a wider crisis that affected many developing markets. The crisis slowed economic growth and reduced demand for steel in many emerging country markets. Between 1997 and 1998, steel consumption in Indonesia, Korea, Malaysia, the Philippines, and Thailand fell by 29.6 million tons, a drop of 41.4 percent.[4970] In Korea alone finished steel consumption dropped by 14.5 million tons or 34.4 percent.[4971] The crisis also led to depreciations in the currencies of the Philippines, Indonesia, Malaysia, and Korea with respect to the US dollar.[4972] By January 1998, these currencies had declined between 38 and 76 percent in nominal terms.[4973]

[4965] (original footnote) USITC Second Supplementary Report, Attachment I, pp. 1-4 (Exhibit CC-11).

[4966] (original footnote) World Economic Outlooks, October 1995-October 1997, Surveys by the Staff of the International Monetary Fund, Exh. 19 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief.

[4967] (original footnote) World Economic Outlooks and APEC Economic Forecasts, Exhs. 19 and 20 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief.

[4968] (original footnote) World Economic Outlooks, Exh. 19 of Minimill 201 Coalition (Long Products) Prehearing Injury Brief and pp. 20-21.

[4969] (original footnote) *Steel*, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001), Vol II, OVERVIEW-17.

[4970] (original footnote) USITC Pub. 3479, Vol. II, OVERVIEW-17.

[4971] (original footnote) USITC Pub. 3479, Vol. II, OVERVIEW-17.

[4972] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-17.

[4973] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-17.

Although the dissolution of the former Soviet Union and the resulting economic dislocations in the former Soviet republics predated the conclusion of the Uruguay Round, unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.[4974] In particular, as Russia and other former republics experienced intense financial disruptions and currency fluctuations in this period, steel exports rose nearly 22 percent.[4975] Other Eastern European countries also emerged as net exporters of steel.[4976]

While other markets experienced significant turmoil and contraction after 1997, demand in the United States remained robust. Indeed, the US economy enjoyed an overall economic expansion in the 1990s of unprecedented length. Consequently, US demand for steel remained strong. Apparent US consumption of certain flat-rolled carbon steel products rose by 7.8 percent between 1996 and 2000, and apparent US consumption peaked in 2000.[4977] Apparent US consumption of long products rose by 20.5 percent between 1996 and 2000 and apparent US consumption for the period peaked in 2000.[4978] Apparent US consumption of tubular products rose 18.2 percent between 1996 and 2000, with apparent US consumption peaking in 2000.[4979] Apparent US consumption of stainless products increased 29.5 percent between 1996 and 2000, with apparent US consumption peaking in 2000.[4980]

Continued growth in the US market, combined with uncertainty and contraction in other markets, led to significant upward pressure on the US dollar. The dollar appreciated significantly against many currencies during the period of investigation, and that appreciation became more notable after the foreign currency dislocations of 1997 and 1998. Between 1996 and the first quarter of 2001, many currencies experienced double-digit declines, in real terms, relative to the dollar.[4981] The high value of the US dollar made the US market an especially attractive market for steel products displaced from other markets.

Steel imports historically have played a role in the US market.[4982] After the beginning of the Asian and Russian economic crises, however, unusually large volumes of foreign steel production were displaced from foreign consumption. The US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production. Widespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms. As currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined."[4983] [4984] [4985]

[4974] (original footnote) Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

[4975] (original footnote) USITC Pub. 3479, Vol. II at OVERVIEW-19 and Table OVERVIEW-5.

[4976] (original footnote) Questionnaire Responses of US producers, importers, purchasers, and foreign producers.

[4977] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[4978] (original footnote) USITC Pub. 3479, Vol. III at Table LONG-C-1.

[4979] (original footnote) USITC Pub. 3479, Vol. III at Table TUBULAR-C-1.

[4980] (original footnote) USITC Pub. 3479, Vol. III at Table STAINLESS-C-1.

[4981] (original footnote) USITC Pub. 3479, Vol. II at Table OVERVIEW-16.

[4982] (original footnote) USITC Pub. 3479, Vol. II at Figure OVERVIEW-10.

[4983] (original footnote) USITC Pub. 3479, Vol. II at Figures OVERVIEW-10 and OVERVIEW-16.

10.111 We also looked at Commissioner Bragg's separate opinion in the Second Supplementary Report with respect to "unforeseen developments". Her statement, in its entirety, is as follows:

> "For each affirmative determination I rendered under Section 202(b)(1) of the Trade Act, as I stated in my separate views on injury, I considered the condition of the domestic industry over the course of the relevant business cycle, in order to properly understand the role of imports in the US market over the period of investigation. I further examined factors other than imports that may be a cause of serious injury or threat to the domestic industry.[4986] Importantly, these other factors were also considered within the context of the relevant business cycle.
>
> The framework of my injury analyses was based upon the statutory directive that the Commission consider the condition of each domestic industry over the course of the relevant business cycle[4987], as well as examine factors other than imports that may be a cause of serious injury or threat to the domestic industry.[4988] Importantly, both the timing and trend of each domestic industry's business cycle are difficult, if not impossible to anticipate, as well as those conditions of competition which can magnify or diminish the operation of each domestic industry's business cycle. Although the nature and importance of the business cycle for each domestic industry is empirically recognized to varying degrees, it is only within the context of the course of the relevant business cycle, including the unexpected and uncontrollable upturn and downturn in the cycle, together with the unprecedented level of injury demonstrated by the domestic industries and the unforeseen volume and timing of increased imports, that one can adequately determine the full and relevant impact of increased imports on the domestic industries over the entire period of investigation.
>
> In particular, as the record data indicate, imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998. It is apparent that these increased imports were the result of the

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[4984] (original footnote) Most of the increase in stainless and tool steel imports occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) may have played a smaller role than they did on imports of other steel products covered by this investigation, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See* INV-Z-013.

[4985] USITC Second Supplementary Report.

[4986] (original footnote) In the investigation questionnaires, US producers, US importers, foreign producers, and US purchasers identified certain developments (and whether the developments were unexpected) during the last ten years that resulted in certain steel products under investigation being imported into the United States in such increased quantities as to have an adverse impact on the domestic industries during the period January 1996 to June 2001. Generally, for each of the like product categories I found in my determinations, the responses identified several common unforeseen developments, including the Asian economic crisis, Russian economic crisis, the collapse of the USSR., emergence of Eastern Europe and China as global steel producers, increasing US demand, the strength of the US dollar relative to foreign currencies, and lower prices of imports. See Commission questionnaire responses from US producers, US importers, foreign producers, and US purchasers indicating any developments and whether such developments were unexpected.

[4987] (original footnote) 19 U.S.C. § 2252(c)(2)(A).

[4988] (original footnote) 19 U.S.C. § 2252(c)(2)(B).

unforeseen global financial crises in Asia and Russia, as well as unanticipated levels of global steel overcapacity, the collapse of foreign steel markets, emerging countries beginning massive steel production, and foreign producers focusing their sales into the lucrative US market, as discussed in my colleagues' response.[4989] Each of these factors was identified in several questionnaire responses. The timing of these imports was such that the volume of imports increased just as the domestic producers expected to enjoy gains in profitability given the simultaneous upswing in the relevant business cycle. As stated in my views, historically, gains during upswings are essential for domestic producers to build financial resources to withstand the inevitable downturn in the cycle. Thus, here the impact of opportunities lost during an upswing in the cycle not only had an immediate impact on the domestic industry by virtue of suppressed and depressed prices, lost sales, and resulting lost revenues, but also produced carryover effects on the domestic industry, which lingered as the cycle turned lower.

Having lost opportunities to the unforeseen increase and timing of imports during the upturn in the relevant business cycle of each domestic industry, many of the industries were therefore weakened in their ability to withstand a downturn and unprepared for the continued impact of lower-priced and sustained imports. As the cycles turned lower towards the end of the investigation period, imports continued entering the United States at relatively high levels further pressuring the domestic market. The effects of injury carryover from the unexpected 1998 surges, together with the more contemporaneous injury resulting from imports continuing to enter the United States at high levels, had a combined hammering effect on the various domestic industries and disrupted the ability of each domestic industry to adjust to the business cycle. As a result, profits for most domestic industries declined sharply and several domestic producers were forced into bankruptcy.

Accordingly, the unforeseen developments identified in this investigation include the Asian economic crisis, Russian economic crisis, the collapse of the USSR., emergence of Eastern Europe and China as global steel producers, increasing US demand, the strength of the US dollar relative to foreign currencies, and lower prices of imports. Within the context of the relevant business cycle of each domestic industry, these unforeseen developments, as identified by several questionnaire responses, led to the relevant steel products being imported into the United States in such unforeseen timing and increased quantities as to be a substantial cause of unprecedented level of serious injury demonstrated by the domestic industry."

Claims and arguments of the parties

10.112 The arguments of the parties can be found in Section VII.C.2(d)(i) *supra*.

[4989] (original footnote) I concur with my colleagues' discussion regarding the response to question 1-Unforeseen developments, with exception of the first three paragraphs. Although I do not necessarily disagree with the perspective provided in the first three paragraphs, I note that the parties and others did not have an opportunity to comment on this construction of "unforeseen developments."

Analysis by the Panel

10.113 Although all of the parties to this dispute recognize the need to show that a logical connection exists between "unforeseen developments" and the increased imports which a Member is seeking to address through the use of a safeguard measure[4990], they differ on how this can be achieved.

10.114 For the complainants, there must be a "causal link" between "unforeseen developments" and increased imports that cause or threaten to cause serious injury.[4991] The investigating authority must explain how these developments are linked to the increased imports that they rely on for the imposition of a safeguard measure.[4992] For the complainants, the USITC's analysis was based on scattered and incomplete facts and resulted in vague suggestions and speculations that severe currency dislocations in the former USSR and Asia led to massive increases of exports, or reductions in steel imports, in these countries, which consequently increased the amounts of steel on the world market and allegedly caused increased imports into the United States. The USITC's assumptions rely on data showing a decline in consumption of steel in the affected markets. The USITC did not, however, address whether production also declined in those markets. According to the United States, the phrase "as a result of" indicates that one thing is the "effect, consequence, issue, or outcome" of another. Therefore, showing that a product is being imported in such quantities and under such conditions as to cause serious injury as a result of unforeseen developments by itself establishes a logical connection between the first and second clauses of Article XIX:1(a). There is no need for a further demonstration or explanation.[4993]

10.115 The Panel agrees with New Zealand that it would be improper to reduce to a nullity the obligation to explain how "unforeseen developments" resulted in increased imports causing or threatening to cause serious injury. In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate.

10.116 First, the Panel notes that at no point in the initial USITC Report is the issue of "unforeseen developments" *per se* mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law.[4994] There is otherwise no discussion of the effects of unforeseen developments for the specific safeguard measures at issue. It is true that the dissolution of the USSR and the depreciation of Asian currencies are mentioned with respect to CCFRS.[4995] The relevant paragraph, which pertains to a discussion on causation, refers to the OVERVIEW section of the Appendix to the Report, a 2-3 pages discussion on the Russian crisis, the Asian crisis and exchange rates. There are also additional references in the determinations for hot-rolled bar, cold-finished bar,

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[4990] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.

[4991] See the written replies of the European Communities, China, and Norway to Panel question No. 2 at the first substantive meeting.

[4992] New Zealand's written reply to Panel question No. 2 at the first substantive meeting.

[4993] United States' written reply to Panel question No. 2 at the first substantive meeting.

[4994] Switzerland's first oral statement, paras. 8-10, citing USITC Report, Vol. I, separate opinion of Commissioner Bragg, p. 270, footnote 4. (Exhibit CC-6).

[4995] See para. 10.106.

rebar and stainless steel rod, as listed in paragraphs 10.106-10.108 above. In the OVERVIEW section, the Russian and Asia crises as well as exchange rate fluctuations are identified, and post-USSR changes are even referred to as "developments"[4996], but the identification of these crises and fluctuations is not done within the context of an explanation of whether they constituted unforeseen developments and whether they resulted in increased imports causing injury.

10.117 In addition, in its initial Report, the USITC stated that "[t]he dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries", again without any supporting data.[4997] Moreover, the United States points in its submissions to the increase of imports from Russia, Kazakhstan and Lithuania.[4998] These figures were part of a chart of imports from numerous countries (INV-Y-180), but the chart was cross-referred in the USITC Report only to support statements relating to NAFTA imports[4999] or imports generally without any discussion of whether the imports were as a result of unforeseen developments.[5000] More importantly, they were not cited in support of, or included in, any discussion relating to unforeseen developments. Likewise, therefore, they cannot be used before the Panel to fill gaps in the USITC's reasoning.

10.118 In summary, there are only ad hoc references to the Asian and Russian crises in the initial USITC Report, which did not address the issue of "unforeseen developments" *per se*. Moreover, there is no adequate discussion of the linkage between unforeseen developments and increased imports causing serious injury in relation to each of the specific safeguard measures at issues in this dispute.

10.119 We examine now the February Second Supplementary Report which begins with the following statement:

> "We provide the following response to USTR's request that we identify any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. (…)"

10.120 This may be an acknowledgement by the USITC that it was, for the first time, formally identifying "unforeseen developments" that resulted in the relevant steel products being imported into the United States in such increased quantities as to cause serious injury or the threat thereof, within the meaning of Article XIX of GATT 1994. We note in this regard the statement by the USITC that "To the extent that WTO panel decisions have suggested that the concept of 'unforeseen' developments relates to the expectations of negotiators of the relevant tariff concessions, we note that such an assessment is in many respects outside of the purview of this agency, since multilateral trade

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[4996] See para. 10.108.

[4997] USITC Report, p. 58.

[4998] United States' first written submission, paras. 970-971, citing USITC Dataweb tables (US-49), which were not included in the report of the competent authority, and INV-Y-180 :-(US-40), which was cited in the report of the competent authority but for reasons having nothing to do with an explanation of unforeseen developments.

[4999] USITC Report, pp. 167-169, footnotes 1026, 1032, 1044; p. 179, footnote 1109; pp. 213-214, footnotes 1354-1355 and 1357-1361; pp. 222-223, footnotes 1433-1437; similar cross-references can be found among the Commissioners' separate views.

[5000] USITC Report, p. 210, footnote 1328; p.213, footnote 1353; p. 218, footnote 1402; p. 222, footnote 1432; p. 371, footnote 88; pp. 372-373, footnote 98; p. 374, footnote 108; pp. 387-388, footnote 165; p. 396, footnote 203; p. 402, footnote 245; similar cross-references can be found among the Commissioners' separate views.

negotiations are not within its mandate, but are the responsibility of the USTR and relevant Executive Branch agencies."[5001]

10.121 In the Secondary Supplementary Report, the USITC insists on the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and economy to displace steel to other markets (and evidenced by what it calls "trade frictions in many markets"). Following the Russian crisis, for instance, anti-dumping investigations or orders had been initiated against imports of Russian steel by 21 trading partners including Argentina, Brazil, Canada, Chile, China, Colombia, the EU, India, Indonesia, Korea, Malaysia, Mexico, Peru, the Philippines, South Africa, Taiwan, Thailand, Turkey, the United States, Venezuela and Vietnam.

10.122 In our view, the weakness of the USITC Report is that, although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers.

10.123 The Panel is of the view that even if "large volumes of foreign steel production were displaced from foreign consumption"[5002] this does not, in itself, imply that imports to the United States increased as a result of unforeseen developments. Article XIX of GATT, however, requires a demonstration that the unforeseen development resulted in *increased imports into* the United States. In our view, the USITC's explanation failed to link these steel market displacements to the specific increased imports *into the United States* at issue.

10.124 The USITC does refer to increased imports: "In particular, as the record data indicate, imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998". However, again such a reference is made without any supporting data. The USITC adds that "as currency depreciations and economic contractions disrupted other markets the share of steel imports to the US market increased sharply and US prices declined" and "[w]idespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms". While this may have been true, and we note in this regard the increased imports data contained in the USITC's increased imports findings, there is no reference to any specific supporting discussion or evidence.

10.125 It may very well be that the contractions in consumption to which the USITC referred in some parts of the world resulted in increased imports to the United States, especially if overproduction of steel products generally in the world steel market led to price suppression. Although this may be a plausible explanation, the USITC did not provide any data to support its general assertion that the confluence of unforeseen developments resulted in the *specific* increased imports at issue in this dispute. The Panel is of the view that in light of the complexity of the matter, a more sophisticated and detailed economic analysis was called for.

10.126 As the complainants have rightly pointed out, the USITC's explanation relates to steel production in general and does not describe how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue.[5003]

[5001] USITC Second Supplementary Report, Attachment I, pp. 1-4 (Exhibit CC-11).

[5002] See para. 10.110.

[5003] European Communities' first written submission, paras. 136-139; Switzerland's first written submission, para. 122-125; Norway's first written submission, paras. 124-127; China's first written submission, paras. 94-96, New Zealand's first written submission, para. 4.20.

10.127 The Panel finds that while it is not necessary for an unforeseen development to affect only one economic sector, or to affect segments of an economic sector or industry differently, it was necessary for the USITC to explain how the increased imports of the specific steel products subject of the investigation were linked to and resulted from the confluence of unforeseen developments. Presumably, the Asian and Russian crises affected some countries worse than others and certain steel products more than others depending on the countries' respective production fo such products. This was certainly the view of producers who stated in USITC questionnaires for example that the Asian financial crisis was having an adverse impact on the operation of the domestic industry with respect to stainless steel wire, but not with respect to stainless steel rod, stainless steel bar or rebar.[5004]

10.128 In spite of what it asked the producers to do in the questionnaires, the USITC made no attempt to differentiate between the impact that the alleged unforeseen developments had on the different product sectors to which the various safeguard measures related.

10.129 In a footnote, the USITC stated:

> "Most of the increase in *stainless and tool steel imports* occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) *may have played a smaller role than they did on imports of other steel products covered by this investigation*, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See* INV-Z-013."[5005]

10.130 The USITC did not further develop this point but instead, simply asserted that "unforeseen developments resulted "as the record data indicate, [in] imports increased over the period of investigation with many product categories at issue experiencing peak import volumes in 1998".[5006] The USITC did not back-up such an allegation by pointing to the relevant data for each specific steel safeguard measures at issue.

10.131 The same is true with Commissioner Bragg who provided additional separate views on unforeseen developments in the February Second Supplementary Report. Leaving aside the question of the value of one Commissioner's view in relation to the majority, Commissioner Bragg's asserts clearly "that these increased imports were the result of the unforeseen global financial crises in Asia and Russia…". However, the Commissioner does not back-up her conclusion, stating simply that the conclusion in her cited sentence "is apparent". In a footnote she adds: "(…) *resulted in certain steel products under investigation being imported into the United States in such increased quantities* as to have an adverse impact on the domestic industries during the period January 1996 to June 2001." (emphasis added). Here again, Commissioner Bragg seems to be able to conclude that "certain" steel products increased. However, she did not specify which ones and how increased imports for each of the safeguard measures were connected to the identified confluence of unforeseen developments.

[5004] Table STAINLESS-108, USITC Report, Vol. III, p. STAINLESS-89, and Table LONG-102, USITC Report, Vol. II, p. LONG-100.

[5005] USITC, Second Supplementary Report, at footnote 24, p. 4.

[5006] See para. 10.111.

10.132 Although the United States argues that there were data to support the USITC's analysis, which extended beyond consumption data for the most severely affected countries in south east Asia and production and consumption data for the former USSR republics[5007], the Panel is concerned with this evidence which was presented as relevant evidence for the first time before the Panel and was not cited in the USITC Report as part of a reasoned and adequate explanation of unforeseen developments.

10.133 For instance, the United States points in its submission[5008] to parts of the USITC Report, which contain footnote references to tables that show imports by country and by product for the entire period of investigation.[5009] It is undoubtedly true that these tables contained data that could have been used to explain how unforeseen developments resulted in increased imports that caused injury. However, the competent authority did no such thing. In fact, the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came.

10.134 In its submissions, the United States also points to the increase of imports from Indonesia, Korea, Malaysia, the Philippines and Thailand.[5010] We find that this *ex post* supporting evidence, which relies on information not found or mentioned in the report of the competent authority, (but available on the USITC website), may be useful to dispel alternative arguments put forth by the complainants, and it may even be the proper explanation of how unforeseen developments resulted in increased imports. However, it raises the issue of whether the United States is, at this later stage of the WTO dispute settlement process, trying to fill gaps left by the USITC in its explanation provided in its published Report.

10.135 The Panel believes that in light of the complexities deriving from the confluence of unforeseen developments that the USITC referred to, coupled with the complexity of the case at hand, the explanation provided by the USITC how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the specific steel products that are the subject of the safeguard measures at issue.

10.136 The complainants also argue, in particular, that there was no demonstration that those unforeseen developments resulted in increased imports from Russia and that the United States was not entitled to take account of increased imports from Russia. We address this issue below.

[5007] United States' written reply to Panel question No. 7 at the second substantive meeting.

[5008] United States' first written submission, paras. 966 – 970.

[5009] The sections of the USITC Report to which the United States has brought our attention are: pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Delaney).

[5010] United States' first written submission, paras. 962-965, citing China's first written submission, para. 103 and USITC Dataweb tables (US-49).

Logical connection between a Member's tariff concessions and increased imports causing serious injury

Claims and arguments of the parties

10.137 The arguments of the parties can be found in Section VII.C.2.(d) *supra*.

Analysis by the Panel

10.138 The complainants' arguments arise out of the language of Article XIX:1(a), which provides *inter alia* that increased imports causing injury must occur "*as a result of* unforeseen developments *and of the effect of* the obligations incurred by a contracting party under this Agreement, including *tariff concessions*."

10.139 The Appellate Body in *Korea – Dairy* and *Argentina – Footwear (EC)* stated:

> "With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ", *we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions*. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994."[5011] (emphasis added)

10.140 It seems to us that when the Appellate Body wrote "this phrase simply means" it was interpreting "as a result of … tariff concessions" to mean that the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product.

10.141 However, the complainants have argued that the present dispute raises a different issue. For them, the issue is whether a Member can invoke a safeguard measure in order to protect its industry from increased imports coming from a non-WTO Member – in other words, from a country with which it has no relevant WTO obligations or tariff concession.

10.142 The Panel agrees with the parties that safeguard measures are to be used against imports of products for which WTO tariff concessions have been granted. The issue here, however, is that it is not clear whether the USITC wanted to argue that the confluence of unforeseen developments led to increased imports from Russia or the ex-Soviet Republics *per se*. In its initial Report, the USITC indeed asserts "[t]he dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries."[5012] In its Second Supplementary Report, USITC also submits that "unanticipated financial difficulties led to a sharp increase in exports of steel from the former Soviet Union between 1996 and 1999.[5013]" Yet, towards the end of its demonstration, the USITC seems to argue rather that unforeseen developments together led generally to world displacement of

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[5011] Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

[5012] USITC Report, p. 58 (footnotes omitted).

[5013] Exports increased because reductions in steel production in the former Soviet Union did not keep pace with declines in consumption. Steel consumption fell more than 70 percent from 1991 to 1998. USITC Pub. 3479, Vol. II at Table OVERVIEW-4.

steel markets that resulted in increased imports of steel products into the United States from various and numerous foreign sources:

> "Steel imports historically have played a role in the US market.[5014] After the beginning of the Asian and Russian economic crises, however, unusually large volumes of foreign steel production were displaced from foreign consumption. The US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production. Widespread currency devaluations made the displaced exports especially attractive to US purchasers on price terms. As currency depreciations and economic contractions disrupted other markets, the share of steel imports to the US market increased sharply and US prices declined."[5015] [5016] [5017]

10.143 The Panel understands the United States' arguments to be that the displacements of steel on world markets led to increased imports to the United States from all sources, and not only to increased imports from Asia and Russia. We believe the USITC could argue that the geographical location of the birth or origin of unforeseen developments may differ from the origin of increased imports, but this hypothesis calls for a reasoned and adequate explanation of such correlation of events and effects.

10.144 We are of the view that this later USITC's explanation of the effects of such a confluence of unforeseen developments leading to increased imports from numerous sources seems plausible but it is not sufficiently supported and explained. Therefore, in light of our ultimate conclusion in paragraphs 10.145-10.150 below, the Panel sees no need to examine the complainants' argument that increased imports (directly) from Russia are not relevant on the grounds that the United States has no tariff concessions with Russia.

4. Conclusion

10.145 In sum, the Panel believes that the complexity of the unforeseen developments pointed to by USITC called for a more elaborate demonstration and supporting data than that provided by the USITC. For instance, although USITC states that "[t]he US market, in which demand remained strong, was the destination for a significant portion of that displaced foreign production"[5018], one is left to wonder how much steel was displaced in the first place and from where. If the portion being imported to the United States was thought by the competent authority to be "a significant portion", this would suggest that the USITC was aware of how much was displaced in total, as well as how much was displaced to the United States as opposed to other countries, or at least the proportion.

[5014] (original footnote) USITC Pub. 3479, Vol. II at Figure OVERVIEW-10.

[5015] (original footnote) USITC Pub. 3479, Vol. II at Figures OVERVIEW-10 and OVERVIEW-16.

[5016] (original footnote) Most of the increase in stainless and tool steel imports occurred late in the period of investigation. The record indicates that the dramatic changes in exchange rates for the US dollar during the period of investigation led to increased imports of stainless and tool steel products during the latter half of the period. Moreover, while the Asian financial crisis and the dissolution of the Soviet Union (and the consequent changes in the Russian and Eastern European markets for steel) may have played a smaller role than they did on imports of other steel products covered by this investigation, their continued effect made the US market more attractive to imports of stainless and tool steel products. These unforeseen developments affected the conditions of competition under which stainless and tool steel imports caused serious injury or threatened to cause serious injury to the domestic stainless bar, stainless wire rod, stainless wire, stainless fittings, and tool steel industries. *See* INV-Z-013.

[5017] USITC Second Supplementary Report.

[5018] See para. 10.110.

10.146 We believe that, the USITC should have offered a more comprehensive and coherent explanation as to how the unforeseen developments *resulted in* increased imports into the United States, their origin and their extent. We believe the USITC could argue that the geographical location of the birth or origin of unforeseen developments may differ from the origin of increased imports, but failed to provide a reasoned and adequate explanation to that effect.

10.147 The Panel recalls that since the demonstration of unforeseen developments is a pre-requisite to the imposition of a safeguard measure, such demonstration must be performed for each safeguard measure. Even if unforeseen developments provide the same justification for several safeguard measures, the Panel believes that the USITC was obliged to explain why this is so and why the specific products under examination were affected individually by the confluence of unforeseen developments.

10.148 On the basis of the foregoing, the Panel finds that, in light of the complexity of the allegations made by USITC, including its reliance on a confluence of economic factors, the USITC failed to provide a reasoned and adequate explanation of how the confluence of unforeseen developments it pointed to had resulted in increased imports into the United States of the specific steel products at issue – causing serious injury to the relevant domestic producers. Therefore, there is no need to examine the remainder of the arguments raised by the complainants, including whether the facts supported the USITC's unforeseen developments' findings.

10.149 For all of the above reasons, the Panel finds that the USITC's unforeseen development findings do not provide a reasoned and adequate explanation of how the confluence of the Asian and Russian Crises, together with the strong United States' economy and US dollar, actually resulted in specific increased imports into the United States causing serious injury to the relevant domestic producers.

10.150 Therefore, the Panel finds that all safeguard measures at issue in this dispute are inconsistent with the requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards with regard to the demonstration of unforeseen developments.

D. CLAIMS RELATING TO INCREASED IMPORTS

1. Claims and arguments of the parties

10.151 The claims and arguments of the parties regarding "increased imports" are set out in Sections VII.F.2-4 *supra*.[5019]

2. Relevant WTO provisions

10.152 Article 2.1 of the Agreement on Safeguards, which sets forth the conditions for the application of a safeguard measure, reads as follows:

> "A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being

[5019] The Panel is aware of the fact that some of the complainants did not invoke Article XIX of GATT 1994 in support of their claims relating to increased imports. Accordingly, the Panel has not examined such claims but, rather, has focused on the claims made under Articles 2 and 4 of the Agreement on Safeguards, which were made by all the complainants. The Panel considers that this approach does not in any way affect the parties' rights in relation to their respective claims and defences relating to increased imports in this dispute.

> imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products." (footnote omitted)

10.153 Article 4.2 sets forth the operational requirements for determining whether the conditions identified in Article 2.1 exist. Regarding increased imports, Article 4.2(a) requires in relevant part that:

> "[I]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate … the rate and amount of the increase in imports of the product concerned in absolute and relative terms …"

3. Analysis by the Panel

(a) The requirements of Articles 2.1 of the Agreement on Safeguards

10.154 Article 2.1 of the Agreement on Safeguards requires that before a Member applies a safeguard measure, it determines "that [a] product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products …".

10.155 All parties agree that Article 2.1 contains three conditions that must be satisfied before a safeguard measure can be imposed and one of these conditions is concerned with "increased imports". Parties disagree on whether Article 2.1 imposes any threshold for this "increased imports" requirement whether quantitative and/or qualitative.

10.156 The complainants refer to *Argentina – Footwear (EC)* where the Appellate Body stated that:

> "[I]ncreased quantities of imports should have been unforeseen or unexpected… In our view the determination of whether the requirements of imports 'in such increased quantities' is met is not merely mathematical or technical requirements. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There 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'."[5020]

10.157 The United States takes issue with this interpretation by the Appellate Body of the wording of Article 2.1 of the Agreement on Safeguards. For the United States, the Appellate Body could not have read into Article 2.1 requirements that were not envisaged by the drafters of the treaty. In particular, the United States points to the wording of Article 2.1 which does not include any reference to the terms "recent", "sudden", "significant" and "sharp". Moreover, the United States is of the view

[5020] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

that once a competent authority has determined that imports have increased, it is entitled to, and it will, examine whether such increased imports are causing serious injury so that only increased imports that are causing serious injury will authorize WTO compatible safeguard measures. Only once the competent authority has reached such findings relating to the serious injury and causation can it make an overall determination that increased imports are causing serious injury to the producers of domestic like products. In other words, the United States argues that whether the increased imports are recent *enough*, sudden *enough*, sharp *enough*, and significant *enough to cause* or threaten serious injury are questions that are answered as competent authorities proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury or threat thereof and causation). According to the United States, these analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry.[5021]

10.158 The Panel notes, first, that all parties agree that Article 2.1 requires that imports have increased. A conclusion that imports have increased, would normally call for a comparison between the levels of imports in different periods or at different points in time. Article XIX of GATT 1994 and Article 2.1 of the Agreement on Safeguards are silent on precisely which points in time are to be the basis for the comparison.

10.159 However, Article 2.1 of the Agreement on Safeguards requires that "a product is being imported in … increased quantities". The Panel believes that the use of the present tense in 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 that the increase in imports was "recent". The Panel notes that neither the Agreement on Safeguards nor Article XIX of GATT 1994 specify expressly the length of the period of investigation for the purpose of increased imports.

10.160 The complainants do not challenge the choice of a five-year period of investigation *per se*. Complainants rather disagree with the fact that, generally, the USITC did not focus sufficiently on the situation of imports in the latest part of the period of investigation.

10.161 The Panel believes that whether imports have recently increased, therefore, calls for an identification of the relevant recent period as well as an assessment of the situation of imports during that recent period, on a case-by-case basis. Moreover, the amount of (absolute or relative) increased imports in practice often shows not an unequivocal upward movement, but instead both upward and downward movements which alternate over time with different amplitudes.[5022] Since there is no defined or prescribed periods within which imports must be compared, a competent authority must conduct a quantitative and qualitative analysis of the features of the development of import numbers over the entire period of investigation and assess whether, overall, imports have increased recently.[5023]

10.162 As regards the question of *how* recently the imports must have increased, the Panel notes, as the Panel in *US – Line Pipe* did[5024], that Article 2.1 of the Agreement on Safeguards speaks of a product that "is being imported … in such increased quantities". Thus, imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increas*ed*, if the products continue "being imported" in (such) increas*ed* quantities. The Panel, therefore, agrees with the *US – Line Pipe* Panel's view that the fact that the increase in imports must be "recent" does not mean that it

[5021] United States' first written submission, para. 177.

[5022] In this regard, *see* as illustrative examples, the graphs on absolute and relative imports represented hereafter in this Section on Increased Imports.

[5023] *See* also Panel Report, *Argentina – Footwear (EC)*, para. 8.161.

[5024] Panel Report, *US – Line Pipe*, para. 7.207.

must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation.[5025] As pointed out by the Panel in *US – Line Pipe*[5026], the most recent data must be the focus, but should not be considered *in isolation* from the data pertaining to the less recent portion of the period of investigation. However, as indicated by the present continuous "are being", there is an implication that imports, in the present, remain at higher (i.e. increased) levels.

10.163 Whether a decrease in imports at the end of the period of investigation, in the individual case, prevents a finding of increased imports in the sense of Article 2.1 of the Agreement on Safeguards will, therefore, depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) "being imported in (such) increased quantities". In this evaluation, factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand.

10.164 To give an extreme example, a short and very recent slight decrease would not detract from an overall increase if imports have increased tenfold over the several years beforehand. Conversely, to give an opposite extreme example, one could no longer talk about a product that "is being imported in (such) increased quantities", or in fact in *any* increased quantities at all, if, at the time of the determination, import numbers have plummeted nearly to zero or to a level below any past point in the period of investigation.[5027]

10.165 The Panel believes that, in their investigation whether imports have increased in the recent period, and whether increased imports are causing serious injury to the domestic producers of like or directly competitive domestic products, competent authorities are required to consider the *trends* in imports over the period of investigation, as suggested by Article 4.2(a).[5028] While Article 4.2(a) requires the evaluation of the "rate and amount of the increase in imports … in absolute and relative terms", the Panel sees no basis for the argument that this rate must always accelerate or that the rate must always be positive at each point in time during the period of investigation.

10.166 Moreover, the Panel recalls that the very purpose of a safeguard measure is to address the results of unexpected events (unforeseen developments pursuant to Article XIX of GATT), namely increased imports causing serious injury. This unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures calls for an assessment of whether imports increased suddenly so that the situation became one of emergency for which safeguard measures became necessary. The Panel believes therefore that increased imports must be "sudden".

10.167 We consider that when the Appellate Body stated "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'"[5029], it was operating under the mandate of Article 3.2 of the DSU which is to clarify the existing provisions, here the meaning of in "such

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[5025] Panel Report, *US – Line Pipe*, para. 7.207.

[5026] Panel Report, *US – Line Pipe*, para. 7.207.

[5027] We do not intend to rule out that an exception could be made, if, despite the deep drop, there are indications that this drop is only temporary and in some sense artificial. *See*, also, Panel Report, *Argentina – Footwear (EC)*, para. 8.159.

[5028] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129; and Panel Report, *Argentina – Footwear (EC)*, para. 8.276.

[5029] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

increased quantities".[5030] In the Panel's view, a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance.

10.168 The Panel agrees with the United States that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an "increase" in the sense of Article 2.1 of the Agreement on Safeguards. In contrast, from the absence of *absolute* standards one cannot conclude that there are no standards at all and that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards. The Panel also agrees with the United States that the inquiry is not whether imports have increased "recently and suddenly" *in the abstract*. A *concrete* evaluation is what is called for. A competent authority must conduct an analysis considering all the features of the development of import quantities and that an increase in imports has a certain degree of being recent and sudden.

10.169 The Panel believes that although a competent authority must make a single[5031] determination that increased imports were such as to cause serious injury, the Panel considers that distinct findings are necessary for each of the requirements of Article 2.1 of the Agreement on Safeguards. Before a Member can impose a safeguard measure, it must have demonstrated relevant unforeseen developments (Article XIX of GATT 1994) and it must have made a determination that increased imports were causing serious injury (Article 2.1 of the Agreement on Safeguards) to the relevant domestic producers. The Panel considers that the investigation of the three requirements that compose the determination that increased imports are causing serious injury and the demonstration whether this resulted from unforeseen developments, do not have to be performed or completed in any specific order. Together these distinct findings must provide a reasoned and adequate explanation (Articles 2, 3.1 and 4 of the Agreement on Safeguards) as to how the relevant pre-requisites to imposing a WTO compatible safeguards measure are satisfied.

10.170 Having said this, the Panel agrees with the United States that in assessing whether the facts justify a conclusion that imports had increased in "such quantities " and "under such conditions" the competent authorities must demonstrate in the first instance that there was an increase in imports, absolute or relative to domestic production. This does not mean that ultimately "any increase will do", as the competent authorities must also determine whether such an increase is sudden and recent within a relevant period of time determined on a case-by-case basis.

10.171 The Panel believes, however, that such a competent authority's findings on increased imports, distinct from its causality and injury findings, may be informed by the results of its entire investigation. The competent authority's findings on the first requirement – increased imports – may have effects on the injury findings or on the causation findings, as prescribed by Article 4.2(a). As a competent authority considers the other conditions necessary for imposition of a safeguard, it determines, as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, and significant enough to cause or threaten serious injury to the relevant domestic producers.

[5030] The Panel is also bound by the mandate to clarify the existing provisions, which obviously also implies, as pointed out in Article 19.2 of the DSU that, in their findings and recommendations, a panel and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."

[5031] *See* Appellate Body Report, *US – Wheat Gluten* paras. 73-74: "We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b) – "The determination referred to in subparagraph (a) shall not be made unless …" – *both* provisions lay down rules governing a *single* determination, made under Article 4.2(a)".

(b) Full-year 2001 data

10.172 The complainants argue that the USITC ignored import trends in the most recent past, i.e. the full-year data for 2001 (including the last six months that followed the end of the period of investigation) insisting that the import data for the full-year of 2001 were available when the USITC updated its Report and completed its determination in February 2002. According to the United States, fundamental legal and practical considerations should lead the Panel to reject the complainants' attempts to expand the period of investigation to encompass full-year 2001 data that are not on the record of the USITC's investigation that began in early July 2001.

10.173 The Panel agrees with the United States that a competent authority cannot be requested to take into account data and evidence that is not available at the time it made its determination.[5032] In this case, the determination in the sense of Article 2.1 of the Agreement on Safeguards, i.e the determination on increased imports, causation and serious injury, was made by the USITC in October 2001. At that time, data for the full-year of 2001 could not possibly have been available. Furthermore, such data related to events (at least partially) occurring *after* the determination. The fact that new data becomes public after a determination has been made does not result in an obligation to make a new determination that replaces the one already made. What the President did in 2002 was not a "determination" within the meaning of Article 2 of the Agreement on Safeguards because the President made no determination that increased imports were causing serious injury to the relevant domestic producers. Therefore, data for import volumes for the second half of 2001 was not relevant for the question whether there were relevant "increased imports" with respect to determinations made by the USITC in October 2001.

10.174 The Panel will, therefore, proceed to evaluate the USITC's findings on increased imports for each product at issue on the basis of the data that was available to the USITC at the end of the entire period of investigation, i.e. by the end of June 2001. The Panel will thus not take into account data relating to the second half of 2001.[5033]

(c) The recent period in the present investigation

10.175 The Panel notes again that the Agreement on Safeguards does not specify how long the period of investigation in a safeguards investigation should be, or whether or how that period should be segmented for purposes of analysis. In light of the Panel's above conclusion that the competent authority must have determined that imports increased suddenly and recently, the Panel will generally

[5032] See Appellate Body Report, *US – Cotton Yarn*, at para. 77: "The exercise of due diligence by a Member cannot imply, however, the examination of evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination. The demonstration by a Member that a particular product is being imported into its territory in such increased quantities as to cause serious damage (or actual threat thereof) to the domestic industry can be based only on facts and evidence which existed at the time the determination was made. The urgent nature of such an investigation may not permit the Member to delay its determination in order to take into account evidence that might be available only at a future date. Even a determination on the existence of threat of serious injury must be based on projections extrapolating from *existing* data." *See* also Appellate Body Report, *US – Lamb*, paras. 150 and 172.

[5033] The Panel recalls that a Member can only impose a safeguard measure to the extent and for the duration necessary to remedy the serious injury caused by increased imports. Delays between the determination that increased imports were causing serious injury and the imposition of the safeguard measure will generally affect the decision pursuant to Articles 5 and 7 of the Agreement on Safeguard. If too long a delay exists between the determination by a competent authority and the actual imposition of the safeguard measure such importing Member may be faced with a situation where the application of a safeguard measure is no longer necessary to remedy serious injury.

focus its analysis on the situation of imports in the more recent period that preceded the end of the period of investigation, keeping in mind that the situation of imports in the earlier part of the period of investigation may also shed light on the movements of imports.

(d) Standard of review

10.176 Finally, with regard to the assessment of the factual aspects of the USITC's determination of an increase in imports, the Panel recalls that the standard of review to be applied is whether the published report on the investigation contains an adequate and reasoned explanation of how the facts before the USITC support the determination made with respect to increased imports.[5034]

10.177 The Panel now proceeds to examine the USITC findings on increased imports for each of the products at issue.

4. Measure-by-measure analysis

(a) CCFRS

(i) The USITC's findings

10.178 As regards increased imports of CCFRS, the USITC determined:

> "We find that the statutory criterion of increased imports is met.[5035] We find that total imports of certain carbon flat-rolled steel, including slabs, plate, hot-rolled, cold-rolled, and coated steel increased in both actual terms and relative to domestic production. In actual terms, total imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000, an increase of 13.7 percent.[5036] Total imports declined from 11.5 million short tons in interim 2000 to 6.9 million short tons in interim 2001.[5037] The ratio of imports to domestic production (including production for captive consumption) also increased during the POI, from 10.0 percent in 1996 to 10.5 percent in 2000.[5038] Imports also increased relative to domestic commercial shipments. Total imports were equivalent to 32.6 percent of domestic commercial shipments in 2000, up from 31.5 percent in 1996.[5039] In interim 2001 total imports were equivalent to 22.7 percent of domestic commercial shipments.[5040]
>
> We note that in 1998, the midpoint of the full five-year period examined, there was a rapid and dramatic increase in imports, as import volumes both in absolute terms and as a percentage of US production peaked. Imports of certain carbon flat-rolled steel were 25.3 million short tons, an increase of 37.5 percent over 1996 levels. While the volume of imports declined in 1999 and 2000 from this peak, the absolute volume

[5034] *See* Panel Report, *US – Wheat Gluten*, para. 8.5; Panel Report, *US – Line Pipe*, para. 7.194.

[5035] (original footnote) Commissioner Devaney joins in the analysis of the majority, related to increased imports, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.*, the statutory criterion of increased imports is met.

[5036] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[5037] (original footnote) INV-Y-209 at Table FLAT-ALT7.

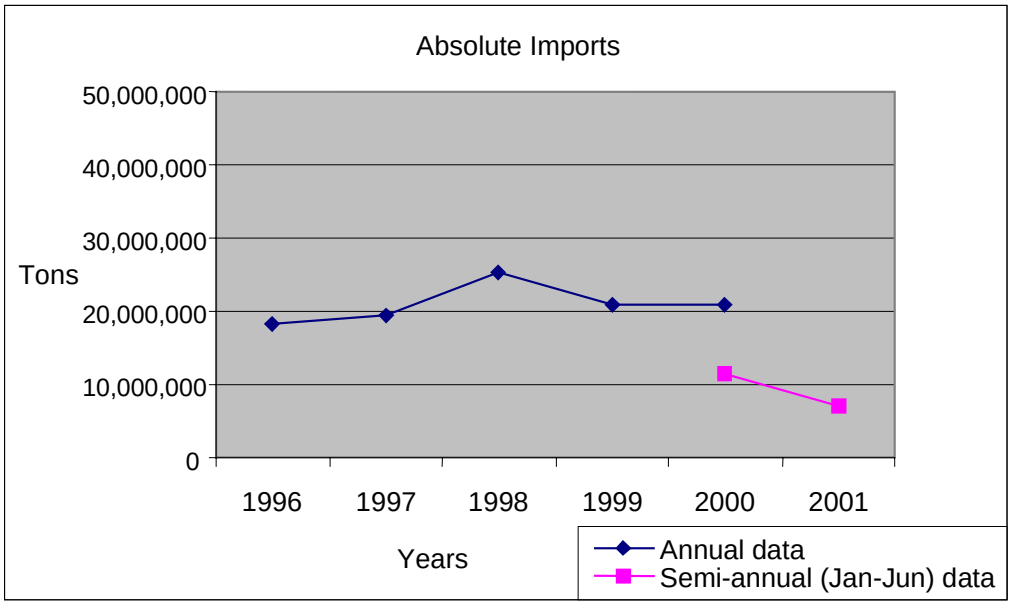
[5038] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[5039] (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

[5040] (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

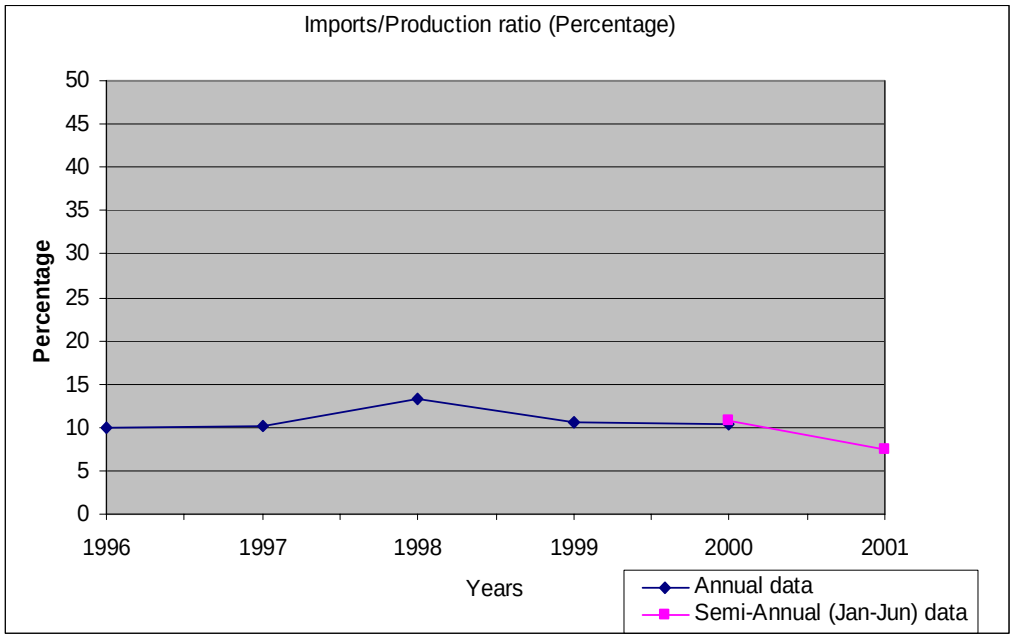
> and ratio of imports to US production were still significantly higher in 1999 and 2000 than at the beginning of the period. The significance of this trend in imports to the domestic industry's performance is discussed below under Substantial Cause of Serious Injury."[5041]

10.179 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5042]



[5041] USITC Report, Vol. I, pp. 49-50

[5042] The data represented in the following two graphs are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) Claims and arguments of the parties

10.180 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(a) *supra*.

(iii) Analysis by the Panel

Absolute imports

10.181 The Panel believes that the USITC's determination on increased imports of CCFRS, as published in its report[5043], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, back to levels nearly as low as the 1996 level. The USITC also noted the significant decrease between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons)[5044], but it did not seem to focus on, or at least account for, this most recent trend in concluding that imports are "still significantly higher … than at the beginning of the period".[5045] Given the sharpness and significance of this most recent decrease the Panel does not find that the USITC explanation as published in its report[5046] contains an adequate and reasoned explanation of how the facts support the determination CCRFS "is being imported in … increased quantities".

10.182 It may well be that the increase occurring until 1998 could have qualified at the time as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards, but the Panel need not express itself on that point because that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken by itself and with the

[5043] USITC Report, pp. 49–50.
[5044] USITC Report, p. 49.
[5045] USITC Report, p. 50.
[5046] USITC Report, pp. 49–50.

decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in … increased quantities".

Relative imports

10.183 The Panel also considers that the USITC's determination on increased imports of CCFRS relative to domestic production[5047] does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, to levels nearly as low as the level in 1996. The USITC noted the significant decrease in interim 2001 only in terms of imports relative to domestic commercial shipments[5048], not in terms of imports relative to domestic production, the criterion stipulated in Article 2.1 of the Agreement on Safeguards.

10.184 As in the situation of absolute imports, the USITC did not seem to focus on, or at least account for, this most recent decline to levels below any point of the investigated period, when it concluded that the ratio of imports to domestic production was "still significantly higher … than at the beginning of the period".[5049] Given the sharpness and significance of this most recent decrease, the Panel does not find the USITC explanation, as published in its Report[5050] to be adequate and reasoned enough to support a conclusion that CCFRS, as a proportion to domestic production, "is being imported in … increased quantities".

10.185 The Panel also need not express itself on the question whether the increase of imports, relative to domestic production occurring until 1998 could have qualified as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards because, in any event, that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken for itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in … increased quantities".

Conclusion

10.186 The Panel consequently finds that the USITC Report did not provide an adequate and reasoned explanation of how the facts support the determination that CCFRS was being imported in "increased quantities", contrary to the requirement of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities".

10.187 The Panel notes that the parties have also made submissions with regard to the question whether imports of the various products comprised in CCFRS, taken individually, have increased. However, the USITC did not make a determination on individual products within the CCFRS group. The USITC made its determination on increased imports only with regard to a category defined as CCFRS products.[5051] This determination, pursuant to which safeguard action has been taken against

[5047] USITC Report, pp. 49–50.
[5048] USITC Report, p. 50.
[5049] USITC Report, p. 50.
[5050] USITC Report, pp. 49–50.
[5051] USITC Report, Vol. I, p. 49. *See* also USITC Report, Vol. I, p. 25.

imports of CCFRS, is subject to review in this dispute. Therefore, in light of the Panel's standard of review, the Panel will not scrutinize individual items comprised in CCFRS.[5052]

(b) Tin mill products

(i) The USITC's findings

10.188 As regards increased imports of tin mill, the USITC determined:

> "We find that the statutory criterion of increased imports is met. We find that total imports[5053] of tin mill products have increased both in actual terms and relative to domestic production during the POI.[5054] In actual terms, imports increased from 444,684 short tons in 1996 to a peak level of 698,543 short tons in 1999, and while they declined to 580,196 short tons in 2000, the overall increase from 1996 to 2000 was 30.5 percent.[5055] Imports of tin mill products were 263,091 short tons in interim 2001, 11.1 percent lower than in interim 2000.[5056] The ratio of imports to domestic production increased during the POI, from 12.0 percent to 17.4 percent in 2000.[5057] The ratio of imports to production was 20.1 percent during the import volume peak in 1999. "[5058] [5059]

10.189 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5060]

[5052] We note the complainants' claims that the tariff quota imposed on slabs constitute a distinct measure from that imposed on the rest of CCFRS. The Panel does not examine these claims and arguments here given that the USITC made its determination on the basis of CCFRS as a single product which included slabs.

[5053] (original footnote) Including imports from NAFTA countries.

[5054] (original footnote) We recognize that the official import data for tin mill products, which is used in our discussion, overstate the imports subject to this investigation to some degree because it includes tin mill products specifically excluded from the request. For example, using Joint Respondents' data, imports of tin mill products increased from 414,013 short tons in 1996 to a peak level of 642,353 short tons in 1999, and declined to 491,836 short tons in 2000. The overall increase from 1996 to 2000 was 18.8 percent. *See* Appendix 2 to Request and Joint Respondents' Tin Mill Prehearing Brief at 5-7.

[5055] (original footnote) CR and PR at Tables FLAT-10 and FLAT-C-8.

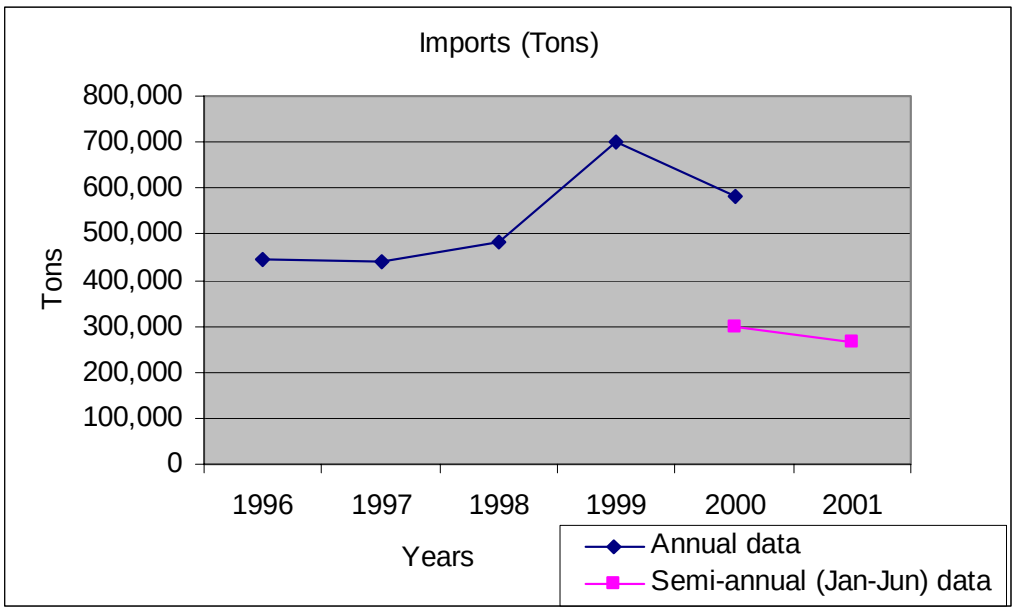
[5056] (original footnote) CR and PR at Tables FLAT-10 and FLAT-C-8.

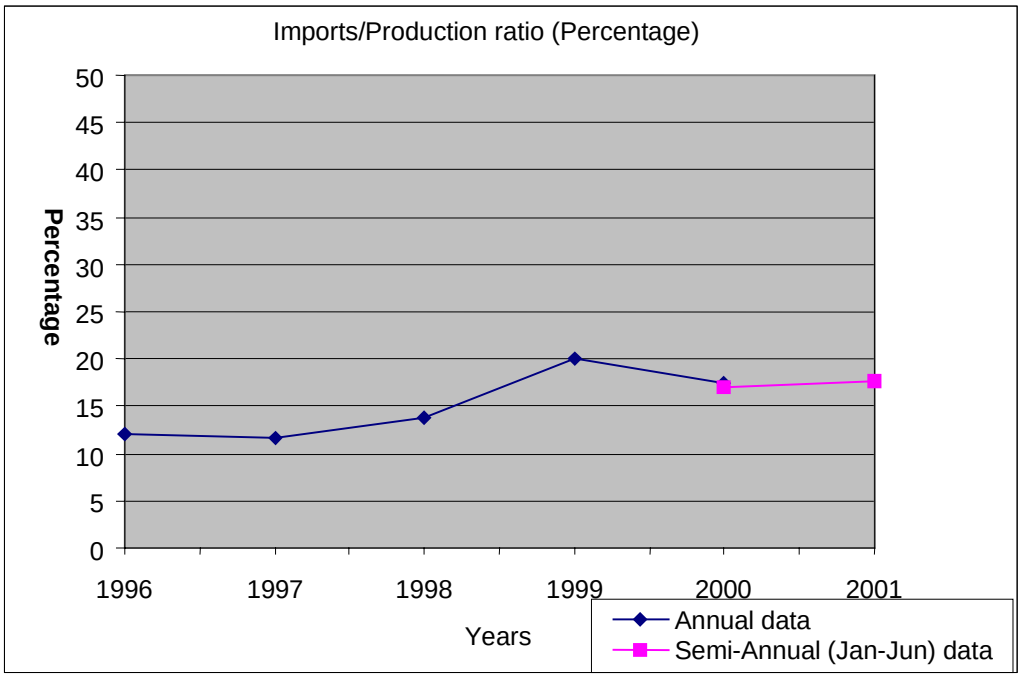
[5057] (original footnote) CR and PR at Table FLAT-10. Tin mill product imports were 17.7 percent of domestic production in interim 2001, compared to 17.1 percent in interim 2000. *Id*. Joint Respondents alleged that if the tin mill products excluded from the request were subtracted from the official import data, the ratio of subject imports to domestic production would increase from 11.2 percent in 1996 to a peak of 18.5 percent in 1999 and decline to 14.8 percent in 2000. Joint Respondents' Tin Mill Prehearing Brief at 7.

[5058] (original footnote) CR and PR at Table FLAT-10.

[5059] USITC Report, p. I-71.

[5060] The data represented in the following two graphs are contained in the USITC Report, in particular in Table FLAT-10 at FLAT-14 and Table FLAT C-8. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

10.190 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5.(b) as well as O.1 and 3 *supra*.

(iii) Analysis by the Panel

10.191 Before being able to review the USITC's determination on increased imports of tin mill the Panel needs to address the issue of the divergent findings made by individual USITC Commissioners:

four of the six Commissioners made findings on tin mill as a separate product[5061], but the two other Commissioners (Bragg and Devaney) treated tin mill products as part of the larger CCFRS category.[5062] The four who examined tin mill as a separate product made a common affirmative finding on increased imports and on serious injury, but later diverged on the question of causation, for which only Commissioner Miller made an affirmative determination.[5063] Ultimately, therefore, only Commissioner Miller reached positive findings regarding tin mill as a separate product. The two Commissioners who treated tin mill as part of CCFRS, reached a positive conclusion on that larger category. Despite the divergent product definitions, the USITC Report concludes that three Commissioners have made "an affirmative determination regarding imports of carbon and alloy tin mill products."[5064]

10.192 In the March Proclamation, the President did not select any of the various affirmative determinations on tin mill as the basis of the decision to impose the safeguard measure on tin mill. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the [US]ITC".[5065] Therefore, it is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Miller), although those three commissioners did not perform their analysis on the basis of the same like product definition.

10.193 The Panel recalls that a Member can impose a safeguard measure only after it has published a report that demonstrates that the WTO pre-requisites for the imposition of a safeguard are satisfied. The Panel agrees with the United States that there must always be a "connection" between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure.[5066] In fact, the measure ultimately imposed must be based on a determination and the underlying investigation, as published in the report. This report must thus provide a reasoned and adequate explanation of how the WTO requirements relating to the imposition of safeguard measures are satisfied. In application of its standard of review, a panel must review whether these requirements are satisfied.

10.194 On its face, the USITC (the three Commissioners voting in the affirmative) made divergent findings relating to tin mill and these different findings are impossible to reconcile, given that they are based on differently defined products. Whatever flexibility the Agreement on Safeguards accords to WTO Members as regards the structure of their internal decision-making processes[5067], it is clear from Articles 2.1 and 3.1 of the Agreement on Safeguards, Article 11 of the DSU and our standard of review that the competent authorities must always provide a reasoned and adequate explanation of their determinations and demonstrations. If they do not, a Panel cannot uphold the measure. The Panel fails to see how the USITC Report, as it stands, can provide a logical explanation of the measure imposed on tin mill and of why the conditions for its imposition, here, increased imports, are satisfied. There is no indication of how interested parties (and the Panel for that matter) can identify which of the various and inconsistent findings by various Commissioners is the basis for the imposition of the safeguard measure on tin mill.

[5061] USITC Report, pp. I-71 et seq.
[5062] USITC Report, p. I-71, footnote 368 and p. 279.
[5063] USITC Report, pp. I-307-309.
[5064] USITC Report, p. I-25.
[5065] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5066] United States' First Written Submission, para. 207.
[5067] *See* Appellate Body Report, *US – Line Pipe*, para. 158.

10.195 The Panel notes that the issue at hand is not one where a Member publishes dissenting opinions and where these dissents depart from the findings which serve as the basis of a measure. In the instant case, the three various individual findings all served as the basis of the "determination of the [US]ITC".[5068] The Panel believes that a Member is not permitted under Articles 2.1 and 3.1 of the Agreement on Safeguards to base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other. Such findings cannot simultaneously form the basis of a determination. For the purposes of the Agreement on Safeguards, with regard to, for instance, the question of whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products. The difference is that the import numbers for different product definitions will not be the same.

10.196 The Panel believes that this is not the situation that was at issue in *US – Line Pipe* where the Appellate Body held that no violation of the Agreement on Safeguards had occurred. The question in *US – Line Pipe* was whether a *determination* could leave open the question whether there was serious injury or threat of serious injury. From the perspective of the Agreement on Safeguards, the conditions of Article 2.1 are satisfied equally by serious injury and by threat of serious injury.[5069] The challenge was not that the *underlying report* was split and contained different reasonings that could not be reconciled one with another and that, therefore, there was a violation of Articles 2.1 and 3.1 of the Agreement on Safeguards.

10.197 The Panel adheres to the Appellate Body's statements made in *US – Line Pipe* on the Members' discretion regarding their internal decision-making process. Specifically, the Appellate Body found:

> "[W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*."[5070]

10.198 Against this background, the Panel is not concerned with the fact that, as in the present case, only the findings of one commissioner making an affirmative determination relate to tin mill as a separate product, while the United States' domestic law requires at least three affirmative determinations. It is for each Member to determine, in their domestic law, how many affirmative decisions are necessary in a collegial decision-making body, be it one, three, four (a majority) or six (unanimity). Obviously, the question of consistency or inconsistency with domestic law is not relevant to the question of WTO consistency. Therefore, the Panel sees no inconsistency with WTO law in the fact itself that only one commissioner reached affirmative findings with regard to tin mill products as a separate product.

[5068] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5069] Appellate Body Report, *US – Line Pipe*, para. 170.
[5070] Appellate Body Report, *US – Line Pipe*, para. 158.

10.199 However, if a Member *relies* on the findings made by *three* Commissioners and the findings of those *three* Commissioners constitute the *determination* of the competent authorities in the sense of Article 2.1 of the Agreement on Safeguards, there is a requirement for those findings to provide a reasoned and adequate explanation. A reasoned and adequate explanation is not contained in a set of findings which cannot be reconciled one with another.

10.200 In conclusion, the Panel, therefore, finds that there is a violation of the obligation under Articles 2.1 and 3.1 to provide a reasoned and adequate explanation of how the facts support the determination of increased imports, since the explanation consists of alternative explanations partly departing from each other which, given the different product bases, cannot be reconciled as a matter of their substance. Thus, the USITC Report does not contain a determination supported by a reasoned and adequate explanation of how the facts support the determination that tin mill products have been imported in such increased quantities, as required by Articles 2.1 and 3.1 of the Agreement on Safeguards.

(c) Hot-rolled bar

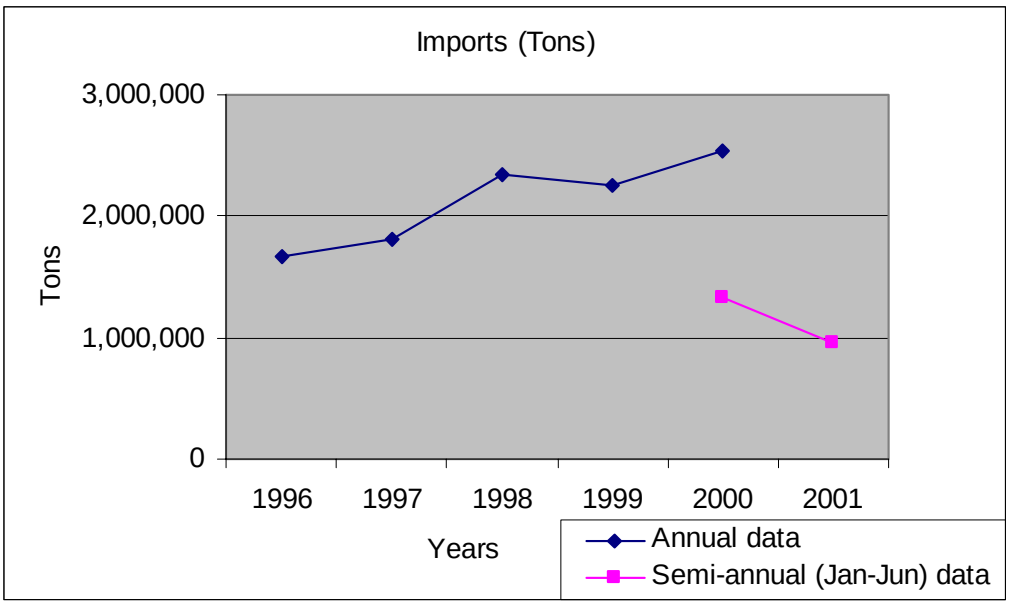
(i) The USITC's findings

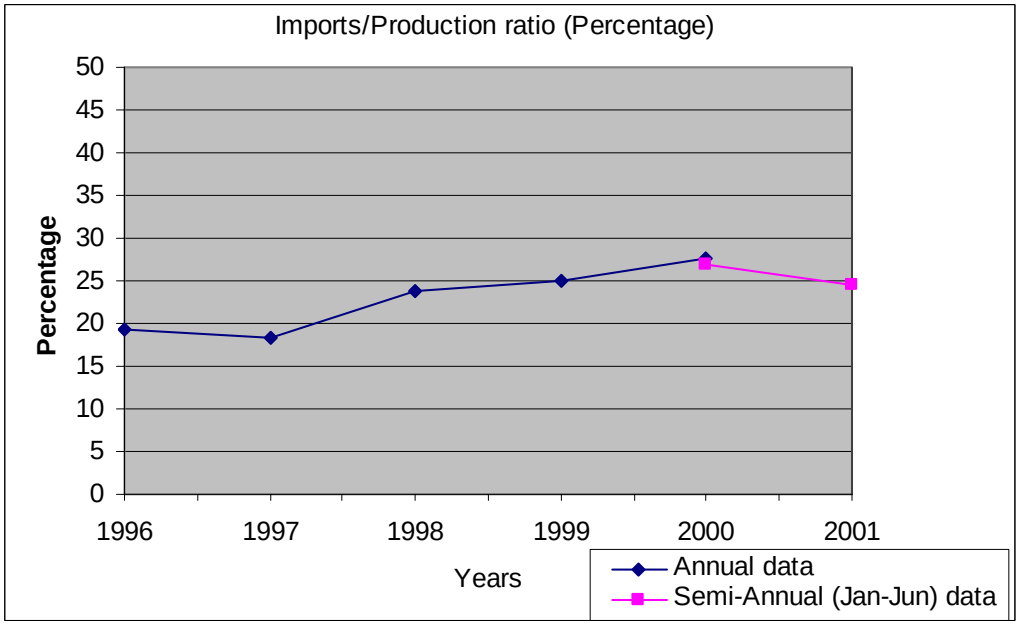
10.201 As regards increased imports of hot-rolled bar, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
> Imports of hot-rolled bar increased from 1.66 million tons in 1996 to 1.81 million tons in 1997 and then to 2.34 million tons in 1998. Imports then declined to 2.26 million tons in 1999 but increased in 2000 to 2.53 million tons. Imports were lower in interim (January-June) 2001, at 952,392 tons, than in interim 2000, when they were 1.34 million tons. Imports increased by 52.5 percent from 1996 to 2000 and by 11.9 percent from 1999 to 2000.[5071]
> As a ratio to US production, imports declined from 19.2 percent in 1996 to 18.4 percent in 1997, but then rose to 23.8 percent in 1998, 24.9 percent in 1999, and 27.5 percent in 2000. The ratio was lower in interim 2001, at 24.6 percent, than in interim 2000, when it was 27.0 percent.[5072]
> Imports were higher, both in absolute terms and relative to US production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year. While imports declined in the interim period comparison, the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.
> In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."[5073]

10.202 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5074]

[5071] (original footnote) CR and PR, Table LONG-5.
[5072] (original footnote) CR and PR, Table LONG-5.
[5073] USITC Report, Vol. I, p. 92.
[5074] The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-5 at LONG-9. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of





(ii) Claims and arguments of the parties

10.203 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5 (c) *supra*.

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imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Absolute imports

10.204 The Panel believes that the USITC's determination on increased imports of hot-rolled bar, as published in its report[5075], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the higher amount of imports in 2000 than in any previous year of the period examined and on the "rapid and dramatic increase" from 1999 to 2000. The decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers. It did so only with regard to imports relative to domestic production[5076], a finding with which the Panel will deal separately.

10.205 This failure to account for the most recent data from interim 2001, as far as absolute imports are concerned, is serious in the view of the Panel. The decrease from interim 2000 (1.34 million tons) to interim 2001 (952,392 tons) represented a decrease by 28.9%, whereas the increase in the year-to-year period before (1999 to 2000) that was characterized as "rapid and dramatic" was merely 11.9%. In light of this decrease in the most recent period, the Panel does not believe that the trend of imports from 1996 to 2000 (an increase by 52.5%) is sufficient to provide a basis for a finding that, at the moment of the determination, hot-rolled bar "is being imported in such increased quantities".

10.206 In the Panel's view, the trend of absolute imports between 1997 and interim 2001 is best described as an alternation of increases and decreases from year to year. Given this up-and-down movement ending with a decrease of 28.9% (in interim 2001), the Panel does not believe that the facts support a conclusion of increased imports, nor has the USITC provided an explanation to that effect. The Panel acknowledges that, until 2000, there was a net increasing trend, in other words, the two increases in 1998 and 2000 were stronger than the decrease in 1999. However, the picture changes again significantly, when one includes the decrease (by 28.9%) in interim 2001, a fact that the USITC acknowledged, but did not evaluate. Taking into account all qualitative and quantitative features of the trends of imports over the period of examination, the Panel, therefore, finds that the USITC's determination on increased imports of hot-rolled bar, as published in its Report[5077], does not contain a reasoned and adequate explanation of how the facts support a conclusion that hot-rolled bar "is being imported in such increased quantities."

10.207 It may well be that the increase occurring from 1997 to 1998, or from 1996 to 1998, taken by itself, would qualify as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards. However, at the time of the determination, this development was not a recent development. Given how the trends in imports developed after 1998, the increase up to 1998 is not a sufficient factual basis to support a determination in October 2001 that hot-rolled bar is "being imported in (such) increased quantities".

Relative imports

10.208 The Panel also considers that the USITC's determination on increased imports of hot-rolled bar relative to domestic production[5078] does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC's conclusion relied on the statement that imports

[5075] USITC Report, Vol. I, p. 92.
[5076] USITC Report, Vol. I, p. 92.
[5077] USITC Report, Vol. I, p. 92.
[5078] USITC Report, Vol. I, p. 92.

relative to domestic production in 2000 were "higher than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year." We note with puzzlement that the attributes "rapid and dramatic" refer to an increase from 24.9% (1999) to 27.5% (2000). The decline in imports in interim 2001 was acknowledged, but according to the USITC "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level."

10.209 The Panel is not convinced by this statement and does not consider it to be a reasoned and adequate explanation supporting the determination of increased imports, given that the ratio of imports to domestic production in the most recent period, interim 2001 (24.6%), not only declined compared with full-year or interim 2000 (27.5% and 27.0% respectively) but was also lower than in 1999 (24.9%) and nearly as low as in 1998 (23.8%). Therefore the facts do not support a conclusion that hot-rolled bar "is being imported in such increased quantities, … relative to domestic production".

Conclusion

10.210 The Panel consequently finds that the USITC Report[5079] did not provide an adequate and reasoned explanation of how the facts support the determination that hot-rolled bar was being imported in "increased quantities", contrary to the requirements of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities".

(d) Cold-finished bar

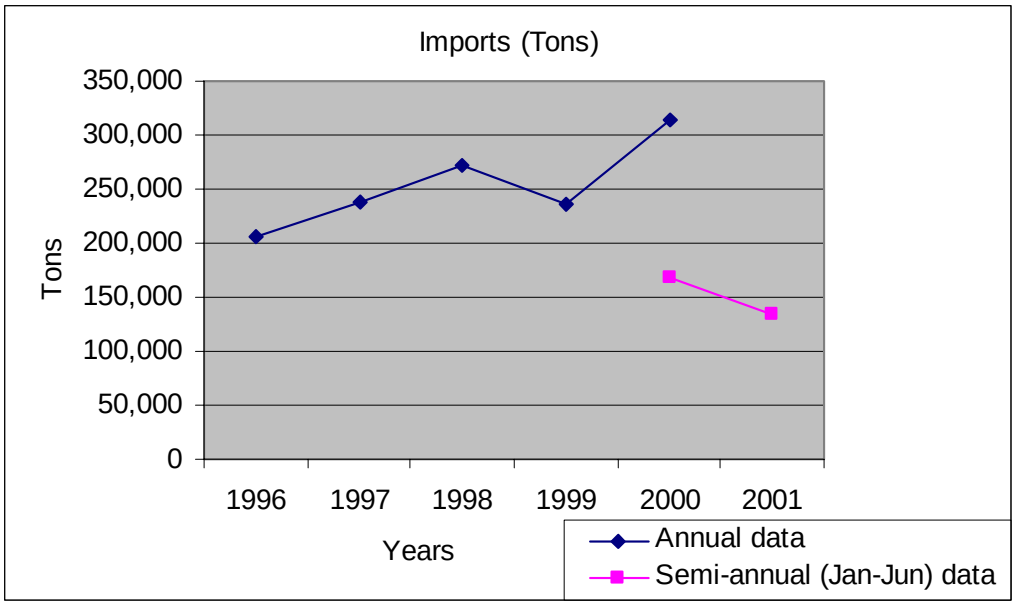
(i) The USITC's findings

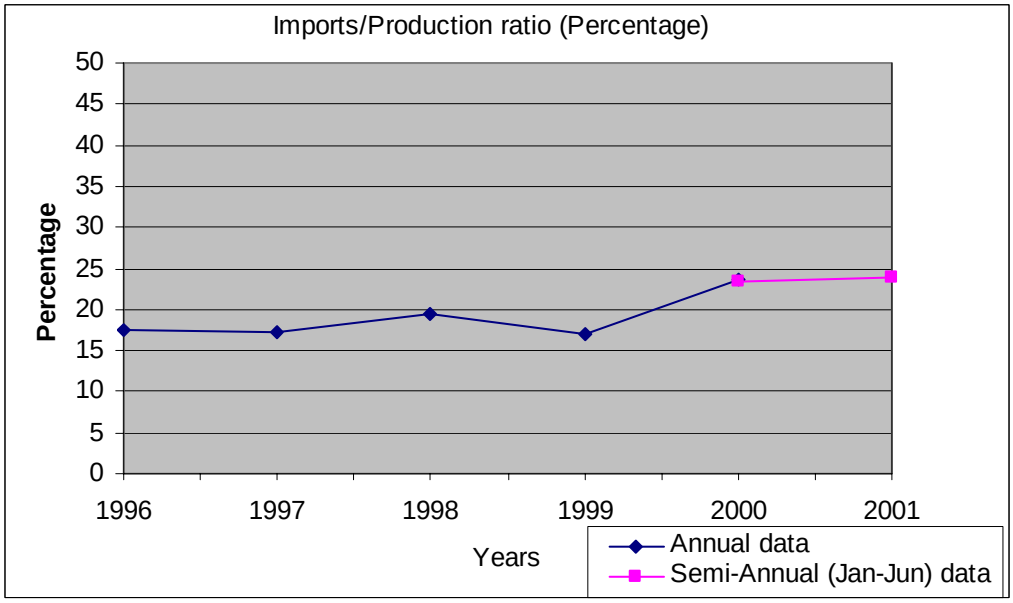
10.211 As regards increased imports of cold-finished bar, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
> Imports of cold-finished bar increased from 206,272 tons in 1996 to 238,221 tons in 1997 and then to 272,972 tons in 1998. Imports then declined to 235,693 tons in 1999 but increased in 2000 to 314,958 tons. Imports were lower in interim 2001, at 134,971 tons, than in interim 2000, when they were 169,889 tons. Imports increased by 52.7 percent from 1996 to 2000 and by 33.6 percent from 1999 to 2000.[5080]
> As a ratio to US production, imports declined from 17.6 percent in 1996 to 17.3 percent in 1997, rose to 19.5 percent in 1998, declined to 17.0 percent in 1999, and then rose to 23.7 percent in 2000. The ratio was higher in interim 2001, at 23.9 percent, than in interim 2000, when it was 23.6 percent.[5081]
> Imports were higher, both in absolute terms and relative to US production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase. Although import volumes declined in the interim period comparison, the ratio of imports to US production in interim 2001 was higher than in any full-year during the period examined.
> In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."[5082]

[5079] USITC Report, Vol. I, p. 92.
[5080] (original footnote) CR and PR, Table LONG-6.
[5081] (original footnote) CR and PR, Table LONG-6.
[5082] USITC Report, Vol. I, pp. 101-102.

10.212 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5083]





(ii) Claims and arguments by the parties

10.213 The claims and arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5.(d) *supra*.

[5083] The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-6 at LONG-10. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Relative imports

10.214 The Panel believes that the USITC's determination on increased imports of cold-finished bar, relative to domestic production[5084], contains an adequate and reasoned explanation of how the facts support the determination. After an up-and-down movement between 1996 and 1999 (starting with 17.6% and ending with 17.0%) without any significant overall net trend, imports increased to 23.7% in 2000 and 23.9% in interim 2001. Comparing the two ratios, this represents 40.6% increase and is a development in the recent past. Given the overall neutral trends in the period until 1999, the Panel sees no development in the period preceding the very recent past that would cast doubt on its evaluation of the most recent trends.[5085]

10.215 Therefore, the Panel considers that the USITC's determination on increased imports of cold-finished bar, relative to domestic production[5086], contains an adequate and reasoned explanation of how the facts support the determination.

10.216 The Panel notes the doubts expressed by the European Communities as to whether the mere six per cent increase in the ratio between imports and domestic production could be seen as a sudden, sharp and significant surge in imports that is capable of causing injury to a domestic industry.[5087] The Panel also notes that 6% is the absolute difference between the two ratios, a variable that is not particularly meaningful. As to whether this proportionate increase by 40.6% is sudden and significant enough in order to cause serious injury, the Panel believes that the increase by 40.6% over the most recent 18 months evidences a certain degree of sharpness, significance, recentness and suddenness.

10.217 Whether the increase by 40.6% is sudden, sharp, recent and significant *enough as to cause serious injury* is a question that is appropriately to be addressed in the context of *causation of serious injury*, not in the context of the condition of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

10.218 Further, the Panel does not agree with the European Communities' argument that the *absolute* decrease in imports from 2000 to 2001 (interim period) detracts from the conclusion of the *relative* increase.[5088] The Agreement on Safeguards makes clear that the requirement is that of an increase, either in absolute or in relative terms. If there is an increase *both* in absolute *and* in relative terms, the condition of increased imports, of course, is also met. However, as a legal matter, a decrease in absolute terms does not invalidate the sufficiency of a relative increase. The Panel also believes that this legal framework is in line with the object and purpose of Article XIX:1(a) of GATT 1994 and the Agreement on Safeguards to allow for emergency action in specific circumstances: if absolute imports decrease, but imports, relative to domestic production, are on the increase, this means that the decrease of domestic production is stronger than that of imports (in absolute levels). Such a scenario may well warrant the imposition of a safeguard measure.

[5084] USITC Report, Vol. I, pp. 101-102.
[5085] European Communities' first written submission, para. 321.
[5086] USITC Report, Vol. I, pp. 101-102.
[5087] European Communities' first written submission, para. 321.
[5088] European Communities' first written submission, para. 321.

Absolute imports

10.219 Given the Panel's finding regarding relative imports, there is no need to make findings on absolute imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Therefore, since the Panel has already disposed of the claims on the basis of relative imports, the Panel sees no need to examine the claims relating to absolute imports.

Conclusion

10.220 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of cold-finished bar with regard to relative imports. The USITC's determination that cold-finished bar was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects violation claims made in this regard.

(e) Rebar

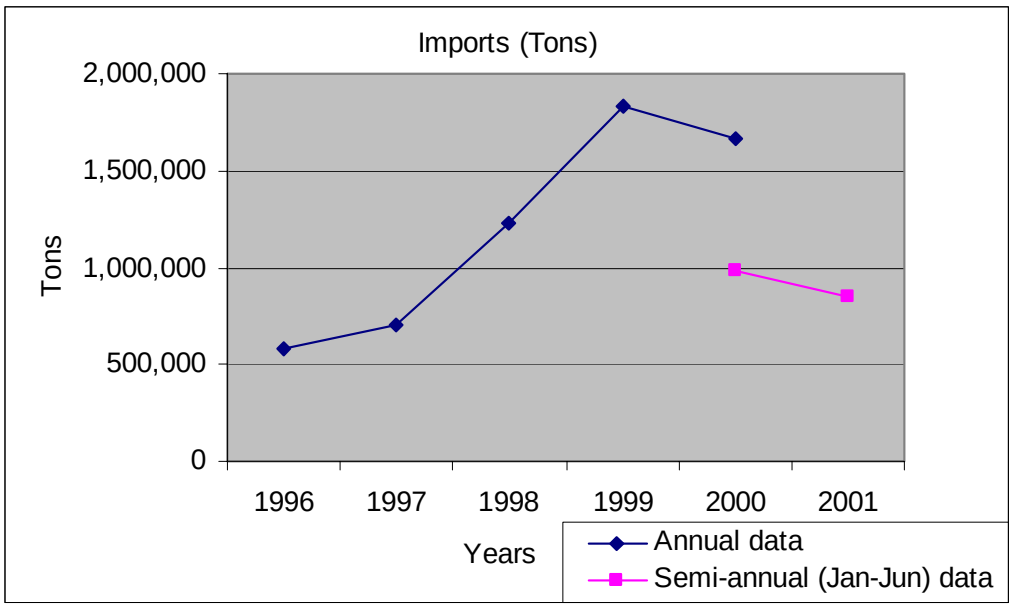
(i) The USITC's findings

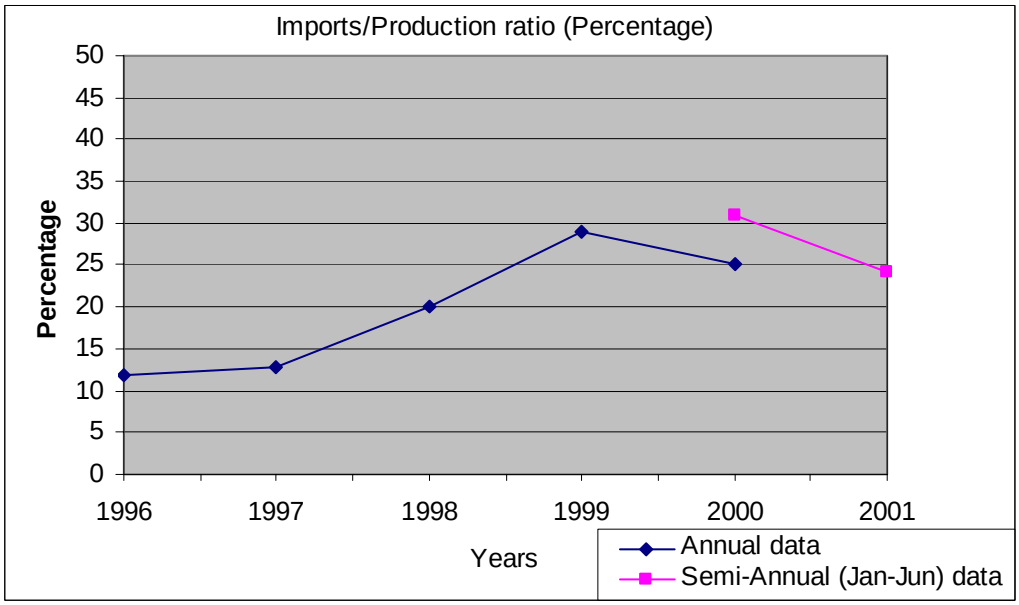
10.221 As regards increased imports of rebar, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
> Imports of rebar increased from 581,731 tons in 1996 to 701,303 tons in 1997 and then to 1.2 million tons in 1998. Imports further increased to 1.8 million tons in 1999 and then declined to 1.7 million tons in 2000. Imports were lower in interim 2001, at 852,488 tons, than in interim 2000, when they were 985,991 tons.[5089]
> As a ratio to US production, imports rose from 11.7 percent in 1996 to 12.8 percent in 1997, 19.9 percent in 1998, and 29.1 percent in 1999. This ratio then declined to 25.2 percent in 2000. The ratio was lower in interim 2001, at 24.3 percent, than in interim 2000, when it was 30.9 percent.[5090]
> Notwithstanding the decline from 1999 levels, imports in 2000 were substantially higher than they were during earlier portions of the period examined, reflecting the rapid and dramatic increase in the prior two years. The quantity of imports in 2000 was 187.0 percent above the 1996 quantity and 35.8 percent over the 1998 quantity, and the ratio of imports to US production in 2000 was more than double the ratio in 1996. By the same token, import quantities for the first six months of 2001 were higher than the quantities for the full-years of either 1996 or 1997, and the ratio of imports to US production in interim 2001 was higher than that for any year from 1996 to 1998.
> In view of the above, we find that imports are in increased quantities and that the first statutory criterion is satisfied."[5091]

10.222 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5092]

[5089] (original footnote) CR and PR, Table LONG-7.
[5090] (original footnote) CR and PR, Table LONG-7.
[5091] USITC Report, Vol. I, p. 109.





(ii) Claims and arguments of the parties

10.223 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(e) *supra*.

[5092] The data represented in the following two graphs are contained in the USITC Report, in particular in Table LONG-7 at LONG-11. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Absolute imports

10.224 The Panel believes that the USITC's determination on increased imports of rebar in absolute terms[5093], contains an adequate and reasoned explanation of how the facts support the determination. In particular, the Panel considers that it amounts to such an adequate and reasoned explanation given that imports more than tripled from 1996 to 1999 (from 581,731 tons to 1.8 million tons) and then declined relatively insignificantly in 2000 (to 1.7 million tons, or by 5.6%) and in interim 2001 (by 13.5%).

10.225 These decreases in themselves might not be insignificant, but as the Panel has stated, the analysis of imports must take into account all features of the development of imports over the period examined, which is what the USITC did with regard to imports of rebar. In light of the tripling of imports, the decrease over the last 18 months is not significant enough in order to stand in the way of a conclusion that rebar "is being imported in such increased quantities". As the Panel has stated, there is no need for imports to "be increas*ing*". Instead, the product must (presently) be imported "in increas*ed* quantities". The Panel has no doubt that the increase until 1999 is recent enough and the subsequent decrease – in comparison – small enough in order to support such a conclusion. On the basis of the facts, the Panel, therefore, disagrees with the contention of the complainants. On the contrary, rebar is, as a matter of fact, being imported in recently and suddenly increased quantities.

10.226 As regards the question raised by the complainants whether the increase was sudden enough, sharp enough, recent enough and significant enough *to cause serious injury*, that is a question more appropriately addressed in the context of *causation of serious injury*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. The Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards. Therefore, the Panel considers that the USITC's determination on increased imports of rebar[5094] contains an adequate and reasoned explanation of how the facts support the determination.

Relative imports

10.227 Given the Panel's finding regarding absolute imports, there is no need to make findings on relative imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Since the Panel has already disposed of the claims on the basis of absolute imports, the Panel sees no need to examine the claims relating to relative imports.

Conclusion

10.228 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of rebar with regard to absolute imports. The USITC's determination that rebar was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". The Panel rejects the violation claims made in this regard.

[5093] USITC Report, Vol. I, p. 109.
[5094] USITC Report, Vol. I, p. 109.

(f) Welded pipe

(i) The USITC's findings

10.229 As regards increased imports of welded pipe, the USITC determined:

> "We find that the statutory criterion of increased imports is met. Imports of welded pipe other than OCTG increased steadily throughout most of the period examined in both absolute terms and relative to domestic production, with the largest increase occurring in 2000. Imports increased from 1.57 million short tons in 1996 to 1.86 million short tons in 1997 and 2.26 million short tons in 1998, declined slightly to 2.12 million short tons in 1999, and then surged to 2.63 million short tons in 2000. Imports increased by 24.2 percent in quantity between 1999 and 2000, which was the largest annual percentage increase of the period examined, and in 2000 were at their highest level of the period examined. Imports continued at a very high level in interim 2001, only slightly (1.7 percent) below the level of the same period of 2000. Imports were 1.41 million short tons in interim 2001, compared to 1.44 million short tons in the same period of 2000.[5095] Thus, imports of welded (non-OCTG) pipe have increased in absolute terms.[5096]
>
> Imports of welded (non-OCTG) pipe also increased relative to domestic production, with the largest increase in the ratio occurring at the end of the period examined, between 1999 and 2000, and into 2001.[5097] Thus, imports have increased relative to domestic production as well as in absolute terms."[5098]

10.230 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5099]

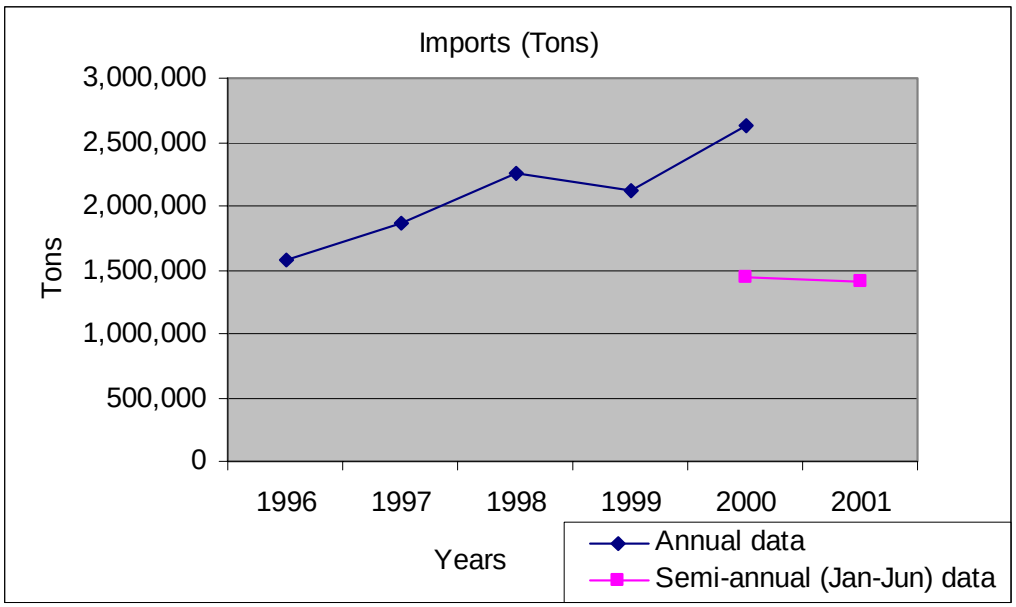
[5095] (original footnote) CR and PR at TUBULAR-C-4.

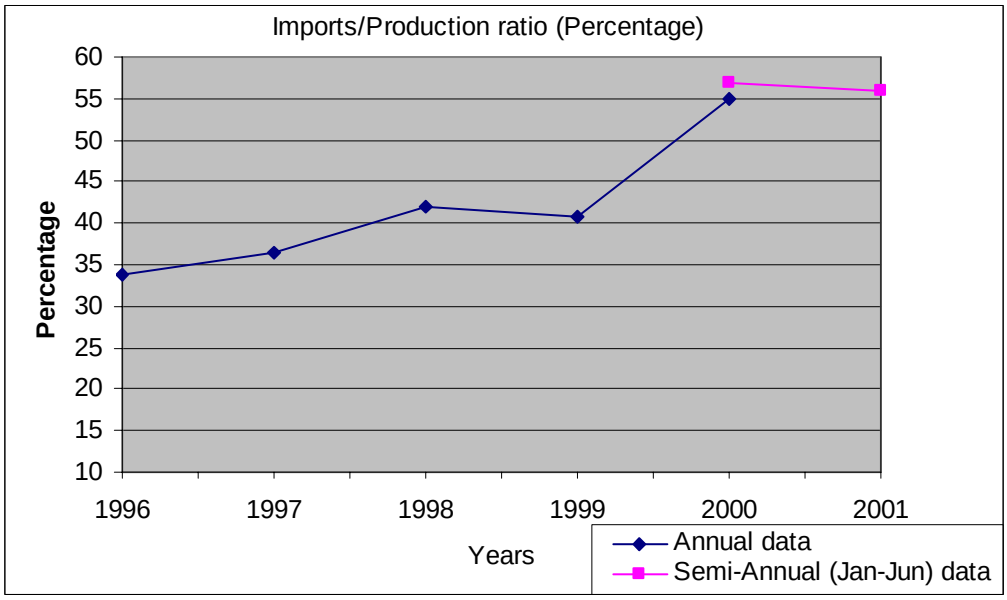
[5096] (original footnote) ESTA argues imports of welded line pipe decreased in the most recent period, based on data they have compiled for 2001. ESTA Posthearing Injury Brief at 8-9. ESTA provided extensive documentation regarding product entered as plate by Berg Steel Pipe Corporation into its foreign trade zone (FTZ) – but entered for customs purposes as imports for consumption of welded line pipe – for this limited period in a separate submission. *See* ESTA submission of October 9, 2001. We note that Berg only provided data for interim 2001, whereas Berg has conducted similar activities in prior years included in our period examined. *See, e.g., Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Invs. Nos. 701-TA-387-391 (Final) and 731-TA-816-821 (Final), USITC Pub. 3273 (Jan. 2000) at IV-5. Thus adjusting data for only one part of the period examined may be misleading. In any event, even if these quantities are excluded, the overall year-to-year trend in imports is not changed; nor is the fact that January-June 2001 imports are higher than imports during the immediately preceding six-month period (July-December 2000). Accordingly, these data do not alter our conclusion that imports increased, or (as described below) that increased imports are a substantial cause of the threat of serious injury.

[5097] (original footnote) In 1996, the ratio of imports to production was 33.8 percent. The ratio increased to 36.4 percent in 1997 and 41.9 percent in 1998, fell slightly to 40.8 percent in 1999, and then increased sharply to 55.0 percent in 2000. The ratio of imports to production was 55.9 percent in interim 2001, comparable to the 56.8 percent level in the same period of 2000. CR at TUBULAR-11; PR at TUBULAR-8.

[5098] USITC Report, Vol. I, pp. 157-158.

[5099] The data represented in the following two graphs are contained in the USITC Report, in particular in Table TUBULAR-6 at TUBULAR-8 and Table TUBULAR-C-4. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

10.231 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(f) *supra*.

(iii) Analysis by the Panel

Absolute imports

10.232 In the present context, the Panel does not address the contention of the European Communities, Korea and Switzerland that the USITC was supposed to make findings on each of the

specific products it grouped together as "certain tubular products".[5100] This is similar to the arguments made by the European Communities, Korea and Switzerland that the definitions of the "imported product" and the "domestic industry producing like … products" were erroneous. The Panel will, in its examination of the USITC's "increased imports" finding, assess the USITC's determination on the basis of the product identified by the USITC in this regard without prejudice to the question of the product/industry definition itself.[5101]

10.233 The Panel believes that the USITC's determination on increased imports of welded pipe in absolute terms[5102] contains an adequate and reasoned explanation of how the facts support the determination. The USITC took into account the import data for each of the years of the period of investigation and conducted a satisfactory analysis of the developments of imports. As the USITC noted, imports declined only from 1998 to 1999 (from 2.26 to 2.12 million short tons, i.e. by 6.2%) and from interim 2000 to 2001 (by 1.7%)[5103], whereas all other years showed increases. Each of these increases was more significant than the two mentioned decreases, so that the overall evaluation is that of a clearly discernible increase. Against the background of the total increase from 1996 to 2000 (from 1.57 million short tons to 2.63 million short tons, i.e. by 67.5%), the subsequent decrease in interim 2001 (by 1.7%) means that imports remained at increased levels even in the most recent past. These facts that were listed and evaluated in the USITC Report, in the view of the Panel, do support a conclusion that welded pipe "is being imported in (such) increased quantities".

10.234 The increase also shows a certain degree of suddenness, sharpness and significance. The Panel disagrees with Switzerland's contention that the increase of imports of welded pipe was "steady" and "gradual", hence "adjustable" and, therefore, not an increase satisfying the requirements of Article 2.1 of the Agreement on Safeguards. The Panel recognizes the possibility that, due to the gradual and steady pattern of an increase, the domestic industry manages to adjust and, therefore, suffers no injury. However, this is a question to be addressed within the context of whether there is serious injury and whether it has been caused by increased imports. An increase in absolute terms may even go hand in hand with an equally strong, or stronger increase of domestic production and a flourishing domestic industry. In such a case, there would be no relative increase, and there may not be *any causation of serious injury*. However, for the purposes of the first condition of Article 2.1 of the Agreement on Safeguards, an absolute increase (without a relative increase) is sufficient.

10.235 The Panel also sees no relevance in the point raised by Switzerland that the increase between 1996 and 1998 was stronger and did not result in the imposition of a safeguard measure. WTO Members do not forego their right to impose a safeguard measure because they refrained from taking such action in a past situation. There is also no justification for the additional argument that, because of an increase at a previous point in time, the more recent increase cannot be sudden and sharp enough so as to qualify as an increase in the sense of Article 2.1 of the Agreement on Safeguards. According to this argument, a Member would forego the right to take a safeguard measure, if in the most distant past, there was a very sharp and sudden increase, which is followed by a less significant increase causing additional serious injury to the relevant domestic industry. The Panel sees no basis in

[5100] European Communities' first written submission, para. 236. European Communities' second written submission, paras. 140 and 283-285.

[5101] The Panel recalls that, for reasons of logic, it has to make this assumption in order to be able to review the USITC's determination with a view to assessing the claim of an inconsistency with the "increased imports" requirement itself. The Panel notes that previous panels and the Appellate Body have operated with similar assumptions, *see*, e.g., Appellate Body Report, *US – Lamb*, paras. 121, 172; and Panel Report, *US – Lamb*, para. 8.1.

[5102] USITC Report, Vol. I, p. 157.

[5103] Ibid.

Article XIX:1 of GATT 1994 or in the Agreement on Safeguards for the proposition that a WTO Member should be prohibited from applying a safeguard measure in such a scenario.

10.236 Whether the increase in the instant case was sudden enough, sharp enough, recent enough and significant enough *to cause serious injury* is a question that is appropriately addressed in the context of *causation of serious injury*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

10.237 The Panel also rejects the European Communities' contention that the USITC failed to provide annual percentage increases and to evaluate *all* the trends by comparing their increases and decreases over the period of investigation.[5104] The requirement under the Agreement on Safeguards is not to present the data in all kinds of possible ways. Rather, the requirement is to provide an adequate and reasoned explanation of how the facts support the conclusion about increased imports. The Panel believes that the USITC has complied with this requirement in this case.

Relative imports

10.238 Given the Panel's finding regarding absolute imports, there is no need to make findings on relative imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Since the Panel has already disposed of the claims on the basis of absolute imports, the Panel sees no need to examine the claims relating to relative increase.

Conclusion

10.239 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of welded pipe with regard to absolute imports. The USITC's determination that welded pipe was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects the violation claims that have been made in this regard.

(g) FFTJ

(i) The USITC's findings

10.240 As regards increased imports of FFTJ, the USITC determined:

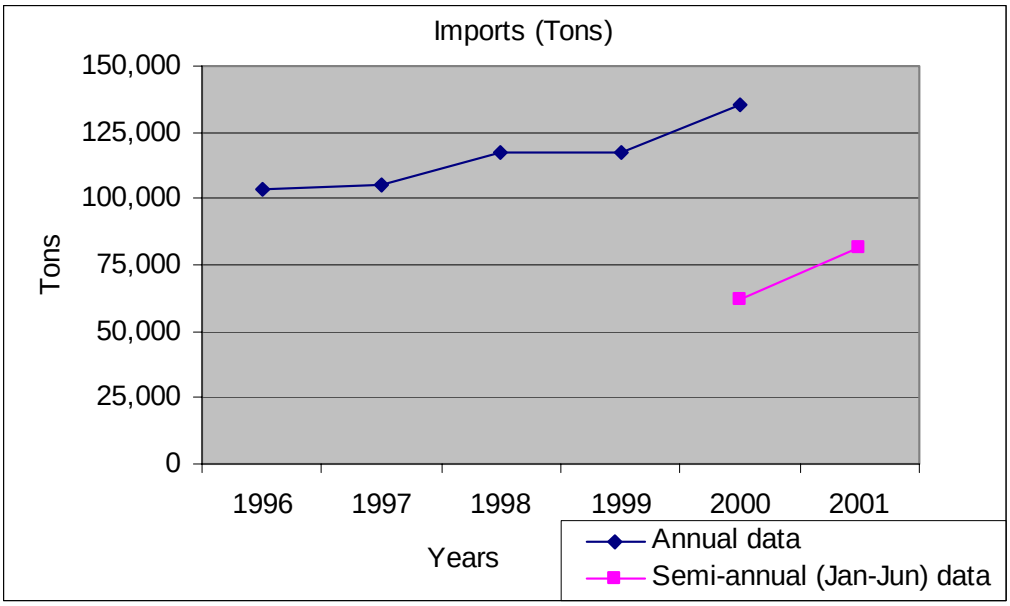
> "We find that the statutory criterion of increased imports is met. Imports of fittings and flanges steadily increased in both absolute terms and relative to domestic production during the period examined, with the largest increase occurring at the end of the period. Imports increased by 30.8 percent from 1996 to 2000, including 15.3 percent between 1999 and 2000. Imports were 32.1 percent higher in interim 2001 than in the same period of 2000.[5105]

[5104] European Communities' first written submission, para. 334.

[5105] (original footnote) Imports were at their highest level of the period examined in 2000 (135,399 short tons), and were significantly above the level of the second highest year, 1999 (117,461 short tons). Imports in interim 2001 were 81,380 short tons, well above the level of the same period in 2000 (61,588 short

> The ratio of imports to US production also increased significantly during the period examined, rising from 50.5 percent in 1996 to 69.7 percent in 2000, and was at its highest full-year level in 2000. The ratio in interim 2001 (88.8 percent) was substantially above the level of the same period of 2000 (59.4 percent).[5106]
> Thus, imports of fittings, flanges, and tool joints are entering the United States in increased quantities."[5107]

10.241 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5108]

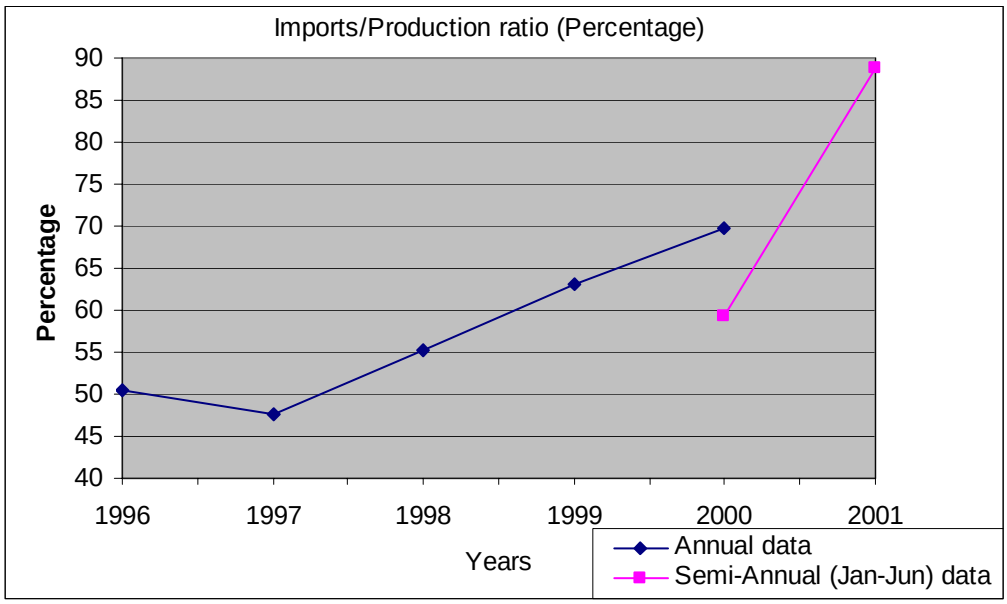


tons). The value of total imports also increased substantially during the period examined (45.9 percent), and between 1999 and 2000 (19.3 percent), and was at its highest full-year level in 2000 ($307.9 million). The value of imports was significantly higher in interim 2001 ($182.3 million) than in the same period of 2000 ($144.7 million). CR and PR at Table TUBULAR-C-6.

[5106] (original footnote) CR and PR at Table TUBULAR-8.

[5107] USITC Report, Vol. I, p. 171.

[5108] The data represented in the following two graphs are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10 and Table TUBULAR-C-6. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.



(ii) Claims and arguments of the parties

10.242 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(g) *supra*.

(iii) Analysis by the Panel

Relative imports

10.243 In the present context, the Panel does not address the contention of the European Communities that the USITC was supposed to make findings on each of the specific products it grouped together in its mix of heterogeneous products.[5109] This is the same argument advanced by the European Communities in the context of its claim of an erroneous definition of the "imported product" and the "domestic industry producing like … products". The Panel will, in its examination of the "increased imports" finding, assess the USITC's determination using as its basis the product category on which it was made. In this review, it is to be assumed that the product definition is correct, without prejudice to the question of the product/industry definition itself.[5110]

10.244 The Panel believes that the USITC's determination on increased imports of FFTJ in relative terms[5111] contains an adequate and reasoned explanation of how the facts support the determination. The USITC noted how much imports, relative to domestic production, had increased during the entire period of investigation and assessed the significance of that increase. The USITC also noted that the end of the period of examination showed the most significant increases (from 50.5% to 69.7% in 2000 and from 59.4% to 88.8% from interim 2000 to interim 2001. Also, in the light of the fact that only

[5109] European Communities' first written submission, para. 344.

[5110] The Panel recalls that, for reasons of logic, it has to make this assumption in order to be able to review the USITC's determination with a view to assessing the claim of an inconsistency with the "increase" requirement itself. The Panel notes that previous panels and the Appellate Body have operated with similar assumptions, *see*, e.g., Appellate Body Report, *US – Lamb*, paras. 121, 172; and Panel Report, *US – Lamb*, para. 8.1.

[5111] USITC Report, Vol. I, p. 171.

the period from 1996 to 1997 showed a decrease (from 50.5% to 47.7%) and that this decrease was less significant than each of the year-to-year increases in the period thereafter, the Panel considers that the increase found by the USITC is of a recent nature. The facts listed and evaluated in the USITC Report, in the view of the Panel, support a conclusion that FFTJ "is being imported in (such) increased quantities".

10.245 The increase also shows a certain degree of sharpness, suddenness and significance, particularly in the very recent past. The Panel disagrees with the European Communities' contention that the USITC failed to explain why the "steady increase" in imports of FFTJ was "sharp and significant enough so as to cause serious injury or a threat thereof".[5112]

10.246 Whether the increase in the instant case was sharp and significant enough *to cause serious injury or threat thereof* is a question that is appropriately addressed in the context of *causation of serious injury or threat thereof*, not in the context of the requirement of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

10.247 The USITC's determination that FFTJ was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 Agreement on Safeguards that the product "is being imported in (such) increased quantities". The Panel rejects the violation claims made in this regard.

Absolute imports

10.248 Given the Panel's finding regarding relative imports, there is no need to make findings on absolute imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Since the Panel has already disposed of the claims on the basis of relative imports, the Panel sees no need to examine the claims relating to absolute increase.

Conclusion

10.249 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of FFTJ with regard to relative imports. The USITC's determination that FFTJ was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects the violation claims made in this regard.

(h) Stainless steel bar

(i) The USITC's findings

10.250 As regards increased imports of stainless steel bar, the USITC determined:

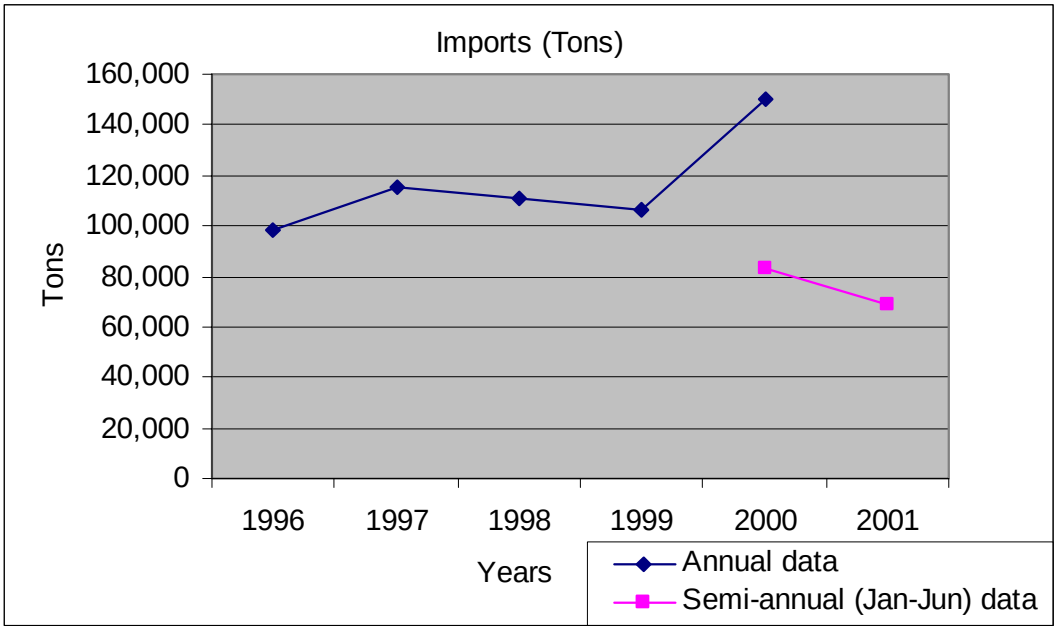
> "We find that the statutory criterion of increased imports is met.
>
> In terms of quantity, imports of stainless bar and light shapes increased by 53.8 percent during the five full-years of the period of investigation, growing from 97.9

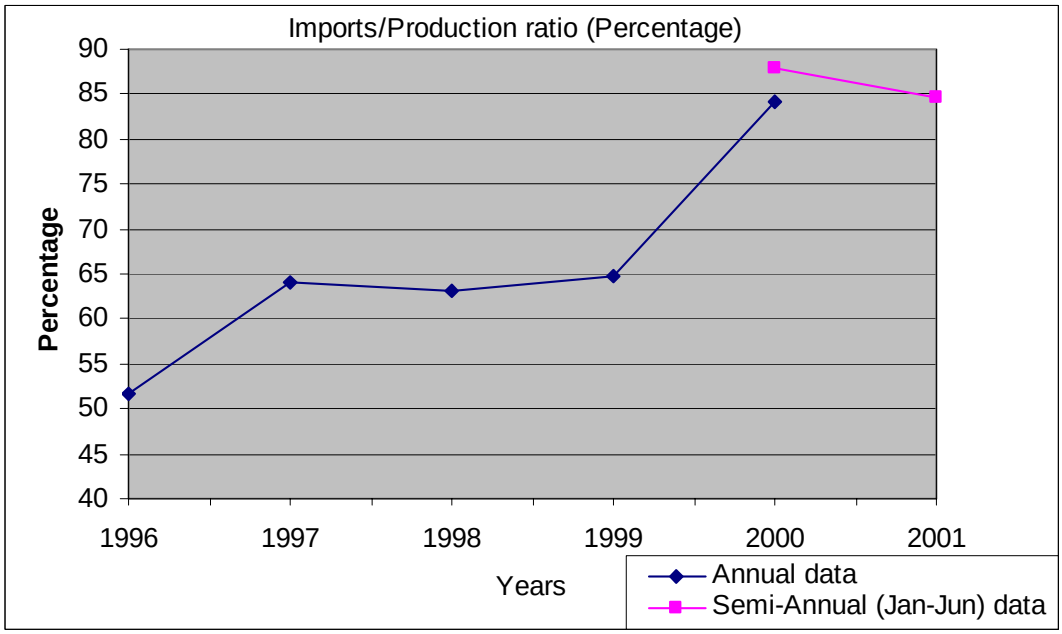
[5112] European Communities' first written submission, para. 344.

> thousand short tons in 1996 to 150.6 thousand short tons in 2000.[5113] Although the quantity of imports fluctuated somewhat (declining slightly in 1998 and 1999 from its level in 1997), a rapid and dramatic increase in import quantity occurred during the last full-year of the period of investigation, when imports of stainless bar grew by 44 thousand short tons.[5114] The quantity of imports declined between interim 2000 and interim 2001, dropping from 83.4 thousand short tons to 69.2 thousand short tons.[5115]
>
> The ratio of imports of stainless steel bar to domestic production also increased significantly during the period, growing from 51.8 percent in 1996 to 84.1 percent in 2000, with the largest single percentage increase in the ratio (19.3 percentage points) occurring in 2000.[5116] The ratio of imports to domestic production decreased from 87.9 percent in interim 2000 to 84.6 percent in interim 2001.[5117]
>
> In sum, imports of bar and light shapes increased significantly, both in quantity terms and as a ratio to domestic production, between 1996 and 2000, with the largest single increase in imports occurring during the last full-year of the period. Although there was a decline in imports in terms of quantity and as a ratio to domestic production between interim 2000 and interim 2001, we find that the first statutory criterion is satisfied."[5118]

10.251 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5119]

[5113] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5114] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5115] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5116] (original footnote) CR and PR at Table STAINLESS-6.
[5117] (original footnote) CR and PR at Table STAINLESS-6.
[5118] USITC Report, Vol. I, pp. 205-206.
[5119] The data represented in the following two graphs are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11 and Table STAINLESS-C-4. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

10.252 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(h) *supra*.

(iii) Analysis by the Panel

Relative imports

10.253 The Panel believes that the USITC's determination on increased imports of stainless steel bar, relative to domestic production[5120], contains an adequate and reasoned explanation of how the facts support the determination. The USITC found that the "ratio of imports of stainless steel bar to domestic production increased significantly during the period, growing from 51.8 percent in 1996 to 84.1 percent in 2000". The USITC also noted that "the largest single percentage increase in the ratio (19.3 percentage points)" occurred in 2000. According to the USITC, the slight decrease in the most recent past (from 87.9% in interim 2000 to 84.6% in interim 2001) was not an obstacle for finding that the requirement of increased imports was satisfied.[5121]

10.254 The Panel considers this to be a satisfactory explanation of how the facts support the determination. In particular, in the light of the significant increase from 1999 to 2000 (19.3 percentage points), the decline by 3.3 percentage points from interim 2000 to interim 2001 is, contrary to what the European Communities has stated[5122], insignificant. It simultaneously does not detract from a finding that imports, relative to domestic production, remain at high levels so that stainless steel bar "is being imported in (such) increased quantities".

10.255 The Panel is satisfied that the increase of relative imports of stainless steel bar, given the sharp increase from 1999 to 2000 shows a certain degree of recentness, sharpness, suddenness and significance. Whether the increase by 40.6% is sudden, sharp and significant *enough as to cause serious injury* is a question that is appropriately to be addressed in the context of *causation of serious injury*, not in the context of the condition of the increase, where no well-founded judgment in this regard can be made. In this regard, the Panel's finding on increased imports must be read together with its subsequent findings on the other conditions of Article 2.1 of the Agreement on Safeguards.

Absolute imports

10.256 Given the Panel's finding regarding relative imports, there is no need to make findings on absolute imports, since such findings could not change the overall result that the complainants' claims of violation of Article 2.1 of the Agreement on Safeguards on the lack of increased imports are to be rejected. Therefore, since the Panel has already disposed of the claims on the basis of relative imports, the Panel sees no need to examine the claims relating to absolute increase.

Conclusion

10.257 The Panel consequently finds that the USITC Report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of stainless steel bar with regard to relative imports. The USITC's determination that stainless steel bar was being imported in "increased quantities" is not inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities". Therefore, the Panel rejects the violation claims made in this regard.

[5120] USITC Report, Vol. I, pp. 101-102.
[5121] USITC Report, Vol. I, p. 206.
[5122] European Communities' first written submission, para. 350.

(i) Stainless steel wire

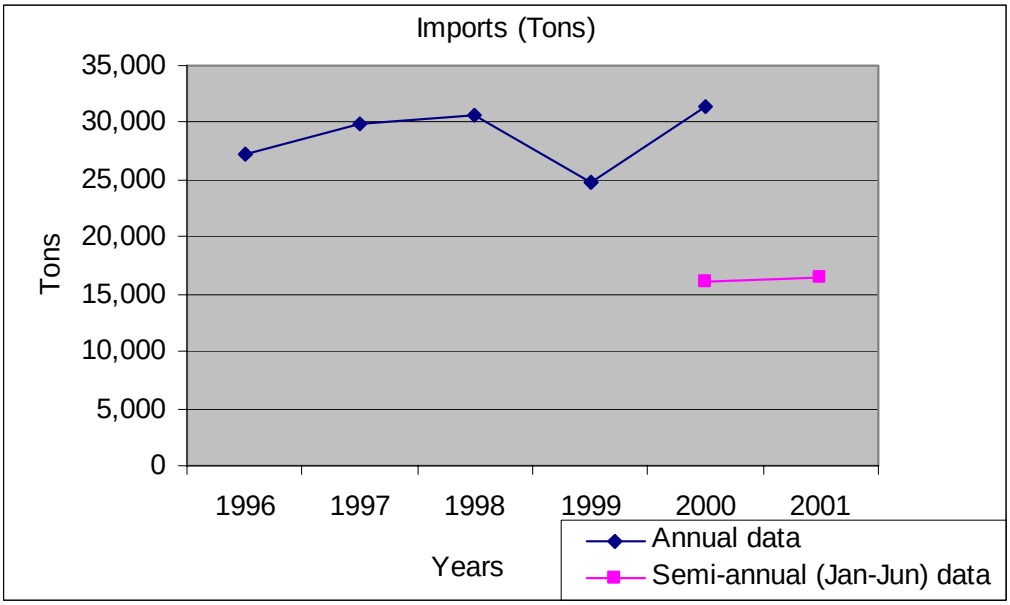
(i) The USITC's findings

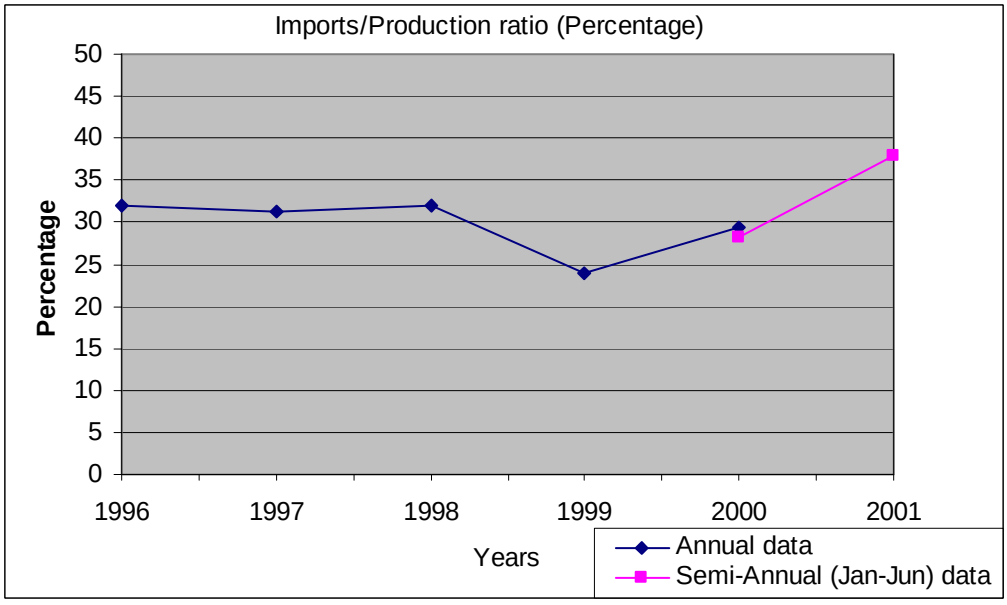
10.258 As regards increased imports of stainless steel wire, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
>
> In quantity terms, imports of stainless wire increased from 27.3 thousand short tons in 1996 to 31.3 thousand short tons in 2000.[5123] The quantity of stainless wire imports fluctuated somewhat during the period, increasing from 27.3 thousand short tons in 1996 to 29.9 thousand short tons in 1997 and then to 30.7 thousand short tons in 1998.[5124] The quantity of imports then declined by 19.4 percent, to 24.7 thousand short tons, in 1999. However, the single largest increase in import quantity occurred between 1999 and 2000, when imports increased by 26.5 percent, from 24.8 thousand short tons to 31.3 thousand short tons.[5125] The quantity of stainless wire imports increased between interim 2000 and 2001, as import volumes grew from 16.0 thousand short tons to 16.5 thousand short tons.[5126]
>
> The ratio of stainless steel wire imports to domestic production exhibited a similar trend during the period of investigation. The ratio remained relatively stable (between 31 and 32 percent) during the first three years of the period but then declined to 23.9 percent in 1999.[5127] The ratio of stainless wire imports to domestic production then increased by 5.5 percentage points, to 29.4 percent, in 2000.[5128] The ratio of imports to domestic production increased to its highest level during the period, 38 percent, in interim 2001.[5129]
>
> In sum, the record indicates that imports of stainless wire increased in quantity terms and as a ratio to domestic production during the period of investigation. Accordingly, we find that the first statutory criterion is satisfied."[5130] [5131]

10.259 The trends in imports, both in absolute and in relative terms, are shown in the following graphs illustrating the data relied upon by the USITC:[5132]

[5123] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5124] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5125] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5126] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5127] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7
[5128] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5129] (original footnote) CR and PR at Table STAINLESS-9 & STAINLESS-C-7.
[5130] (original footnote) Chairman Koplan does not join the remainder of this section of the opinion.
[5131] USITC Report, Vol. I, pp. 234-235.
[5132] The data represented in the following two graphs are contained in the USITC Report, in particular in Table STAINLESS-9 at STAINLESS-14 and Table STAINLESS-C-7. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.





(ii) Claims and arguments of the parties

10.260 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(i) as well as VII.O.1 and 3 *supra*.

(iii) Analysis by the Panel

10.261 At the outset, the Panel notes that, in its defence, the United States relies not only on the increased imports findings reached by Commissioner Koplan, but also on those made by Commissioners Bragg and Devaney. The former made findings on stainless steel wire as a separate product whereas the latter two made affirmative findings with regard to a broader product category than stainless steel wire (stainless steel wire and rope). In this regard, the situation is equivalent to that encountered in the context of tin mill products, because the other Commissioners who defined

stainless steel wire as a separate product, did not reach an affirmative result. In the March Proclamation, the President did not select any of the various affirmative determinations as the basis of the decision to impose the safeguard measure on stainless steel wire. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the USITC".[5133] It, therefore, is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Koplan), although those three Commissioners did not perform their analysis on the basis of the same like product definition.

10.262 For the reasons set out above in relation to the USITC's determination(s) on tin mill[5134], the Panel believes that the Agreement on Safeguards does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products. If such findings cannot be reconciled one with another (as a matter of substance), they cannot simultaneously form the basis of a determination. The Panel therefore believes that there is a violation of the obligation under Articles 2.1 and 3.1 of the Agreement on Safeguards to provide a reasoned and adequate explanation of how the facts support the determination, if that explanation consists of alternative explanations departing from each other and which, given the different product basis, cannot be reconciled as a matter of substance.

10.263 Thus, the USITC Report did not contain a determination supported by a reasoned and adequate explanation of how the facts support the determination that imports of stainless steel wire have increased, contrary to Articles 2.1 and 3.1 of the Agreement on Safeguards.

(j) Stainless steel rod

(i) The USITC's findings

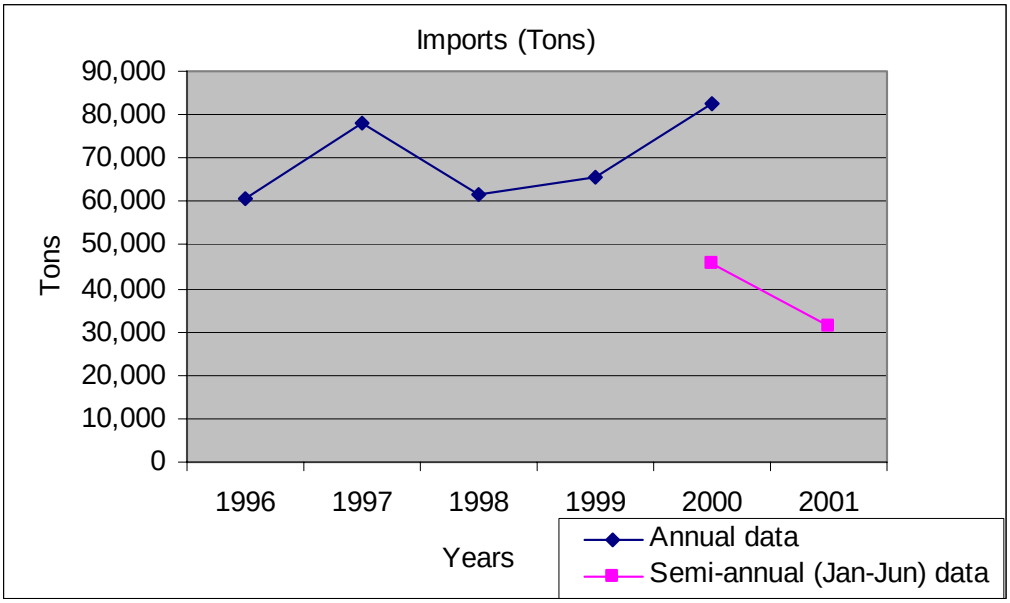
10.264 As regards increased imports of stainless steel rod, the USITC determined:

> "We find that the statutory criterion of increased imports is met.
>
> In quantity terms, imports of stainless rod increased by 36.1 percent during the period of investigation, growing from 60.5 thousand short tons in 1996 to 82.3 thousand short tons in 2000.[5135] Although the quantity of imports fluctuated somewhat during the period of investigation, the largest increase in terms of quantity occurred in 2000, the last full-year of the period of investigation, when import quantities increased by more than 25 percent, growing from 65.9 thousand short tons to 82.3 thousand short tons.[5136] The quantity of stainless rod imports declined by 31.3 percent between interim 2000 and 2001, falling from 45.6 thousand short tons to 31.4 thousand short tons.[5137] We note, however, that the market share of imports remained essentially stable in interim 2001, declining slightly from *** percent interim 2000 to *** percent in interim 2001.[5138]

[5133] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5134] *See supra* paras. 10.191-10.200.
[5135] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.
[5136] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.
[5137] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.
[5138] (original footnote) CR and PR at Table STAINLESS-7 & STAINLESS-C-5.

> The ratio of imports of stainless steel rod to domestic production also increased significantly during the period, increasing from *** percent in 1996 to *** percent in 2000. While the ratio fluctuated somewhat during the period of investigation, the largest single increase in the ratio (*** percentage points) occurred in 2000, the last full-year of the period of investigation.[5139] The ratio of imports to domestic production decreased from *** percent of domestic production in interim 2000 to *** percent in interim 2001.[5140]
>
> In sum, imports of stainless rod increased significantly, both in quantity terms and as a ratio of domestic production, between 1996 and 2000, with a rapid and dramatic increase in imports occurring during the last full-year of the period of investigation. Accordingly, we find that the first statutory criterion is satisfied."[5141]

10.265 The trends in imports, in absolute terms, are shown in the following graph illustrating the data relied upon by the USITC:[5142]



(ii) Claims and arguments of the parties

10.266 The arguments of the parties regarding the USITC's findings are set out in Sections VII.F.4 and 5(j) *supra*.

[5139] (original footnote) CR and PR at Table STAINLESS-7.
[5140] (original footnote) CR at Table STAINLESS-7.
[5141] USITC Report, Vol. I, pp. 214-215.
[5142] The data represented in the following graph are contained in the USITC Report, Table STAINLESS-7 at STAINLESS-12 and Table STAINLESS-C-5. As is visible from the graphs, the data for 2001 have not been "annualized" but have been left in their raw format. The Panel finds this format sufficient to reach a conclusion on the trends of imports in the most recent past and therefore does not take a position on the question of whether and how these six-month data can be "annualized", a question on which there is disagreement between the parties.

(iii) Analysis by the Panel

Absolute imports

10.267 The Panel believes that the USITC's determination on increased imports of stainless steel rod, as published in its Report[5143], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000 (25%). The decline between interim 2000 and interim 2001 was acknowledged, but the USITC did not give an explanation why it nevertheless found that there was an increase of imports in absolute numbers. This failure is particularly serious since this decrease (by 31.3%) was sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years.

10.268 The only additional aspect adduced by the USITC in response to the decrease in interim 2001 was the nearly stable market share of imports. The market share, however, is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes. In light of the decrease in the most recent period and the overall developments between 1996 and interim 2001 which can be best described as a double up-and-down movement (returning to the low point at the end), the Panel does not believe that the facts support a finding that, at the moment of the determination, stainless steel rod "is being imported in (such) increased quantities".

10.269 It may well be that the increases occurring from 1996 to 1997, or from 1998 to 2000, taken by themselves, would qualify as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards. However, at the time of the determination, the trends of imports showed a significant recent decline, so that these past increases can no longer serve as the basis that stainless steel rod "is being imported in (such) increased quantities".

10.270 The Panel notes the argument made by the United States, that even if imports followed a pattern of successive surging and receding, this could cause serious injury to the domestic industry, such as to warrant a safeguard measure.[5144] In the eyes of the Panel, it is true that, despite a return of imports to a low level and, therefore, the absence of a product "being imported in … increased quantities", it is, nevertheless, conceivable that the intervening increases, or the shock-therapy of increases and decreases have caused serious injury to the domestic industry. In the Panel's view, the right to impose a safeguard exists only when, in addition to serious injury, and causation, there is also an increase in imports and this increase has to be recent. The legal framework contained in the Agreement on Safeguard requires, in addition to the causation of serious injury that the product "is being imported in … increased quantities".

Relative imports

10.271 The Panel also considers that the USITC's determination on increased imports of stainless steel rod relative to domestic production[5145] does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC performed an analysis which is similar to that rejected by the Panel in the context of absolute imports. What is more, the USITC did not provide any of the data on which it relied. All such numbers were replaced by asterisks. Therefore, there is no explanation of how the facts support a conclusion of increased imports because there are no facts supporting any conclusion.

[5143] USITC Report, Vol. I, pp. 214-215.
[5144] United States' first written submission, paras. 295-296 and 300.
[5145] USITC Report, Vol. I, p. 215.

10.272 The Panel agrees that a competent authority is not barred from relying on data provided by individual parties on a confidential basis in the course of the investigation. Article 3.2 of the Agreement on Safeguards contains an obligation to treat such data as confidential, i.e. not to disclose it (without permission). In this sense, the Panel, therefore, takes a position similar to that of the Appellate Body in *Thailand – H-Beams*.[5146] Competent authorities may rely on confidential data, even if these data are not disclosed to the public in their Reports.

10.273 However, Article 3.1 of the Agreement on Safeguards contains the obligation that competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) adds the obligation that competent authorities "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". On the basis of these obligations and the obligation under Article 2.1, to make a determination, *inter alia*, that imports of the product in question have increased, competent authorities must provide a reasoned and adequate explanation of how the facts support the conclusion. In the view of the Panel, this requirement can, in an individual case, be limited by the obligation of Article 3.2 to protect confidential data.

10.274 However, we believe that Article 3.1 and 3.2 can be interpreted harmoniously.[5147] The obligation of Article 3.1 cannot be interpreted so as to imply a violation of Article 3.2. In other words, a competent authority is obliged to provide these explanations to fullest extent possible without disclosing confidential information. This implies that if there are ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality, a competent authority is obliged to resort to these options. Conversely, the provision of no data at all, is permitted only when all these methods fail in a particular case.

10.275 The Panel believes that even if competent authorities are permitted not to disclose the data yet, nevertheless, rely on it, they are still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation. This obligation could be complied with through the kind of explanation that the USITC has provided on page 215 of its report[5148], i.e. an explanation in words and without numbers. However, this obligation also includes an explanation by the competent authority of why there was no possibility of presenting *any* facts in a manner consistent with the obligation of protecting confidential information. That explanation was not provided in the instant case.

[5146] Appellate Body Report, *Thailand – H-Beams*, paras. 111, 112 and 119.

[5147] *See* Appellate Body Report, *Korea – Dairy*, para. 81: "In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.' " *See* also Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *US – Gasoline*, p. *23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. *12; and Appellate Body Report, *India – Patents (US)*, para. 45.

[5148] For instance, at page 215 of the USITC's Report, Vol. I, one can read the following analysis protecting confidential information:

> "The ratio of imports of stainless steel rod to domestic production also increased significantly during the period, increasing from *** percent in 1996 to *** percent in 2000. While the ratio fluctuated somewhat during the period of investigation, the largest single increase in the ratio (*** percentage points) occurred in 2000, the last full year of the period of investigation. The ratio of imports to domestic production decreased from *** percent of domestic production in interim 2000 to *** percent in interim 2001." (Footnotes omitted).

10.276 The Panel also believes that, irrespective of the confidentialization of the numbers, the USITC's determination on increased imports of stainless steel rod relative to domestic production, as published in its Report[5149], does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on a "significant" increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000, the last full-year investigated. The decline between interim 2000 and interim 2001 was acknowledged, as was the fact that the ratio fluctuated over the period of investigation. Given these fluctuations and the most recent decline, the Panel does not believe that the USITC gave a reasoned and adequate explanation supporting that stainless steel rod, relative to domestic production "is being imported in increased quantities". This would at least have required some indication that relative imports, at the end of the period of investigation, remain at increased levels, for example, because the decline in the interim period was small in comparison with the increase until 2000. Such indication does not exist in the present case where the USITC, much as in the context of absolute imports, failed to place the existing, intervening increases in the context of previous and subsequent decreases. The only indication that remains is the stated increase from 1996 to 2000, but 2000 is not the end of the period investigated, so that the mentioned statement cannot provide a basis for the conclusion that stainless steel rod "is being imported" in increased quantities, relative to domestic production.

Conclusion

10.277 The Panel consequently finds that the USITC Report did not provide an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" and that the USITC's determination that stainless steel rod was being imported in "increased quantities" is inconsistent with the requirement of Article 2.1 of the Agreement on Safeguards that the product "is being imported in (such) increased quantities".

E. CLAIMS RELATING TO CAUSATION

10.278 As a preliminary point, the Panel notes that it has assumed for the purposes of its consideration of the issue of causation, that serious injury or threat thereof to all relevant domestic producers of the like or directly competitive products within the meaning of Article 4.2(a) of the Agreement on Safeguards, existed with respect to each of the safeguard measures at issue. The Panel has also assumed that the relevant domestic producers had been correctly defined, within the meaning of Article 4.1(c) of the Agreement on Safeguards. Of course, if there was no serious injury (or threat thereof) at all, serious injury could not have been caused by increased imports.

1. Claims and arguments of the parties

10.279 The arguments of the parties are set out in Section VII.H.1-3 *supra*. In summary, the complainants claim that: (i) the USITC determination(s) failed to establish the necessary causal link between increased imports and serious injury for each of the US measures; and (ii) the USITC failed to comply with the obligation that injury from other factors not be attributed to imports, contrary to the requirements of Article XIX of GATT 1994, and Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

[5149] USITC Report, Vol. I, pp. 214-215.

2. Relevant WTO provisions[5150]

10.280 Article 2.1 of the Agreement on Safeguards provides that:

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

10.281 Article 4.2(a) provides that:

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

10.282 In addition, Article 4.2(b) provides that:

> "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

3. Standard of review

10.283 We recall that, as the Appellate Body has stated, the precise nature of the examination to be conducted by a panel in reviewing a claim under Article 4.2 of the Agreement on Safeguards stems in part from the panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2.[5151] Article 11 requires us to make an objective assessment of the facts and the applicability and conformity of the measures in question in this dispute with the Agreement on Safeguards.[5152]

[5150] The Panel is aware that Article XIX is relevant to the issue of causation but that Article 2.1 and, in particular, Article 4.2(b) of the Agreement on Safeguards address the issue of causation more specifically. The Panel is also aware that some complainants have raised causation claims pursuant to Article XIX of GATT as well as pursuant to the Agreement on Safeguards. However, the Panel considers that it need not to examine the relationship between Article XIX and the Agreement on Safeguards with regard to the causation to resolve the complainants' claims relating to causation. Therefore, the Panel has addressed the issue of causation by referring exclusively to the relevant provisions contained in the Agreement on Safeguards. We believe that this approach does not diminish the rights of the parties in this dispute.

[5151] Appellate Body Report, *US – Lamb*, para. 105.

[5152] Appellate Body Report, *Argentina – Footwear (EC)*, para. 120.

10.284 In addition, the Appellate Body has provided us with specific guidance with respect to the application of the standard of review in cases involving claims under Article 4 of the Agreement on Safeguards. In particular, in *Argentina – Footwear (EC)*, the Appellate Body stated that the Panel in that case was obliged by the terms of Article 4 to assess whether the competent authorities had examined all the relevant facts and had provided a reasoned explanation.[5153] In *US – Lamb*, the Appellate Body added that a panel can assess whether the competent authority's 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. The Appellate Body stated that, therefore, panels must review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[5154] Further, the Appellate Body in *US – Line Pipe* stated that a mere assertion that injury caused by other factors has not been attributed to increased imports does not establish explicitly with a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports.[5155]

10.285 We have further guidance as to how to apply the standard of review in relation to the competent authorities' causation analysis. In particular, in *Argentina – Footwear (EC)*, the panel[5156] stated:

> "Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."[5157]

4. Analysis by the Panel

10.286 The first sentence of Article 4.2(b) of the Agreement on Safeguards provides that, in determining whether increased imports have caused or are threatening to cause serious injury to a domestic industry under Article 4.2(a), a competent authority must demonstrate, "on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof."

10.287 In *US – Wheat Gluten*, the Appellate Body interpreted the reference to "the causal link" in Article 4.2(b) and concluded that it effectively requires a finding of a "genuine and substantial relationship of cause and effect" between increased imports and serious injury.[5158] Nevertheless,

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[5153] Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[5154] Appellate Body Report, *US – Lamb*, para. 106.
[5155] Appellate Body Report, *US – Line Pipe*, para. 220.
[5156] While the Appellate Body in *Argentina – Footwear (EC)* did not specifically comment on these causation findings, it did state that it saw "no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*": Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.
[5157] Panel Report, *Argentina – Footwear (EC)*, para. 8.229.
[5158] Appellate Body Report, *US – Wheat Gluten*, para. 69.

questions arise as to what is entailed in such a requirement. More particularly, how should the first and second sentences of Article 4.2(b) be operationalized to meet this requirement? The Panel considers that important issues to be addressed in this regard include the following. The first is the standard or threshold that should apply in determining whether or not a "genuine and substantial relationship of cause and effect" exists. The second is the issue of how (that is, using which analytical tools) a causal link can be established for the purposes of Article 4.2(b). The third is concerned with the non-attribution requirement provided for in the second sentence of Article 4.2(b) – how it is to be performed and its relationship with the overall demonstration of a causal link.

(a) Standard for assessment of the "causal link"

10.288 We commence with the first issue referred to above, namely the standard or threshold that should apply in determining whether or not a "genuine and substantial relationship of cause and effect" exists. At the outset, the Panel notes that the Appellate Body in *US – Wheat Gluten* found that

> "[T]he first sentence of Article 4.2(b) … provides that a determination 'shall not be made unless [the] investigation demonstrates … the existence of *the causal link* between increased imports … and serious injury or threat thereof.' (emphasis added) Thus, the requirement for a determination, under Article 4.2(a), is that 'the causal link' exists. The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element.[5159] The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection'[5160] or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that '*other* factors' causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, even *though other factors are also contributing, 'at the same time', to the situation of the domestic industry*."[5161]

10.289 In *US – Lamb*, the Appellate Body reiterated that the Agreement on Safeguards does not require that increased imports alone be capable of causing, or threatening to cause, serious injury.[5162] In addition, the Appellate Body in *US – Wheat Gluten* found that the causation requirement of Article 4.2(b) can be met where serious injury is caused by the interplay of increased imports and other factors.[5163]

10.290 It is clear to the Panel that, in order to meet the causation requirements in Article 4.2(b), it is not necessary for the competent authority to show that increased imports *alone* must be capable of

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[5159] (original footnote) *The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, pp. 355 and 356.
[5160] (original footnote) Ibid., p. 1598.
[5161] Appellate Body Report, *US – Wheat Gluten*, para. 67.
[5162] Appellate Body Report, *US – Lamb*, paras. 165-170.
[5163] Appellate Body Report, *US – Wheat Gluten*, paras. 67-68.

causing serious injury. [5164] Rather, if a number of factors have caused serious injury, a causal link may be demonstrated if the increased imports have, in some way, contributed to "bringing about", "producing" or "inducing" the serious injury. In this regard, the Appellate Body in *US – Wheat Gluten* concluded that the contribution must be sufficiently clear as to establish the existence of "the causal link" required[5165] but rejected the panel's conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause "serious" injury.[5166]

10.291 The Panel notes that the United States has argued that, on the basis of the standard dictionary definitions of the words "substantial" and "important", the words have essentially the same meaning when used to define the weight that must be given to a particular factor in a decision or an analysis.[5167] The United States further argues that, therefore, by requiring the USITC to find that increased imports are an "important" cause of injury and as important as any other cause, the United States' safeguards statute ensures that the USITC finds a "genuine and substantial" causal link between imports and serious injury before issuing an affirmative safeguards finding.[5168]

10.292 The Panel considers that the mere fact that the literal definitions of "important" and "substantial" may be considered by some to be "equivalent" is not necessarily relevant. In our view, what is important for this Panel is whether the test *applied* by the USITC for each of the safeguard measures at issue meets the standard or threshold prescribed by the requirement that there be a "genuine and substantial" relationship of cause and effect between the increased imports and the serious injury. We will discuss this further in the measure-by-measure analysis, which we undertake below.

10.293 Finally, the Panel recalls that serious injury within the meaning of Article 4.2(a) of the Agreement on Safeguards is to be determined with reference to the "overall impairment in the position of the domestic industry". Similarly, as further developed below, we believe that pursuant to Articles 2 and 4 of the Agreement on Safeguards, a competent authority must determine whether "overall", a genuine and substantial relationship of cause and effect exists between increased imports and serious injury suffered by the relevant domestic producers.

(b) Demonstration of a causal link

10.294 We proceed with the second issue referred to above, namely the question of how a causal link can be demonstrated for the purposes of Article 4.2(b) of the Agreement on Safeguards. The Panel notes first that Article 4.2(b) does not prescribe the use of any particular methods or analytical tools for demonstrating a causal link.[5169] The Panel is of the view that it is for the competent authority to decide the method it considers most appropriate in making a causal link determination. While the methods to determine causal link are not prescribed by Article 4.2(b), the competent authority should be encouraged to perform this analysis as thoroughly as the circumstances require. Whatever tool or method is used, it must be capable of determining whether or not a genuine and substantial relationship of cause and effect exists between the increased imports and the serious injury suffered by the relevant domestic producers.

[5164] Appellate Body Report, *US – Wheat Gluten*, para. 70.
[5165] Appellate Body Report, *US – Wheat Gluten*, paras. 66 and 69.
[5166] Appellate Body Report, *US – Wheat Gluten*, para. 61 ff and 79.
[5167] United States' first written submission, paras. 442 and 443.
[5168] United States' first written submission, paras. 442 and 443.
[5169] Panel Report, *Korea – Dairy*, para. 7.96.

10.295 This dispute raises the issue of the role that analyses of coincidence and conditions of competition must or may play in the demonstration of a causal link under Article 4.2(b). More particularly, the Panel considers that this dispute raises the issue of whether a competent authority *must* undertake a coincidence analysis when determining whether a causal link exists between increased imports and serious injury. We need to consider this issue because for some of the measures that are the subject of our review in this case, the USITC did not perform a coincidence analysis. Rather, the USITC limited itself to an analysis of the conditions of competition. We note in this regard that the USITC did not in its Report explicitly make a distinction between coincidence and conditions of competition analyses. Both types of analyses were undertaken by the USITC either individually or in conjunction in the section of the USITC Report containing its causation analysis.

10.296 Indeed, the characterization of the analyses undertaken by the USITC as coincidence and/or conditions of competition analyses is something that was done by the Panel for a number of reasons, which are further elaborated below. First, we note that the Agreement on Safeguards does not prescribe how causal link should be demonstrated. At the same time, WTO jurisprudence indicates that coincidence is central to a causation analysis. In this regard, a number of complainants have argued that the failure by the USITC to undertake a coincidence analysis in relation to some of the safeguard measures was fatal. Finally, the Panel is of the view that tools other than a coincidence analysis, such as a conditions of competition analysis, could also be used to establish a causal link under Article 4.2(b). We, therefore, developed an analytical framework to assess whether, in light of the circumstances of the causation determinations for each of the measures, the USITC demonstrated, through a reasoned and adequate explanation, that the facts supported its findings that causation existed. The Panel explains hereafter its understanding of what is entailed in coincidence and conditions of competition analyses. As a preliminary point, the Panel notes that in making this distinction between the types of analyses undertaken by the USITC, we have looked at the substance of the analyses undertaken rather than the labels used by the USITC in its Report.

(i) Coincidence

10.297 We first consider the role that a coincidence analysis plays in the context of the causal link analysis that is demanded by Article 4.2(b) of the Agreement on Safeguards. In this regard, the Panel recalls that the panel in *Argentina – Footwear (EC)* stated that Article 4.2(a) "requires" national authorities to analyse trends in both injury factors and imports. The panel considered that such an analysis was relevant in relation to a causation assessment:

> "In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the 'rate' (i.e., direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the 'changes' in the injury factors (sales, production, productivity, capacity utilization, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the *trends* – in both the injury factors and the imports – matter as much as their absolute levels. In the *particular context of a causation analysis, we also believe that this provision means that 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."*[5170] (emphasis added)

10.298 The Appellate Body agreed with the panel and observed:

[5170] Panel Report, *Argentina – Footwear (EC)*, para. 8.237.

> "We see no reason to disagree with the Panel's interpretation that the words 'rate and amount' and 'changes' in Article 4.2(a) mean that 'the *trends* – in both the injury factors and the imports – matter as much as their absolute levels'. We also agree with the Panel that, in an analysis of causation, 'it is the relationship between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.' "[5171] (emphasis added)

10.299 We understand from the foregoing, firstly, that the term "coincidence" refers to the relationship between the movements in imports and the movements in injury factors. The panel and Appellate Body made it clear that, in considering movements in imports, it is necessary to look at movements in import volumes and import market shares.[5172] In our view, the word "coincidence" in the current context refers to the *temporal* relationship between the movements in imports and the movements in injury factors. In other words, upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist. We note that, below, we qualify these comments to take account of cases where a lag exists between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry.

10.300 Secondly, the above indicates that the Appellate Body considers that "coincidence" between movements or trends in imports and movements or trends in the relevant injury factors plays a "central" role in determining whether or not a causal link exists. Indeed, both the panel and the Appellate Body in *Argentina – Footwear (EC)* stated that the relationship between the movements in imports and the movements in injury factors *must* be central to a causation analysis. We also note that the same panel, supported by the Appellate Body[5173] went on to state that "[I]n practical terms, we believe therefore that [Article 4.2(a)] means that if causation is present, an increase in imports *normally* should coincide with a decline in the relevant injury factors."[5174]

10.301 The Panel is of the view that since coincidence is "central" to a causation analysis, a competent authority should "normally" undertake a coincidence analysis when determining the existence of a causal link. We believe that in situations where the effects of injurious factors other than increased imports have not been attributed to increased imports[5175], overall clear coincidence between movements in imports and movements in injury factors will provide a competent authority with an adequate basis upon which to conclude that a genuine and substantial relationship of cause and effect between increased imports and serious injury exists.

10.302 As mentioned, the Panel is also of the view that *overall* coincidence is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered. We refer in this regard to the panel's decision in *US – Wheat Gluten*, where it stated that:

> "[I]n light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to

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[5171] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5172] Significantly, no mention was made by the panel and the Appellate Body in *Argentina – Footwear (EC)* to movements in import prices. We will discuss the relevance of this in the succeeding section of our findings dealing with "conditions of competition".

[5173] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5174] Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

[5175] That is, in compliance with the non-attribution requirements as discussed in paras. 10.325-10.334 *infra*.

> imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury." [5176]

10.303 In the present dispute, the question arises as to how a causal link must be established for the purposes of Article 4.2(b) in cases where there is an *absence of coincidence*. By absence of coincidence we mean situations where coincidence does not exist or an analysis of coincidence has not been undertaken. In this regard, we agree with statements made by the panel and Appellate Body in *Argentina – Footwear (EC)* and the panel in *US – Wheat Gluten*, that coincidence in movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation, while *the absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why a causal link is still present.*[5177]

10.304 We also recall that the panel in *Argentina – Footwear (EC)*, supported by the Appellate Body[5178], as well as the panel in *US – Wheat Gluten*[5179], noted that, in situations where a causal link exists, "an increase in imports *normally* should coincide with a decline in the relevant injury factors" and "coincidence… would *ordinarily* tend to support a finding of causation." In our view, even when coincidence does not exist or an analysis of coincidence has not been undertaken, a competent authority may still be able to demonstrate the existence of a causal link if it can offer a compelling explanation that such causal link exists.

10.305 The Panel emphasizes that the Appellate Body in *Argentina – Footwear (EC)* upheld the panel's statement that "coincidence by itself *cannot prove* causation" (emphasis added).[5180] The Panel considers that there are situations where a coincidence analysis may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link. Indeed, there may be situations where a competent authority, as part of its overall demonstration of the existence of a causal link, undertakes different analyses, with a view to proving that a genuine and substantial relationship of cause and effect exists between increased imports and serious injury.

10.306 In our view, there may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving a causal link.[5181]

10.307 We are of the view that in all cases, the competent authority must provide a reasoned and adequate explanation of its causal link findings. In the first case (i), assuming fulfilment of the non-attribution requirement, when clear coincidence exists, no further analysis is required of the

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[5176] Panel Report, *US – Wheat Gluten*, para. 8.101.

[5177] Panel Report, *US – Wheat Gluten*, para. 8.95; Panel Report, *Argentina – Footwear (EC)*, paras. 8.237-8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5178] Panel Report, *Argentina – Footwear (EC)*, paras. 8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5179] Panel Report, *US – Wheat Gluten*, para. 8.95.

[5180] Panel Report, *Argentina – Footwear (EC)*, paras. 8.237-8.238; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5181] These are situations that the Panel has encountered in this case. This is not to say that other situations may not exist.

competent authority and the Panel will confine its review to the coincidence analysis. In the second case (ii), the Panel will examine both the coincidence analysis and the other analysis undertaken by the competent authority with a view to assessing whether the competent authority has provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury.

10.308 In cases (iii) and (iv), the competent authority should explain the absence of coincidence or why a coincidence analysis was not undertaken and provide, in particular, a compelling explanation as to why a causal link exists notwithstanding the absence of coincidence. Ultimately, it is for the competent authority to decide upon the analytical tool it considers most appropriate to perform this compelling analysis in demonstrating the existence of a causal link.

10.309 Another issue that has arisen in the present dispute is whether or not coincidence can be considered to exist in cases where there is a *temporal lag* between the influx of imports and the manifestation of the effects of such an influx on the domestic industry. More particularly, the United States has argued that a lag or delay in the manifestation of certain injury factors may be attributed to the delayed effect of increased imports on certain factors, such as employment and bankruptcy.[5182] A number of the complainants argue, on the other hand, that the nature of the markets involved in the present case is such that such a lag effect could not exist. They submit that the effect of the increased imports should be felt immediately and that a lag of two years, which they submit existed in the present case, is too long.[5183]

10.310 The Panel considers that the argument by the United States of a lag between the increased imports and the manifestation of the effects of such increased imports on the domestic industry may have merit in certain cases. More particularly, in our view, there may be instances in which injury may be suffered by an industry at the same point in time as the influx of increased imports. However, the injury that is caused at that point in time may not become apparent until some later point in time. In other words, there may be a lag between the influx of imports and the manifestation of the injurious effects on the domestic industry of such an influx.

10.311 We find support for this view from the panel's decision in *Egypt – Steel Rebar*. There, the panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry[5184], noting that this argument:

> "[R]est[ed] on the quite artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing company. Such an assumption implicitly rests on the existence of so-called "perfect information" in the market (i.e., that all actors in the market are instantly aware of all market signals.)"[5185]

Nevertheless, we note that, in that case, the lag between the effects of imports on a market that the panel suggested was acceptable was, at most, a year in duration.

[5182] United States' first written submission, paras. 446, 448 and 449; United States' second written submission, paras. 119-122.

[5183] Japan's written reply to Panel question No. 86 at the first substantive meeting; Korea's second written submission, para. 141; Brazil's written reply to Panel question No. 86 at the first substantive meeting.

[5184] Panel Report, *Egypt – Steel Rebar*, paras. 7.127-7.132.

[5185] Panel Report, *Egypt – Steel Rebar*, para. 7.129.

10.312 The Panel considers that there are limits in temporal terms on the length of lags between increased imports and the manifestation of the effects that are acceptable for the purposes of a coincidence analysis under Article 4.2(b) of the Agreement on Safeguards. The limits that apply would, undoubtedly, vary from industry to industry and factor to factor. Generally speaking, the more rigid the market structure associated with a particular industry, the more likely a lag in effects would exist, at least in relation to some factors. Conversely, the more competitive the market structure, the less tenable it is that lagged effects could be expected. In addition, the Panel considers that while lags may be expected in relation to some factors (for example, employment), lags in the manifestation of effects are less likely to exist in relation to other injury factors such as production, inventories and capacity utilization, which, ordinarily, would react relatively quickly to changes taking place in the market, such as an influx of imports if increased imports are causing serious injury. If the competent authority does rely upon a lag as between the increased imports and the injury factors, we consider that such a lag must be fully explained by the competent authority on the basis of objective data.

(ii) Conditions of competition

10.313 The Panel recalls that while coincidence plays a central role in determining whether or not a causal link exists, other analytical tools may also come in to play.

10.314 As mentioned above, there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis. In such situations, reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists. Indeed, in our view, consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury.

10.315 There may also be cases where a competent authority considers that it is necessary to *support* its coincidence analysis with another analysis because, for example, coincidence cannot be established with a sufficient degree of certainty. In such situations, the competent authority may rely upon analysis of the conditions of competition to reinforce its causal link demonstration. In such situations, a panel will review the conditions of competition analysis performed by the competent authority with a view to assessing whether it provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury.

10.316 We believe that Articles 2.1 and 4.2(a) and (b) confirm the relevance of conditions of competition when determining causation. Article 2.1 calls for a determination that increased imports are occurring "*under such conditions* as to cause or threaten to cause serious injury." The Appellate Body in *US – Wheat Gluten* interpreted the meaning of "under such conditions" in Article 2.1 as follows:

> "[T]he phrase 'under such conditions' refers generally to the prevailing 'conditions', in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase 'under such conditions' is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors 'having a bearing on the situation of [the] industry'. The phrase 'under such conditions', therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in

> imports, not alone, but in conjunction with the other relevant factors, cause serious injury."[5186]

10.317 We also note that the panels in *Argentina – Footwear (EC)* and *US – Wheat Gluten* considered the conditions of competition in the market between imported and domestic footwear in reviewing whether a causal link existed between increased imports and injury.[5187] The Appellate Body in *Argentina – Footwear (EC)* explicitly supported the panel's analysis, stating that: "[W]e agree with the Panel's conclusions that 'the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)' ".[5188]

10.318 The Panel is of the view that the factors that should be considered in a conditions of competition analysis for the purposes of Article 4.2(b) are not pre-determined but include those mentioned in Article 4.2(a). This is so because Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards must be given a mutually consistent interpretation.[5189] We refer in this regard to the following comments of the Appellate Body in *US – Wheat Gluten*:

> "[*B*]*oth* provisions [4.2(a) and 4.2(b)] lay down rules governing a *single* determination, made under Article 4.2(a). In our view, it would contradict the requirement in Article 4.2(a) to evaluate – and, thereby, include in the determination – the 'bearing' or effect *all* the relevant factors have on the domestic industry, if those *same* effects, caused by those *same* factors, were, with the exception of increased imports, to be excluded under Article 4.2(b), as the Panel suggested." (emphasis original)[5190]

10.319 Given then that the factors referred to in Article 4.2(a) are relevant in defining the conditions of competition for the purposes of the causation analysis under Article 4.2(b), in the Panel's view, volume of imports, imports' market share, changes in the level of sales and profit and losses are of particular interest. In addition, we note that the panel in *Argentina – Footwear (EC)* referred to physical characteristics, quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market as factors that could be taken into consideration in assessing the conditions of competition in a market for the purposes of a causation analysis.[5191]

10.320 A consideration of the various factors that have been mentioned provides context for the consideration of *price*, which, in the Panel's view, is an important, if not the most important, factor in analysing the conditions of competition in a particular market, although consideration of prices is not necessarily mandatory.[5192] The Panel agrees with the argument advanced by the European Communities insofar as it submits that price will often be relevant to explain how the increased volume of imports caused serious injury.[5193] Indeed, we consider that relative price trends as between

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[5186] Appellate Body Report, *US – Wheat Gluten*, para. 78.

[5187] Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Panel Report, *US – Wheat Gluten*, para. 8.108.

[5188] Appellate Body Report, *Argentina – Footwear* (EC), para. 145.

[5189] Appellate Body Report, *US – Wheat Gluten*, para. 73.

[5190] Appellate Body Report, *US – Wheat Gluten*, para. 73.

[5191] Panel Report, *Argentina – Footwear (EC)*, para. 8.251.

[5192] The Panel agrees with the following comments made by the panel in *Korea – Dairy* at para. 7.51 in this regard: "Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2, that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country."

[5193] European Communities' written reply to Panel's question No. 29 at the second substantive meeting.

imports and domestic products will often be a good indicator of whether injury is being transmitted to the domestic industry (provided that the market context for such trends are borne in mind) given that price changes have an immediate effect on profitability, all other things being equal. In turn, profitability is a useful measure of the state of the domestic industry.

10.321 The relevance of price in the analysis of the conditions of competition appears to be supported by comments made by the panel in *Argentina – Footwear (EC)*.[5194] Further, the panel in *US – Wheat Gluten* was of the view that a price analysis is potentially relevant, although not necessarily mandatory:

> "'Price' is not expressly listed in Article 4.2(a) [of the Agreement on Safeguards ('SA')] as a 'relevant factor' having a bearing on the situation of the domestic industry. However, this is not to say that 'price' may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.
>
> Therefore, in the context of safeguards measures, the relevance of 'price' will vary from case to case, in light of the particular circumstances and the nature of the particular product and domestic industry involved. Given that this is the nature of the 'price' factor under the Agreement on Safeguards, we consider that the phrase 'under such conditions' does not necessarily, in every case, require a price analysis."[5195]

10.322 With respect to the argument made by the European Communities that if imports are sold at a higher price than domestic products, it is unlikely that such imports are responsible for any serious injury[5196], the Panel considers that the existence or absence of underselling by imports cannot, on its own, lead to a definitive conclusion regarding the presence or otherwise of a causal link between the increased imports and the serious injury. In our view, pricing trends must always be considered in context. It is only after this contextual consideration that conclusions can be drawn regarding the existence or otherwise of the causal link.

10.323 As to *how detailed* an analysis of the conditions of competition must be, the Panel is of the view that the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration.[5197] In this regard, the Panel agrees with the following statement by the panel in *Argentina – Footwear (EC)*, particularly in relation to CCFRS, which will be discussed further below:

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

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[5194] Panel Report, *Argentina – Footwear (EC)*, para. 8.251.
[5195] Panel Report, *US – Wheat Gluten*, paras. 8.109-8.110.
[5196] European Communities' written reply to Panel's question No. 29 at the second substantive meeting.
[5197] Panel Report, *Argentina – Footwear (EC)*, para. 8.261, footnote 557.

> the locus of competition in the market. With regard to the present case, we do not disagree that a quite detailed investigation of the industry was conducted, in which a great deal of statistical and other information was amassed. What in our view was missing was a detailed analysis, on the basis of objective evidence, of the imports and of how in concrete terms those imports caused the injury found to exist in 1995. In this regard, we note that Act 338 contains a section entitled 'Conditions of competition between the domestic products and imports'. This section does not contain such a detailed analysis, however, but rather summarizes questionnaire responses from domestic producers about their strategies for 'fending off foreign competition', and from importers and domestic producers concerning 'the sales mix' of domestic products and imports, including their overall views about quality and other issues concerning domestic and imported footwear, with the importers stressing the benefits of imports. This summary of subjective statements by questionnaire respondents does not constitute an analysis of the 'conditions of competition' by the authority on the basis of objective evidence."[5198]

10.324 The Panel will consider in detail below in its measure-by-measure analysis the relevance of the conditions of competition for the purposes of determining whether the USITC provided a reasoned and adequate explanation that the facts supported a determination that a causal link existed in the context of a number of the safeguard measures at issue in this dispute.

(iii) Non-attribution

10.325 A third important issue arising in a causation analysis is the non-attribution requirement. The second sentence of Article 4.2(b) provides that:

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

10.326 The above makes it clear that in cases where factors other than increased imports have caused injury to the domestic industry, a "non-attribution" exercise must be undertaken pursuant to the second sentence of Article 4.2(b). As noted by the Appellate Body[5199], it is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities "shall not … attribute" to increased imports injury caused by other factors.

10.327 The scope of the non-attribution requirement has been articulated by the Appellate Body on a number of occasions. In its discussion of the non-attribution requirement, the Appellate Body in *US – Wheat Gluten* stated that:

> "Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually*

[5198] Panel Report, *Argentina – Footwear (EC)*, para. 8.261, footnote 557.
[5199] Appellate Body Report, *US – Wheat Gluten*, para. 68.

> caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*."[5200]

10.328 The Appellate Body in *US – Lamb* emphasized that the three steps mentioned in *US – Wheat Gluten* simply describe a logical process for complying with the obligations relating to causation set out in Article 4.2(b). It further stated that these steps are not legal "tests" mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.[5201] Nevertheless, it concluded that the primary objective of the process described in *US – Wheat Gluten* is to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof.[5202]

10.329 On the basis of its findings in *US – Wheat Gluten*[5203], *US – Lamb*[5204] and *US – Hot-Rolled Steel*[5205], the Appellate Body in *US – Line Pipe* stated that:

> "Article 4.2(b), last sentence, requires that, when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports. We have previously ruled, and we reaffirm now, that, to fulfill this requirement, competent authorities must separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors. [5206] As we ruled in *US – Hot-Rolled Steel* with respect to the similar requirement in Article 3.5 of the *Anti-Dumping Agreement*, so, too, we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."[5207]

10.330 The Appellate Body in *US – Line Pipe* further added that to fulfil the requirement contained in the second sentence of Article 4.2(b), the competent authority must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[5208]

[5200] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[5201] Appellate Body Report, *US – Lamb*, para. 178.
[5202] Appellate Body Report, *US – Lamb*, para. 179.
[5203] Appellate Body Report, *US – Wheat Gluten*, para. 70.
[5204] Appellate Body Report, *US – Lamb*, para. 179.
[5205] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222, 223, 230 and 214.
[5206] (original footnote) Appellate Body Report, *US – Wheat Gluten*, , para. 70; Appellate Body Report, *US – Lamb*, para. 179. In the context of the *Anti-Dumping Agreement*, see, Appellate Body Report, *US – Hot-Rolled Steel*, para. 222.
[5207] Appellate Body Report, *US – Line Pipe*, para. 215.
[5208] Appellate Body Report, *US – Line Pipe*, para. 217.

10.331 Clearly, when factors other than increased imports are causing or are said to be causing injury to the industry, the competent authority *must* perform a non-attribution exercise to assess the effects of these other factors so that injury caused by those other factors is not attributed to increased imports with a view to determining whether a genuine and substantial relationship of cause and effects exist between increased imports and serious injury to the relevant domestic producers.

10.332 The Panel notes that purpose of the non-attribution exercise is to enable a competent authority to separate and distinguish the effects of increased imports from those caused by factors other than increased imports and, ultimately, to assess the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports. Therefore, the requirement to identify the nature and extent of the injurious effects of factors other than increased imports calls for an overall assessment of such "other factors". As we see it, Article 4.2(b) is not concerned with the relative importance of individual factors as between themselves or as compared with increased imports. Essentially, Articles 2 and 4 of the Agreement on Safeguards are concerned with the injurious effects of increased imports on the situation of the domestic industry as distinct from the injurious effects of all "other factors".

10.333 With regard to arguments made by complainants regarding the consistency of the "substantial cause" test *applied* by the USITC[5209] and the Agreement on Safeguards, the Panel notes that the Appellate Body in *US – Lamb* stated that:

> "[B]y examining the *relative* causal importance of the different causal factors, the USITC clearly engaged in some kind of process to separate out, and identify, the effects of the different factors, including increased imports. Although an examination of the *relative* causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the *Agreement on Safeguards*. On the record before the Panel in this case, a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors."[5210]

10.334 In the Panel's view, there is nothing in the substantial cause test applied by the USITC, in itself, that would necessarily mean that the obligation to "separate and distinguish" the effects of other causes on the state of domestic industry cannot be fulfilled and was not fulfilled in the case of the safeguard measures that are the subject of our review in this case. Nor do we consider that it would necessarily preclude the consideration and evaluation of the nature and extent of the effects of those factors as required by the Agreement on Safeguards. The Panel does, however, believe that whether or not the approach that the USITC has adopted for each of the safeguard measures complies with the requirements of the Agreement on Safeguards will depend, in each case, on whether the USITC's analysis "established explicitly" on the basis of a "reasoned and adequate explanation" that the effect of the other factors on the situation of the domestic industry had not been attributed to the increased imports. We will consider this issue below in our measure-by-measure analysis.

[5209] The Panel recalls that the complainants have not challenged the United States' statute on safeguards *per se*, see at paras 10.6 – 10.8 above.

[5210] Appellate Body Report, *US – Lamb*, para. 184.

(iv) Quantification

10.335 In their argumentation on the legal standard for causation (as well as for the appropriate remedy), parties advanced detailed arguments on the question of whether quantification is required and on the use of econometric models.

10.336 We note, first, that the text of the Agreement on Safeguards does not require quantification. However, in the Panel's view both the Agreement on Safeguards and relevant jurisprudence anticipate that quantification *may* occur. In addition, the Panel considers that quantification may be particularly desirable in cases involving complicated factual situations where qualitative analyses may not suffice to more fully understand the dynamics of the relevant market.

10.337 In support, we note that Article 4.2(a) of the Agreement on Safeguards refers to "factors of [a] quantifiable nature." As explained in paragraph 10.318 above, we consider that Articles 4.2(a) and 4.2(b) must be read together and in a mutually consistent fashion. Therefore, the factors referred to in Article 4.2(a) must be taken into consideration in undertaking the non-attribution exercise (in addition to any other factors that may be relevant). In addition, the requirement in Article 4.2(a) that evaluated factors be of a "quantifiable nature" implies that at least some of the factors assessed in the non-attribution exercise will be quantifiable and, in those circumstances, should be quantified.

10.338 Further, the Panel recalls comments made by the Appellate Body in *US – Line Pipe* where it stated that compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient justification for a measure and should also provide a benchmark against which the permissible extent of the measure should be determined. In particular, the Appellate Body stated that:

> "We observe here that the non-attribution language of the second sentence of Article 4.2(b) is an important part of the architecture of the *Agreement on Safeguards* and thus serves as necessary context in which Article 5.1, first sentence, must be interpreted. In our view, the non-attribution language of the second sentence of Article 4.2(b) has two objectives. First, it seeks, in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required 'causal link' between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports. Second, it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence. Indeed, as we see it, this is the only possible interpretation of the obligation set out in Article 4.2(b), last sentence, that ensures its consistency with Article 5.1, first sentence. It would be illogical to require an investigating authority to ensure that the 'causal link' between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors."[5211]

10.339 The Panel considers that quantification could help in identifying the share of the overall injury caused by increased imports, as distinct from the injury caused by other factors, which would in turn yield a "benchmark" for ensuring that the safeguard measure is imposed only to the extent necessary to prevent or remedy serious injury and allow for adjustments.

[5211] Appellate Body Report, *US – Line Pipe*, para. 252.

10.340 In addition, the Panel considers that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution "explicitly" on the basis of a reasoned and adequate explanation.[5212] In this regard, the Panel recalls that, as stated on several occasions by the Appellate Body, WTO Members are expected to interpret and apply their WTO obligations in good faith.[5213] Moreover, in light of the obligations imposed on competent authorities to consider all plausible alternative explanations submitted by the interested parties, we believe that a competent authority may find itself in situations where quantification and some form of economic analysis are necessary to rebut allegedly plausible alternative explanations that have been put forward. While the wording of the provisions of the Agreement on Safeguards does not require quantification in the causal link analysis *per se*, the circumstances of a specific dispute may call for quantification.

10.341 Having said that quantification may be desirable, useful and sometimes necessary depending on the circumstances of a case, the Panel recognizes that quantification may be difficult and is less than perfect. Therefore, the Panel is of the view that the results of such quantification may not necessarily be determinative. We consider that an overall qualitative assessment that takes into account all relevant information, must always be performed. Nevertheless, in the Panel's view, even the most simplistic of quantitative analyses may yield useful insights into the overall dynamics of a particular industry and, in particular, into the nature and extent of injury being caused by factors other than increased imports to a domestic industry.

10.342 Regarding argumentation by the parties as to the form which quantification should take, the Panel considers that this will depend again upon the complexity of the situation under consideration. The approach adopted should enable a competent authority to apportion, even roughly, the injury attributable to factors other than increased imports that may come into play in the context of a particular industry. The more complex the situation, the more necessary a sophisticated analysis becomes.[5214] Whatever approach or model is adopted, it should be applied in good faith and with due diligence.[5215] It seems to us that this is demanded by the good faith interpretation and application of Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards.

(v) Sequence of assessment

10.343 As for the sequence of assessment of the various elements that may be involved in establishing the existence of a causal link, the Panel is of the view that the Agreement on Safeguards does not prescribe any order. The Panel recalls the Appellate Body's comments in *US – Lamb*, where, in defining the steps that might be undertaken in the non-attribution analysis, it stated that "these steps are not legal 'tests' mandated by the text of the *Agreement on Safeguards*, nor is it imperative that

[5212] The Appellate Body in *US – Line Pipe* stated that a mere assertion that injury caused by other factors has not been attributed to increased imports does not establish explicitly with a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports.: Appellate Body Report, *US – Line Pipe*, para. 220.

[5213] See, for example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 297 *et seq*.

[5214] We note in this regard that the United States used econometric models in its demonstration of compliance with Article 5.1 before the Panel.

[5215] In support of our argument that the approach or model used for quantification should be one based on good faith and due diligence, we refer to the Appellate Body's decision in *US – Cotton Yarn,* which said the exercise of due diligence was required in relation to the obligations under the Agreement on Textiles and Clothing, being the equivalent to Article 3 of the Agreement on Safeguards (Appellate Body Report, para. 76). In addition, the Appellate Body in *US – Offset Act* acknowledged the relevance of the principle of good faith as a general rule of conduct in international relations that controls the exercise of rights by states. The Appellate Body stated that there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith. (Appellate Body Report, para. 297 *et seq*)

each step be the subject of a separate finding or a reasoned conclusion by the competent authorities."[5216]

10.344 Accordingly, the Panel does not consider that the non-attribution exercise need necessarily precede a consideration of coincidence between the increased imports and the injury factors and the conditions of competition or *vice versa*. The Panel is of the view that the wording of Articles 2.1 and 4.2 does not require that non-attribution be undertaken in advance of or following any other analysis that may be undertaken with a view to establishing the existence of a causal link. Provided that the various elements entailed in a causation analysis are considered and analysed in coming to a conclusion on the existence or otherwise of a "causal link", this should suffice. This much is clear from the Appellate Body's comments in *US – Wheat Gluten* and *US – Lamb*:

> "[L]ogically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors."[5217]

10.345 As for the significance of the fact that the USITC, in a number of instances, may have begun its text with a finding of a "causal link" before it undertook the non-attribution demonstration, in the Panel's view, this does not necessarily entail a violation of Article 4.2(b). In this regard, we emphasise the Appellate Body's comment that "the final determination about the existence of the 'causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment in turn follows the separation of the effects caused by all the different factors". In our view, what matters is whether, ultimately, the USITC's report contains a reasoned and adequate explanation of the various elements that need to be established under Article 4.2(b).

10.346 As noted above, it is always incumbent upon a competent authority to determine, including through compliance with the non-attribution requirement, whether, overall, a genuine and substantial relationship of cause and effect exists between increased imports and serious injury. In this context, the Panel disagrees with the suggestion by Japan and Brazil that, in certain cases, once the effect of other factors has been separated and distinguished, the "connection between the imports and the serious injury is ascertained".[5218] The Panel is of the view that this assumption cannot be made automatically since the determination of whether a causal link exists always calls for an overall assessment.

[5216] Appellate Body Report, *US – Lamb*, para. 178.

[5217] Appellate Body Report, *US – Lamb*, para. 180; Appellate Body Report, *US – Wheat Gluten*, para. 69.

[5218] Brazil's written reply to Panel's question No. 87 at the first substantive meeting, Japan's written reply to Panel's question No. 87 at the first substantive meeting.

(vi) Imports from free-trade areas – "other factors"?

10.347 The complainants' claims raise the issue of whether imports from free-trade areas that were ultimately excluded from the application of the safeguard measures had to be treated as an "other factors" in the context of the non-attribution exercise that is required under Article 4.2(b).

10.348 The Panel will review, in the following measure-by-measure analysis, the USITC's causation findings for each specific safeguard measures at issue and contained in its 22 October 2001 determination published in December 2001. That determination treated imports from *all* sources together. Since the excluded imports (from Canada, Mexico, Jordan and Israel) were part of all imports for the purposes of the October causation analysis, they cannot be simultaneously treated as an "other factor" and part of "all imports" at the same time.

10.349 In the present case, there was indeed a "gap" between the imports covered by the determination (October 2001) and those covered by the safeguard measures (March 2002). In such a situation, pursuant to the principle of parallelism, the importing Member must establish explicitly that imports from sources covered by the measure satisfy the requirements of Articles 2 and 4 of the Agreement on Safeguards. The Panel's review of the demonstration of compliance with the principle is contained in the following section of our Reports dealing with parallelism. There, we will consider how the USITC treated the exclusion of imports from Canada, Mexico, Jordan and Israel in the context of the re-adjustments called for by the existence of a "gap" between the imports covered by the determination and those covered by safeguard measures.

5. Measure-by-measure analysis

10.350 We recall first our findings in paragraphs 10.306-10.308 above . There may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence at all; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving causal link.

10.351 We also stated previously that, in all cases, in conducting its causal link analysis, the competent authority must provide a reasoned and adequate explanation of such analysis. In cases where there is an absence of coincidence (whether or not a coincidence analysis was undertaken), a compelling explanation of why causation exists is needed, since coincidence should normally be central to causation determinations. In light of our foregoing legal analysis, the Panel will review the various components of the USITC's findings on causation in the order they were dealt with by the USITC in its Report.

10.352 In cases where *the USITC undertook a coincidence analysis* and the causal link determination has been challenged by the complainants, we will examine whether the USITC provided a reasoned and adequate explanation that a causal link existed where it found coincidence between movements in imports and movements in injury factors.

10.353 As will be seen below, there is an instance where the Panel agreed with the USITC's conclusion that clear coincidence existed.[5219] In such cases, according to our analytical framework in

[5219] We refer, in particular, to the case of FFTJ.

paragraphs 10.306-10.308, there is generally no need for the competent authority to conduct a further analysis to support its coincidence analysis. Nor would it be necessary in these cases for the Panel to review any further analysis if it has been undertaken by the competent authority. However, in that particular instance, the USITC had not provided a reasoned and adequate explanation of the existence of coincidence, so the Panel proceeded to review the USITC's conditions of competition analysis.

10.354 There are also a number of instances where the Panel considered that the relevant facts did not support a finding of coincidence by the USITC at all. In these cases, the Panel proceeded to consider whether the USITC, nevertheless, provided a compelling explanation that a causal link existed. The Panel proceeded in this fashion even in cases where the complainants did not specifically challenge the compelling explanation provided by the USITC. We consider that we are entitled to adopt such an approach, provided that the complainants challenged the causal link determination.

10.355 Finally, there are a number of instances where the Panel was unsure whether the facts supported a finding of coincidence or where overall coincidence was not clear. In these cases, the Panel considered whether the USITC undertook a *further* analysis to demonstrate that a causal link existed. Where it did so, the Panel examined the further analysis performed by the USITC to assess whether, overall, a causal link existed. We consider that we are entitled to adopt such an approach, provided that the complainants challenged the causal link determination.

10.356 In cases where *the USITC did not undertake a coincidence analysis*, we assessed whether the USITC provided a reasoned and adequate explanation as to why it did not do so and whether it provided a compelling explanation as to why a causal link nevertheless existed. In so doing, we considered whether, on the basis of the analysis used by the USITC in such cases, the facts supported the conclusions drawn by the USITC. Again, the Panel proceeded in this fashion even in cases where the complainants did not specifically challenge the compelling explanation. We consider that we are entitled to adopt such an approach, provided the complainants challenged the causal link determination.

10.357 With respect to non-attribution, the Panel will consider whether relevant factors other than imports were considered by the USITC. Further, we will consider whether the USITC established explicitly, on the basis of a reasoned and adequate explanation, that injury caused by those other factors was not attributed to imports.

10.358 Finally, in the case of CCFRS, the Panel will examine the difficulties encountered in reviewing the USITC's causation analysis for this product. We note that such difficulties are associated with the fact that CCFRS is comprised of five constituent items, namely, slab, plate, hot-rolled steel, cold-rolled steel and coated steel.

10.359 As a preliminary point, we note that all data that has been relied upon by the Panel in this section was obtained directly from the USITC Report or from the various tables and annexes to which that Report refers. In addition, we note that, for each part of our discussion on the USITC's causation analysis for the various safeguard measures at issue, we have set out what we consider to be the relevant parts of the USITC Report. Finally, as a more specific point, the Panel notes that, on a number of occasions, we have reviewed pricing analyses undertaken by the USITC as part of its causal link analysis. We note that in conducting such a review, the Panel has treated unit values as a proxy for prices. We consider that this is acceptable given that this is apparently what the USITC itself did.[5220] Further, we understand that price trends mirror unit value trends. As a related point, we

[5220] See, for example, the USITC's analysis for CCFRs at pp 55 – 63 of the USITC Report, Vol I.

do not consider that any distinction exists between "unit values" on the one hand and "average unit values" on the other hand. More particularly, in the context of this case, we consider that unit values for a particular year are implicitly averages.

(a) CCFRS

10.360 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants which, for us, raised the most problematic aspects of the USITC's determinations on causation – that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.361 The USITC findings read as follows:

> "We find that the increased imports of certain carbon flat-rolled steel are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry.[5221] In making this finding, we have considered carefully evidence in the record relating to the enumerated statutory factors, as well as evidence relating to domestic production, capacity, capacity utilization, shipments, market share, profit and loss data, plant closings, wages and other employment-related data, productivity, capital expenditures, and research and development expenditures. Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.
>
> a. Conditions of Competition
>
> We take into account a number of factors that affect the competitiveness of domestic and imported certain carbon flat-rolled steel in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestic or imported articles.
>
> Producers generally agree that there are few or no substitutes for certain carbon flat-rolled steel.[5222] Certain carbon flat-rolled steel may represent a relatively high share of the cost of downstream certain carbon flat-rolled steel, but typically represents a relatively small share of the value of finished products.[5223]

[5221] (original footnote) Commissioner Devaney joins in the analysis of the majority, related to causation, as presented here. He further notes that when the analysis is performed over the entire industry as he has defined it, the result is the same, *i.e.* imports are a substantial cause of serious injury.

[5222] (original footnote) CR at FLAT-67 and PR at FLAT-53. There are few or no substitute products for each of the product categories included in our certain carbon flat-rolled products class. CR at FLAT-67-68 and PR at FLAT-53-FLAT-54.

[5223] (original footnote) CR at FLAT-68 and PR at FLAT-54.

Demand for certain carbon flat-rolled steel depends upon the demand for a variety of end-use applications.[5224] A significant percentage of certain carbon flat-rolled steel is consumed in the production of other downstream certain carbon flat-rolled steel.[5225] All slabs are consumed in the production of downstream steel, and steelmakers themselves are the only purchasers of slab. Slab is not a rolled product and requires additional processing before it may be incorporated into a finished product. As expected for feedstock products, the majority of domestically-produced hot-rolled and cold-rolled steel are consumed in the production of further processed steel, although a merchant market exists for both hot-rolled and cold-rolled steel.[5226] On the other hand, a majority of domestically-produced plate and coated steel, which are further processed steel, is sold on the merchant market, with relatively small shares of these steels being devoted to the production of downstream products.[5227] Construction and automotive applications are significant end-uses for plate, hot-rolled, cold-rolled, and coated steel.[5228]

By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel.[5229] Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, climbed steadily during the period, from 203.2 million short tons in 1996 to 219.0 million short tons in 2000, an increase of 7.8 percent.[5230] Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, declined 14.9 percent from interim 2000 to interim 2001.[5231] Net sales of certain carbon flat-rolled steel increased from 58.8 million short tons in 1996 to 65.2 million short tons in 2000, an increase of 10.9 percent.[5232] Net sales of certain carbon flat-rolled steel declined 11.7 percent between interim 2000 and interim 2001.[5233] A decline in demand, however, can be seen at the end of the period examined, as apparent domestic consumption of certain carbon flat-rolled steel was 14.9 percent lower in interim 2001 than in interim 2000.

Similar, though not identical, increases occurred in the consumption of each type of flat-rolled steel. Apparent domestic consumption of slabs rose from 71.4 million short tons in 1996 to 74.4 million short tons in 2000; apparent domestic

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[5224] (original footnote) CR at FLAT-66 and PR at FLAT-51.
[5225] (original footnote) CR and PR at OVERVIEW-10 and Table OVERVIEW-2.
[5226] (original footnote) CR and PR at Tables FLAT-14 and FLAT-15.
[5227] (original footnote) CR and PR at Tables FLAT-13 and FLAT-16.
[5228] (original footnote) CR and PR at Table OVERVIEW-2.
[5229] (original footnote) We are cognizant of the difficulty of measuring consumption, production, capacity, and import penetration in a product for which a significant portion of production is consumed in the production of other, downstream materials also included in the like product. Adding figures for each of the product categories would tend to overstate domestic capacity and production and understate the true impact of imports, while concentrating solely on commercial shipments would be inconsistent with available capacity data. *See* CR at FLAT-18 n.11, FLAT-34 n.13, and FLAT-60 n.14, PR at FLAT-15 n.11, FLAT-30 n.13, and FLAT-44 n.14. We have considered the arguments of both domestic producers and respondents regarding the appropriate method for determining these indicators, and we have considered a variety of different measurements in reaching our determination. In general, however, we found that the same conclusions were warranted regardless of which measurement was used.
[5230] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5231] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5232] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5233] (original footnote) INV-Y-209 at Table FLAT-ALT7.

consumption of slabs in 2000 was the highest level registered in the POI.[5234] Apparent domestic consumption of slabs declined 15.6 percent between interim 2000 and interim 2001.[5235] Apparent domestic consumption of hot-rolled steel increased from 68.5 million short tons in 1996 to 75.1 million short tons in 2000; apparent domestic consumption of hot-rolled steel in 2000 was the highest level registered in the POI.[5236] Apparent domestic consumption of hot-rolled steel declined 17.1 percent between interim 2000 and interim 2001.[5237] Apparent domestic consumption of cold-rolled steel actually peaked in 1999 at 40.6 million short tons. Nonetheless, apparent domestic consumption of cold-rolled steel in 2000, at 40.0 million short tons, was 9.8 percent higher than the 1996 level of 36.4 million short tons.[5238] Apparent domestic consumption of cold-rolled steel declined 12.3 percent between interim 2000 and interim 2001.[5239] Similarly, apparent domestic consumption of coated steel peaked in 1999 at 22.8 million tons, but apparent domestic consumption in 2000, at 22.3 million short tons, was 16.9 percent higher than the 1996 level of 19.1 million short tons.[5240] Apparent domestic consumption of coated steel was 13.0 percent lower in interim 2001 than in interim 2000.[5241] Only plate consumption exhibited a significantly different trend, with apparent consumption in 2000, at 7.1 million short tons, below the 1996 level of 7.8 million short tons.[5242] Apparent domestic consumption of plate was 3.6 percent lower in interim 2001 than in interim 2000.[5243]

With regard to supply of certain carbon flat-rolled steel, as discussed above, domestic capacity increased steadily from 1996 to 2000. Foreign production capacity also increased from 1996 to 2000.[5244] As measured by production capacity for plate and hot-rolled steel only, foreign production capacity rose from 290.9 million short tons in 1996 to 335.2 million short tons in 2000, an increase of 15.2 percent.[5245] Foreign production capacity for each of the product categories increased during the POI. Foreign production capacity for slabs rose 8.0 percent between 1996 and 2000, while production capacity for plate rose 9.5 percent.[5246] Foreign production capacity for further processed flat-rolled steel rose much more significantly between 1996 and 2000, with production capacity for hot-rolled steel rising by 16.3 percent, for cold-rolled steel by 13.9 percent, and for coated steel by 29.4 percent.[5247]

[5234] (original footnote) CR and PR at Table FLAT-C-2.
[5235] (original footnote) CR and PR at Table FLAT-C-2.
[5236] (original footnote) CR and PR at Table FLAT-C-4.
[5237] (original footnote) CR and PR at Table FLAT-C-4.
[5238] (original footnote) CR and PR at Table FLAT-C-5.
[5239] (original footnote) CR and PR at Table FLAT-C-5.
[5240] (original footnote) CR and PR at Table FLAT-C-7.
[5241] (original footnote) CR and PR at Table FLAT-C-7.
[5242] (original footnote) CR and PR at Table FLAT-C-3.
[5243] (original footnote) CR and PR at Table FLAT-C-3.
[5244] (original footnote) We note that domestic producers criticized the quality of data from our questionnaires regarding foreign capacity. Prehearing Brief of Bethlehem Steel Corporation, LTV Steel Company, Inc., National Steel Corporation and United States Steel LLC at 70 n.217 and Appendix A. We have followed our long-standing practice of relying on questionnaire data in reaching our determination, although we have considered the alternative data provided by domestic producers and other parties.
[5245] (original footnote) INV-Y-215 at Table VII-ALT1.
[5246] (original footnote) CR and PR at Tables FLAT-30 and FLAT-33.
[5247] (original footnote) CR and PR at Tables FLAT-36, FLAT-39, and FLAT-43.

These significant production capacity increases occurred during a period of disruption in world steel markets. The depreciation of several Asian currencies in late 1997 and early 1998 significantly curtailed steel consumption in those countries and created a pool of steel seeking alternative markets.[5248] The dissolution of the USSR led to significant increases in steel exports to the United States from former USSR countries.[5249]

There is a moderate to high degree of substitutability between domestically-produced and imported certain carbon flat-rolled steel.[5250] Purchasers typically ranked "quality" as the most important factor in their purchasing decision.[5251] A significant majority of purchasers found domestically-produced and imported certain carbon flat-rolled steel comparable in product quality, product range, and consistency.[5252] Only in delivery time did purchasers note a clear difference between domestically-produced and imported certain carbon flat-rolled steel.[5253] Furthermore, while more purchasers ranked quality as the most important factor in the purchasing decision, a significant number ranked price first, and most purchasers included price as one of the top three factors.[5254] A significant number of purchasers reported they "always" or "usually" purchase the lowest priced flat-rolled steel offered.[5255]

Imports of various certain carbon flat-rolled steel products are affected by a number of existing antidumping and countervailing duty orders and suspension and other trade restricting agreements.[5256] Some of these measures pre-dated the POI and did not prevent the import surge observed in this investigation. However, other measures were imposed during the POI.

b. Analysis

…

The dramatic increase in the volume of imports in 1998 – at the midpoint of the period examined – coincided with sharp declines in the domestic industry's performance and condition which occurred despite growing US demand. Total imports were 18.4 million short tons in 1996 and 19.3 million short tons in 1997, an increase that only modestly exceeded the increase in total apparent domestic

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[5248] (original footnote) CR and PR at OVERVIEW-17.

[5249] (original footnote) CR and PR at OVERVIEW-18.

[5250] (original footnote) CR at FLAT-68, PR at FLAT-54.

[5251] (original footnote) CR and PR at Table FLAT-64. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.20-22.

[5252] (original footnote) CR at Table FLAT-65, PR at Table FLAT-65. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.15-19.

[5253] (original footnote) CR at Table FLAT-65, PR at Table FLAT-65. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.15-19.

[5254] (original footnote) CR at Table FLAT-64, PR at Table FLAT-64. Purchasers made similar responses for each of the types of certain carbon flat-rolled steel. INV-Y-212 at Flat Products, pp.20-22.

[5255] (original footnote) CR at FLAT-71, PR at FLAT-57.

[5256] (original footnote) CR and PR at Table OVERVIEW-1; *see also Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, Inv. Nos. 701-TA-393 (Final) and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283 (March 2000) at 20 (comprehensive agreement with Russia); *Certain Hot-Rolled Steel from Brazil and Japan*, 701-TA-384 (Final) and 731-TA-806 and 808 (Final), USITC Pub. 3223 (Aug. 1999) at 3 n.7 (suspension agreements with Brazil and Russia).

consumption.[5257] Imports in 1998 jumped more than 30 percent over the previous year's level, to a total of 25.3 million short tons.[5258] This increase occurred in a year when total apparent domestic consumption, including all captive consumption, increased 3.2 percent and net domestic sales rose a scant 0.5 percent.[5259] After this steep increase, import volume lessened in 1999 and 2000 but remained above 1996 and 1997 levels.[5260]

This import surge occurred in most types of certain carbon flat-rolled steel. Imports of plate increased by 53.4 percent between 1997 and 1998; imports of hot-rolled steel increased by 76.4 percent; and imports of cold-rolled steel increased 13.0 percent, after already increasing 38.2 percent between 1996 and 1997.[5261] For coated steel, the surge came a year later, as imports increased by 15.8 percent between 1998 and 1999.[5262] After these primary surges, imports of hot-rolled steel increased by another 14.4 percent between 1999 and 2000, and cold-rolled steel imports by 11.2 percent between interim 2000 and interim 2001, despite a sharp decrease in demand.[5263]

The impact of the 1998 surge in imports on the domestic industry is undeniable. In 1996 and 1997, before the rapid escalation in import volume, the domestic industry performed moderately well. In 1997, with net merchant sales of 61.1 million short tons, the domestic industry had an operating income of 6.1 percent of sales and a net income of 4.5 percent.[5264] In 1998, despite an increase in net sales to 61.3 million short tons and a modest decrease in unit costs, the industry's operating margin declined to 4.0 percent. In 1999, net sales increased to 63.5 million short tons and cost of goods sold were the lowest during the POI, but the industry experienced operating losses of 0.7 percent of sales. In 2000, net sales again increased to 65.2 million short tons and the total cost of goods sold increased a modest one percent, yet operating losses fell further, to 1.4 percent of sales. The industry experienced net operating losses in both 1999 and 2000.[5265] The industry's operating margin continued to slide in the first half of 2001, to a loss of 11.5 percent of sales.

After the initial import surges in 1998, as noted, the volume of imports slackened somewhat but remained above the levels seen in 1996-1997. One way in which the impact of the massive import volume continued to reverberate beyond 1998 was through increased inventories. End-of-period inventories held by importers increased substantially in 1998, as did inventories held by service centers.[5266]

The imports that entered the US market between 1998 and 2000 were generally significantly lower-priced than in the earlier years of the POI. These price

[5257] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5258] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5259] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5260] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5261] (original footnote) CR and PR at Tables FLAT-C-3-FLAT-C-5.
[5262] (original footnote) CR and PR at Table FLAT-C-7.
[5263] (original footnote) CR and PR at Tables FLAT-C-4 and FLAT-C-5.
[5264] (original footnote) INV-Y-212 at STL201FT.WK4.
[5265] (original footnote) INV-Y-212 at STL201FT.WK4.
[5266] (original footnote) CR and PR at Table FLAT-49; Dewey/Skadden Prehearing Brief at Exhs. 55 and 56 (we note that the data in the latter exhibits do not distinguish between domestic and imported product).

decreases were sharp and generally unrelated to overall demand in the US market, which steadily increased even as prices fell.

Import Average Unit Values[5267]

	1996	1997	1998	1999	2000	Interim 2000	Interim 2001
Certain Carbon Flat-Rolled	370	376	344	298	331	323	310
Slabs	253	251	231	177	221	222	180
Plate	400	424	466	400	398	418	409
Hot-Rolled	331	325	288	269	303	299	276
Cold-Rolled	505	485	447	402	466	463	399
Coated	608	609	596	537	558	556	519

The import surge in 1998 altered the competitive strategy of domestic producers. After the initial wave of imports in 1998, which captured substantial market share from domestic producers, domestic producers sought to protect market share against further import penetration by competing aggressively against imports on price.[5268] Repeated price cuts by the industry, while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry's condition. Moreover, the price declines occurred despite the fact that demand for certain carbon flat-rolled steel increased in both 1999 and 2000.

Average Unit Values of Commercial Shipments for Domestically Produced Steel[5269]

	1996	1997	1998	1999	2000	Interim 2000	Interim 2001
Certain Carbon Flat-Rolled	470	474	459	415	418	428	373
Slabs[5270]	248	251	250	215	214	224	205
Plate	482	473	470	402	401	400	379
Hot-Rolled	348	356	335	294	312	329	257
Cold-Rolled	492	496	472	440	445	452	409
Coated	616	621	597	557	544	553	508

A review of product specific data supports the claims of the domestic producers that imports were priced below domestically produced steel, and that imports led to the decline in prices. For example, for hot-rolled product 3A, *** led

[5267] (original footnote) CR and PR at Tables FLAT-C-1-FLAT-C-5 and FLAT-C-7. We are mindful not to place undue weight on average unit values, as these may be affected by issues of product mix.

[5268] (original footnote) Dewey/Skadden Posthearing Brief on Flat-Rolled at 27.

[5269] (original footnote) CR and PR at Tables FLAT-12 to FLAT-15, and FLAT-17.

[5270] (original footnote) Between 1996 and 2000, commercial shipments of slabs accounted for only 0.9 percent of total shipments of domestically produced slab. CR and PR at Table FLAT-12.

to ***, reductions in shipments of the domestic product, and sharp subsequent reductions in domestic prices.[5271] Similar pricing and volume patterns, with significant dips in import prices garnering historically large sales volumes, followed by sharp cuts in domestic prices, occurred for cold-rolled products 4A and 4B.[5272]

As noted above, purchasers generally consider price an important factor in the purchasing decision, and the lowest price frequently wins the sale. In addition, although purchasers rank quality as the most important purchasing factor, purchasers generally consider imported certain carbon flat-rolled steel comparable in quality to domestically produced certain carbon flat-rolled steel. In such a market, the increased volume of imports, at prices that undercut and depressed and suppressed domestic prices, had an injurious impact on the domestic industry, particularly when the domestic industry aggressively cut prices to meet the continued influx of import volumes.

The domestic industry includes a number of producers who rely on imported certain carbon flat-rolled steel–especially slab–for use as raw materials in the production of further processed certain carbon flat-rolled steel. Some of these producers may have benefitted from the decline in import prices during the POI.[5273] Despite these possible isolated individual benefits[5274], the record indicates that the domestic industry as a whole suffered serious injury from increased imports.

Respondents have argued that, since imports generally peaked in 1998, any injury resulting from increased imports has long since passed, or been repaired by the imposition of subsequent Title VII duties. Between the surge in 1998 and the last full-year of the POI, 2000, domestic producers filed Title VII complaints on carbon steel plate, hot-rolled steel, and cold-rolled steel.[5275] Additionally, outstanding orders on coated steel were reviewed and retained during this same time period.[5276] Existing orders on cold-rolled steel were revoked only late in 2000.[5277] We find it reasonable to conclude that the filing of these Title VII actions to some extent staunched the flow of imports after 1998; indeed, respondents admit that the filing of a Title VII action temporarily repressed cold-rolled imports.[5278] We note, however, that import levels remained high through 1999 and 2000, and that the corrosive effects of low-priced

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[5271] (original footnote) INV-Y-212 at Table FLAT-ALT69. *See also* Product 3B (historically high import volume in 1998, and falling domestic prices from second quarter 1998 to second quarter 1999).

[5272] (original footnote) INV-Y-212 at Tables FLAT-ALT70 and FLAT-ALT71.

[5273] (original footnote) The *** US firms that rely exclusively on imported slab–***–showed generally more positive financial results than the industry as a whole. However, the unit raw material costs of these *** firms were ***. INV-Y-212 at STL201P2.WK4 (results on plate for ***), STL201H3.WK4 (results on hot-rolled for ***), STL201C4.WK4 (results on cold-rolled for ***), and ST201R6.WK4 (results on coated steel for ***).

[5274] (original footnote) For example, slab imports represent approximately ten percent of the slab consumed in the United States. CR and PR at Table FLAT-C-2.

[5275] (original footnote) CR and PR at Table OVERVIEW-1.

[5276] (original footnote) *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. AA1921-197, 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), USITC Pub. 3364 (November 2000) at 3.

[5277] (original footnote) USITC Pub. 3364 at 3.

[5278] (original footnote) Joint Respondents' Prehearing Brief on Cold-Rolled Steel at 11-12.

imports continued to injure the domestic industry even as the absolute volume of imports slackened somewhat. Although the volume of imports was lower in 1999 and 2000, prices of those imports continued to decline.

In sum, the causal link between increased imports and the injury to the domestic industry is clear. In 1997, at an operating margin of 6.1 percent, the industry was performing modestly well and thus was well poised to increase its profitability in 1998 as demand strengthened. However, the surge in imports in 1998, at prices below domestic prices, led to a decline in the industry's financial and other indicators. The industry then cut prices to hold on to market share but the price cuts prevented the industry from restoring profitability. The industry's operating margins declined steadily from 6.1 percent in 1997 to 4.0 percent in 1998 to negative 0.7 percent in 1999 and to negative 1.4 percent in 2000. Finally, in interim 2001, although import levels declined somewhat, prices remained low. The domestic industry entered a period of falling demand already in a weakened condition and deteriorated even further to an operating margin of negative 11.5 percent."[5279]

Claims and arguments of the parties

10.362 The arguments of the parties are set out in Section VII.H.2(a)(i) and (ii) *supra*.

Analysis by the Panel

10.363 At the outset, the Panel notes that the USITC undertook a coincidence analysis for CCFRS and concluded that coincidence existed. Accordingly, we will consider whether these findings provide a reasoned and adequate explanation of how the facts support this conclusion.

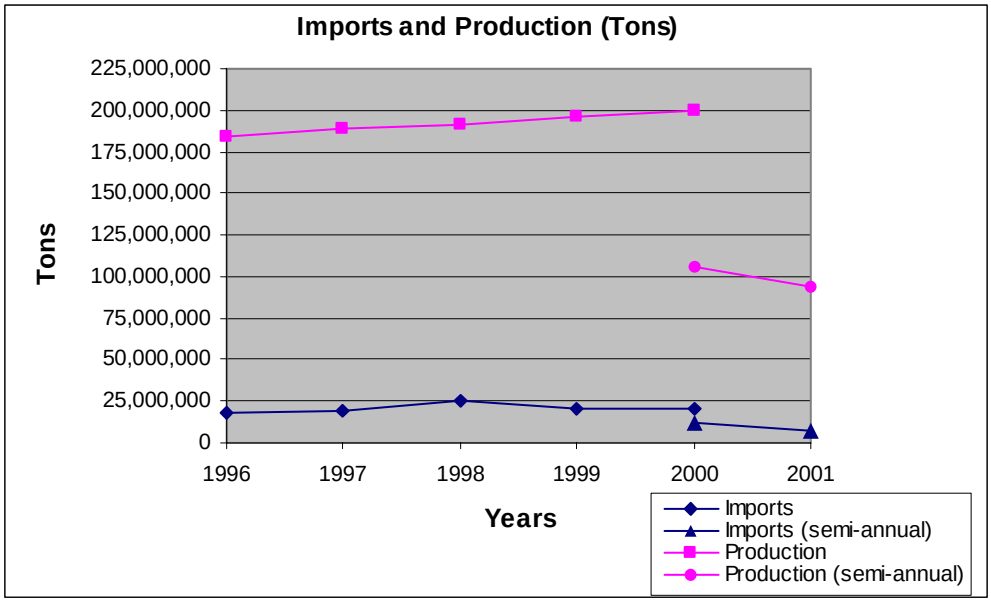
10.364 The Panel recalls that, when examined by a competent authority, coincidence must be demonstrated between the movements in imports and the movements in injury factors. The injury factors are listed in Article 4.2(a) of the Agreement on Safeguards. Specifically, they are: the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

10.365 The Panel has considered coincidence between a number of the injury factors mentioned in Article 4.2(a), including those referred to by the USITC, and imports. More specifically, we make reference to the following graphs of imports versus injury factors, which have been generated using USITC data, with a view to determining whether the USITC provided a reasoned and adequate explanation of how the facts support its determination that coincidence between increased imports and serious injury factors existed for CCFRS. Since CCFRS was treated by the USITC as a single product, aggregated data for each of the constituent items of CCFRS have been relied upon by the Panel.

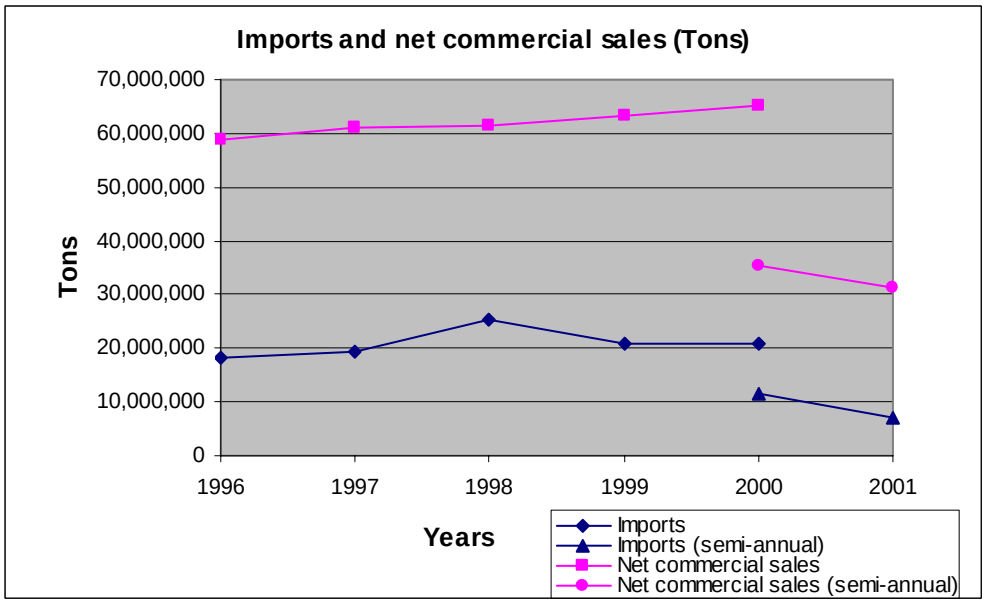
10.366 The Panel has first considered the relationship between imports and production. In the Panel's view, there does not appear to be any coincidence between import trends and production trends. In fact, production seems to have increased (albeit gradually) throughout most of the period of

[5279] USITC Report, Vol. I, pp. 55-63.

investigation, despite an increase in imports in 1998. Further, at the very end of the period of investigation, production decreased even though imports also decreased during that time.[5280]



10.367 Similarly, despite an increase in imports in 1998, net commercial sales increased (again, albeit gradually) throughout most of the period of investigation and do not appear to have been affected by the level of imports. Further, at the very end of the period of investigation, net commercial sales decreased even though imports also decreased during that time.[5281]

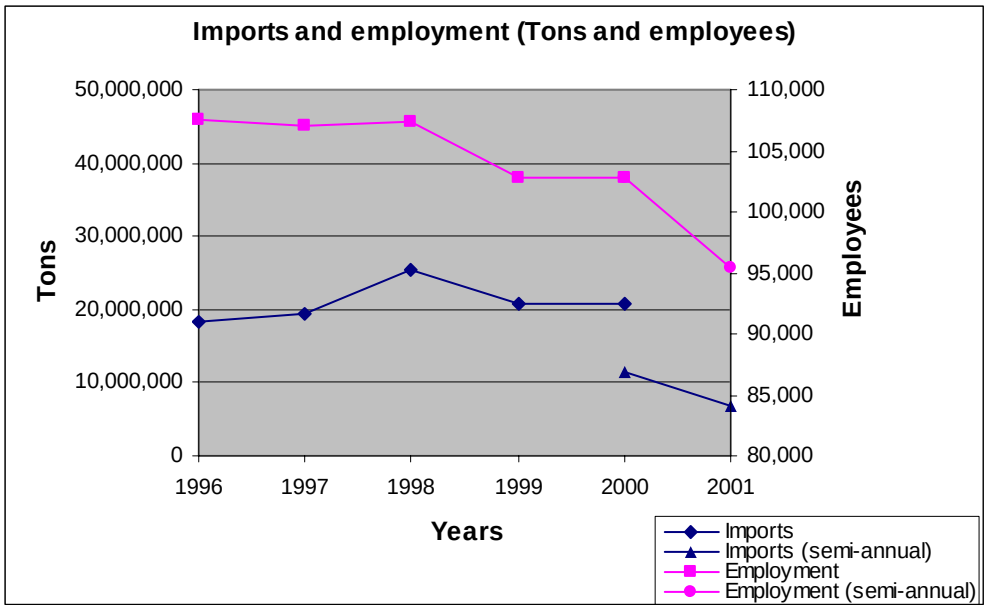


[5280] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

[5281] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

10.368 Assuming that a lag in the manifestation of effects can be expected in relation to employment, it would appear that, indeed, there is some coincidence between import levels in 1998 and employment levels in 1999. In particular, the surge in imports in 1998 appears to have been followed by a drop in employment levels in the following year. Similarly, a drop in import levels between 1998 and 1999 seems to correspond to a slight gain in employment levels in the succeding year, namely 1999 to 2000. In our view, the fact that employment decreased at the very end of the period of investigation even though imports also decreased during that time does not detract from our conclusion that, overall, coincidence appears to exist between import trends and employment trends, assuming a lag in the manifestation of the effects.

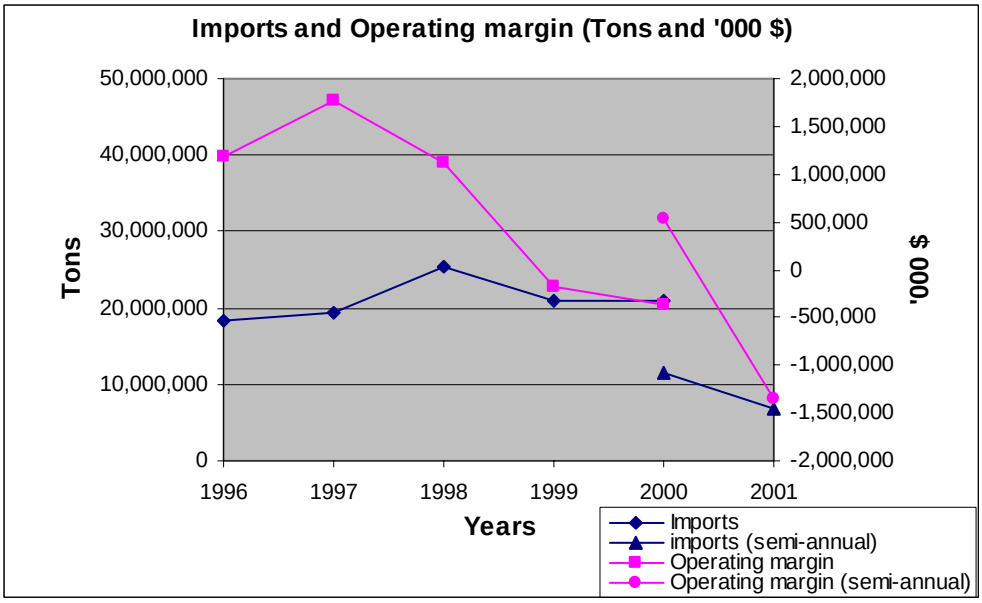
10.369 In our view, it is not inconceivable that a lag could be expected with respect to employment. We tend to agree with the argument made by the United States that companies may, in the face of adverse market conditions, defer taking employment decisions in the hope that the market situation will improve. A one-year lag between the influx of imports and declines in employment would, in the Panel's view, be reasonable. However, despite the fact that a lag is conceivable in relation to employment, we note that the USITC made no reference in its Report to this lag effect and the United States cannot rely on this argument before the Panel.[5282]



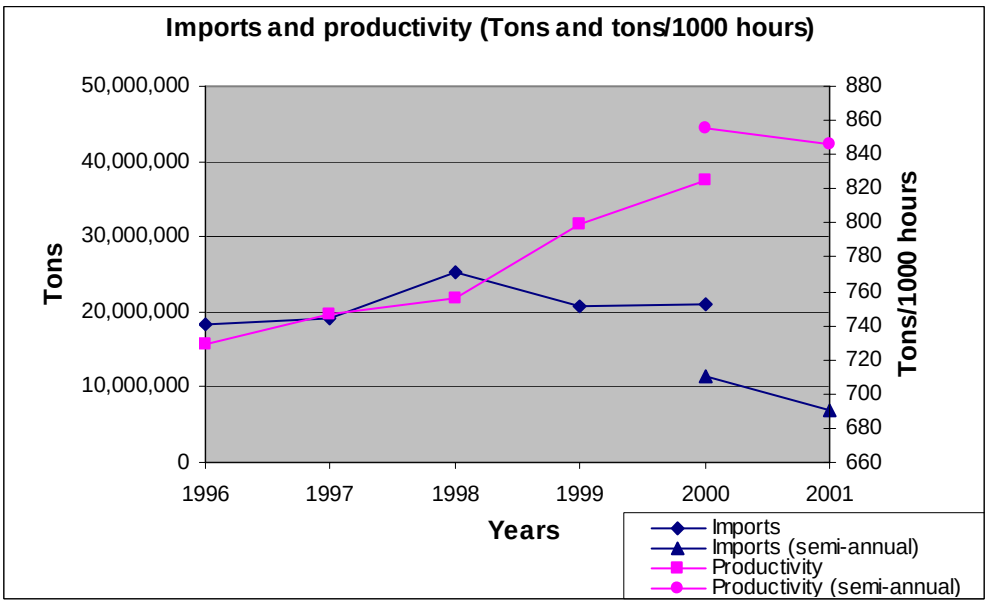
10.370 With respect to operating margin, which was apparently used by the USITC as a proxy for profit and losses and is, consequently, used for the same purpose here by the Panel, there appears to be some coincidence between a rise in imports from 1997 until 1998 and a sharp decline in the level of operating margin during the same period. However, from 1998 to 1999 when the level of imports fell and then subsequently stabilized from 1999 to 2000, the operating marging continued to decline quite dramatically. The continuing decline in operating margin in the latter part of the period of

[5282] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

investigation despite the decline in the level of imports suggests that something other than increased imports was also causing injury.[5283]



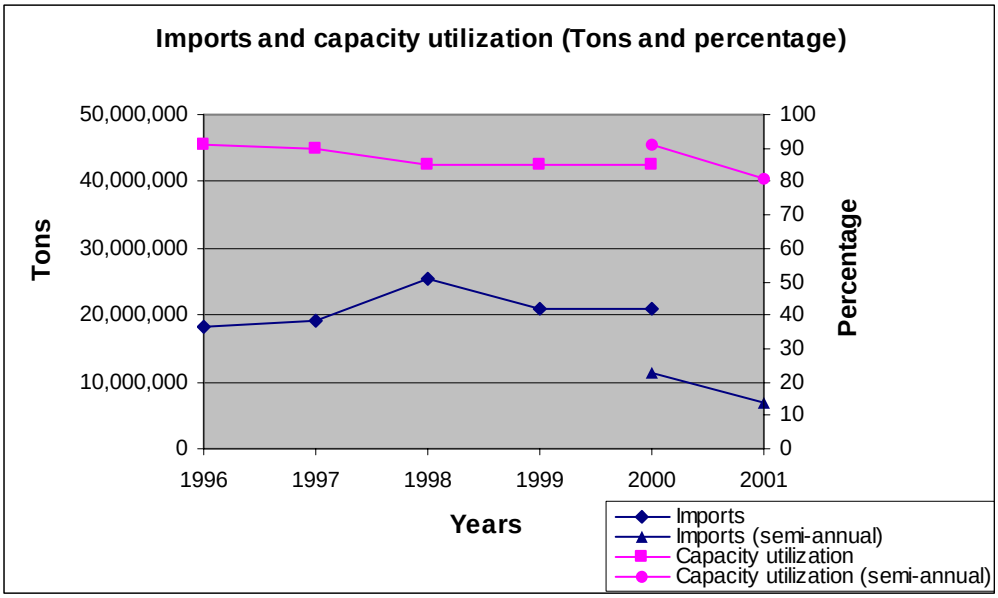
10.371 There does not appear to be coincidence between the import trends and trends in productivity. Indeed, even following the alleged surge in imports in 1998, productivity levels increased from 1998 onwards. Further, at the very end of the period of investigation, productivity decreased even though imports also decreased during that time.[5284]



[5283] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

[5284] The data represented in the graph below are contained in the USITC Report, in particular inINV-Y-209 at Table FLAT-ALT 7.

10.372 In the Panel's view, there appears to be an absence of coincidence between trends in imports and capacity utilization trends. In particular, capacity utilization appears to be fairly stable throughout the period of investigation, even following the increase in imports in 1998. Further, at the very end of the period of investigation, capacity utilization decreased even though imports also decreased during that time.[5285]



10.373 With respect to importers' inventories, the Panel notes that the USITC stated in its Report that: "One way in which the impact of the massive import volume continued to reverberate beyond 1998 was through increased inventories." Reference is made by the USITC in its report to Table-FLAT 49, which does, as the USITC finds, indicate that importers' inventories climbed significantly during the period of investigation. We agree that a build-up in importers' inventories may provide such importers with the ability to flood the domestic market. However, unless there is evidence of a subsequent increased volume of sales of imported products, we do not consider that a build-up of importers' inventories is necessarily relevant. While there was a peak in imports in 1998, this was followed by a return in the level of imports to that which existed towards the beginning of the period of investigation. Therefore, we do not consider that the build-up in importers' inventories is necessarily indicative of anything in this case, particularly since the USITC did not provide any explanation of the relationship between the building up of importers' inventories and the serious injury suffered by the producers of domestic CCFRS.

10.374 As stated by the Panel above, it is the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation that must be considered. The Panel has assessed whether the USITC provided a reasoned and adequate explanation of how the facts support the determination that coincidence existed for CCFRS. In so doing, we have found that there was no coincidence between, on the one hand, imports trends and the situation of the domestic industry of CCFRS, as reflected in data for production, net commercial sales, productivity and capacity utilization of the domestic CCFRS. We have also found that there was a lack of coincidence between imports trends and declines in domestic operating margin, particularly

[5285] The data represented in the graph below are contained in the USITC Report, in particular in INV-Y-209 at Table FLAT-ALT 7.

towards the end of the period of investigation. We did discern coincidence, albeit lagged, between increased imports, on the one hand, and employment, on the other hand. However, we note that the USITC made no reference in its Report to a lagged effect between increased imports and employment and the United States cannot now rely on this argument before the Panel. Finally, we did not consider that the build-up of importers' inventories during the course of the period of investigation was relevant given that there was no evidence to indicate that such a build-up subsequently entered into the market through sale (except for in 1998).

10.375 Having taken into consideration all of the foregoing, in the Panel's view, overall, coincidence did not exist between import trends for CCFRS and the serious injury suffered by the domestic industry. The Panel is particularly compelled by the fact that the indicators that would ordinarily be assumed to react shortly after an increase in imports did not display coincidence with the increased imports – namely, production, net commercial sales, productivity, capacity utilization and, most importantly, operating margin. The Panel notes in this regard that the USITC relied primarily on trends in net commercial sales and operating margin in its determination that coincidence existed, two factors for which we believe the facts do not support a conclusion that coincidence existed.

10.376 Given the lack of coincidence between imports trends and the injury factors, it was for the USITC to provide a compelling explanation as to why a causal link was considered, nevertheless, to exist. We proceed now to the USITC's analysis of the conditions of competition for CCFRS.

10.377 At the outset, the Panel would like to make some observations about the pricing data upon which the USITC relied in making its analysis of the conditions of competition in the CCFRS market for the purposes of determining whether or not a causal link existed between the increased imports and the serious injury. First, as mentioned above, the premise for the USITC's investigation regarding CCFRS is that CCFRS is a single product. Reference is made in the USITC's price analysis to average unit values ($/ton) for imported and domestically produced CCFRS. The Panel notes that the USITC itself admits that there may be difficulties associated with aggregated data upon which it relied, presumably including average unit values for CCFRS as a single product. In particular, the USITC stated in its Report that:

> "Throughout our analysis, we generally rely on combined data for five types of certain carbon flat-rolled steel. However, we also recognize that some combined data – for production and capacity for example – may involve double-counting, and we therefore cite data for the separate types of certain carbon flat-rolled steel where appropriate. Separate data also show trends similar to those for the industry as a whole in most cases."[5286]

In light of the foregoing, the Panel considers that it was incumbent upon the USITC to explain, where appropriate, why aggregate data could not be relied upon and justify the use of data for the items constituting CCFRS.

10.378 Further, as a related point, on the basis of the Panel's comments in *Argentina – Footwear (EC)*, the Panel notes that the use of a very broad product definition in this case that covered a number of separately identifiable items, means that "the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market."[5287] Given the similarities in terms of product breadth between the products at issue in *Argentina – Footwear (EC)* and CCFRS, we consider that serious doubt would

[5286] USITC Report Vol I, p. 51, note 193.
[5287] Panel Report, *Argentina – Footwear (EC*), para. 8. 261, footnote 557.

be cast on the validity of the price analysis for CCFRS on the basis of the foregoing. More particularly, in cases where a causal link determination is made using a conditions of competition analysis, the product upon which the safeguard measure was imposed, namely, CCFRS, should be amenable to a proper analysis of the conditions prevailing in the market. We do not consider that the grouping of the various products that constituted CCFRS renders it amenable to such an analysis because it becomes difficult, if not impossible, for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis for the purposes of establishing a causal link for CCFRS.

10.379 In any event, and this leads us to our second point, we note that, in concluding that there was import underselling for CCFRS as a single product, the USITC appears to have primarily relied upon data for constituent items of CCFRS rather than for CCFRS as a whole. This much is evident from the following statement made by the USITC: "A review of product specific data supports the claims of the domestic producers that imports were priced below domestically produced steel, and that imports led to the decline in prices". Putting aside the difficulties we have with the USITC's reliance on such data that have already been mentioned, a comparison of the imported and domestic prices for the constituent items of the CCFRS product indicates that while some of the domestically produced constituent items were undersold by the import counterparts at particular points during the period of investigation, this was not necessarily the case for the entire period of investigation. Nor was it the case for all the constituent items that made up CCFRS. Indeed, the USITC was, in our view, conveniently selective in the data to which it referred in its pricing analysis. In particular, it only referred to prices for hot-rolled products and cold-rolled products:

> "For example, for hot-rolled product 3A, *** led to ***, reductions in shipments of the domestic product, and sharp subsequent reductions in domestic prices.[5288] Similar pricing and volume patterns, with significant dips in import prices garnering historically large sales volumes, followed by sharp cuts in domestic prices, occurred for cold-rolled products 4A and 4B.[5289]"

Further, it provided no explanation as to why pricing data for the other three items that constituted CCFRS were not specifically considered and why the pricing data that it did refer to was respresentative of CCFRS.

10.380 For the reasons expressed above, we consider that whether the USITC relied upon average unit values for CCFRS as a single product or values for constituent items making up CCFRS, the USITC's analysis could certainly not justify the conclusion that:

> "In such a market, the increased volume of imports, at prices that undercut and depressed and suppressed domestic prices, had an injurious impact on the domestic industry, particularly when the domestic industry aggressively cut prices to meet the continued influx of import volumes.
>
> …
>
> However, the surge in imports in 1998, at prices below domestic prices, led to a decline in the industry's financial and other indicators."

[5288] (original footnote) INV-Y-212 at Table FLAT-ALT69. *See also* Product 3B (historically high import volume in 1998, and falling domestic prices from second quarter 1998 to second quarter 1999).

[5289] (original footnote) INV-Y-212 at Tables FLAT-ALT70 and FLAT-ALT71.

10.381 In conclusion, we are of the view that in conducting a conditions of competition analysis for CCFRS, the USITC did not provide a compelling explanation that demonstrates the existence of a causal link between increased imports and serious injury suffered by domestic producers of CCFRS. In particular, it is our view that the flaws in the data referred to by the USITC coupled with selective reliance upon data undermines the validity of the USITC's analysis.

(ii) Non-attribution

USITC findings

10.382 The USITC's findings read as follows:

> "Respondents have suggested several alternate sources of injury to the domestic industry, including declining domestic demand, intra-industry competition, domestic capacity increases, buyer consolidation, excess leverage of domestic producers, and legacy costs. We consider each of these in turn.
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> Respondents argue that the domestic industry has been injured by declining US demand. But all evidence suggests that the decline occurred very late in the POI, as late as the fourth quarter of 2000. Demand for certain carbon flat-rolled steel was lower in the first six months of 2001 than in the first six months of 2000.[5290] Apparent domestic demand in 2000 was higher than in 1996 for slabs, hot-rolled, cold-rolled, and coated steel, and apparent domestic demand for all certain carbon flat-rolled steel was higher in 2000 than in 1999.[5291] The domestic industry showed the signs of injury described above well before the latter portion of 2000, when demand began to drop off. The domestic industry first saw its operating income decline in 1998, at a time when demand was increasing and would continue to increase for another two years.[5292] The period of increasing demand was also when imports surged. We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period. Indeed, the losses experienced by the industry in 1999 and 2000 as a result of imports left the industry in a much weakened position to face the slowdown in demand.
>
> Respondents argue that the domestic industry has been injured by increases in domestic capacity well in excess of the increase in domestic demand. As noted above, domestic capacity for certain carbon flat-rolled steel in total and each certain carbon flat-rolled steel category increased between 1996 and 2000. These capacity increases occurred at a time when domestic demand rose consistently. Thus, increases in domestic capacity in general were justified in light of market conditions.
>
> It is true, as alleged by respondents, that capacity increases did exceed the increases in domestic consumption. From 1996 to 2000, apparent consumption of certain carbon flat-rolled steel increased by 7.8 percent for both internal transfers and commercial shipments, and increased by 10.9 percent for commercial shipments

[5290] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5291] (original footnote) INV-Y-209 at Table FLAT-ALT7 and CR and PR at Tables FLAT-C-2, FLAT-C4-FLAT-C-5, and FLAT-C-7.
[5292] (original footnote) INV-Y-209 at Table FLAT-ALT7.

alone.[5293] By contrast, domestic capacity increased by the following amounts from 1996 to 2000: 15.9 percent, for certain carbon flat-rolled steel; 12.2 percent for initial-stage steel-making capacity (slabs); 16.9 percent for combined hot-rolled steel and plate. Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined.

Respondents have argued that the presence of this new capacity, combined with the failure of the industry to retire older, less efficient capacity, put tremendous pressure on the domestic industry to cut costs in order to generate sales to fill the new capacity. It is true that there is a significant incentive to maximize the use of steelmaking assets, which can affect producers' pricing behavior. As we noted above, however, product-specific data, as well as AUV data, indicate that imports, rather than domestically produced steel, led prices downward during the POI. Indeed, capacity of foreign producers, already substantial exporters, increased steadily over the POI.[5294] Additionally, imports supplied a higher share of apparent domestic consumption in 2000 than in 1996. If increased domestic capacity were in fact the source of injury to the domestic industry, we would have expected to see the domestic industry lead prices downward, and wrest market share from imports. Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports.

Respondents have also claimed that poor management decisions, such as capital investment decisions that increased companies' debt load, are responsible for bankruptcies and poor financial performance by the domestic industry.[5295] We do not find these arguments persuasive. We noted above that the financial position of the industry weakened after imports first surged in 1998. The most serious injury to the domestic industry occurred in years of record overall demand. High levels of low-priced imports prevented the domestic industry from achieving profitability despite increased demand and increased shipments by the domestic industry. We find that the poor financial position of the domestic industry, including the high degree of debt leverage, is a result of the injury from increased imports suffered by the domestic industry, including poor equity performance, rather than a cause of that injury.[5296] Moreover, increased debt load and other allegedly poor management decisions cannot explain the price declines experienced by this industry.[5297]

Respondents argue that legacy costs, in the form of pension and non-pension benefits, have increased costs substantially, and those increased costs are more responsible for

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[5293] (original footnote) INV-Y-209 at Table FLAT-ALT7, CR and PR at Tables FLAT-12 to FLAT-15, FLAT-17, FLAT-C-2 to FLAT-C-5 and FLAT-C-7.

[5294] (original footnote) INV-Y-215 at Table VII-ALT1.

[5295] (original footnote) Joint Respondents' Prehearing Framework Brief at 63-83.

[5296] (original footnote) Injury Tr. at 988-89 (Dr. Kothari).

[5297] (original footnote) We have examined respondents' allegations of poor strategies followed by individual domestic companies. In an industry as large and diverse as the industry producing certain carbon flat-rolled steel, it is always possible to question the business strategies of individual firms. However, such examples, even if true, could not explain the substantial decline in the performance of the domestic industry as a whole. We do not find such a pattern of poor decision-making.

the wave of bankruptcy filings than are increased imports.[5298] The funding of legacy costs is a vexing problem for the domestic industry, and evidence on the record indicates that legacy costs have prevented needed consolidation within the domestic industry from taking place. However, the burden of legacy costs varies tremendously among domestic producers.[5299] The issue of legacy costs is not a new one to this industry. The difficulties in meeting these obligations were recognized before the POI, and the domestic industry was able to earn a reasonable rate of return in 1996 and 1997 despite these costs. Respondents have offered no reason why the industry's longstanding problem would cause no injury in 1996 or 1997 but then begin to depress prices and strangle revenue in 1998-2000. Legacy costs may have left certain members of the domestic industry less able to compete with low-priced imports, but are not responsible for the low prices that have injured the industry. We therefore find that legacy costs are not a source of injury to the domestic industry equal to or greater than increased imports.

Respondents argue that intra-industry competition, spurred by the increased presence of efficient minimills, has caused injury to the domestic industry. Minimills did typically enjoy cost advantages over integrated producers, based in part on differing product mixes and raw material costs. However, these cost advantages existed throughout the POI, and integrated producers as well as minimills enjoyed declining costs throughout the POI.[5300] The addition of a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did. However, as noted above, imports, rather than minimills, typically led prices downward. Hot-rolled steel is the primary commercial product for minimills. Prices for hot-rolled steel produced by minimills typically *** prices of hot-rolled steel produced by integrated producers ***.[5301] In 1998 and again in 2000, imports *** hot-rolled steel produced by both integrated producers and minimills by ***, resulting in lowered sales for domestically produced hot-rolled steel and subsequent price cuts by both integrated producers and minimills.[5302] Thus, while in general, minimills may have been in a somewhat better position to withstand low-priced import competition than other domestic producers, we find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports.

Respondents have also argued that buyer consolidation, especially among automobile manufacturers, reduced the bargaining power and the profit margins of domestic producers. The record does contain evidence that automobile manufacturers in particular have either consolidated or attempted to consolidate their buying operations. Automotive manufacturers are important purchasers of certain carbon flat-rolled steel.[5303] There is some consolidation in other steel-purchasing sectors as

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[5298] (original footnote) Joint Respondents' Posthearing Brief on Flat-Rolled Steel, Vol. 2 at Exh. B, Answers to Vice Chairman Okun's Questions at 17.

[5299] (original footnote) CR and PR at OVERVIEW-31-35. Producers Birmingham, CSI, Commercial Metals, Nucor, and SDI have defined contribution plans, while other steel producers provide defined benefit plans. CR and PR at OVERVIEW-32 nn.37 and 38.

[5300] (original footnote) INV-Y-215 at STL20P2I.WK4, STL20P2M.WK4, STL20H3I.WK4, STL20H3M.WK4, STL20C4I.WK4, STL40C4M.WK4, STL20R6I.WK4, and STL20R6M.WK4.

[5301] (original footnote) INV-Y-215 at Pricing Tables for products 3A and 3B.

[5302] (original footnote) INV-Y-215 at Pricing Tables for products 3A and 3B.

[5303] (original footnote) CR and PR at Table OVERVIEW-2.

> well.[5304] A smaller number of purchasers would tend to give the purchasers greater bargaining power which would be expected to impact price. However, purchaser consolidation has been an ongoing process that did not suddenly occur beginning in 1998. We do not find that purchaser consolidation can explain the substantial decline in domestic prices or that consolidation is an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports.
>
> In view of the above, we find that increased imports are a substantial cause, and a cause no less important than any other cause, of serious injury to the domestic certain carbon flat-rolled steel industry. Our finding is based on the increase in imports and subsequent increase in the share of the domestic market held by imports, the lower prices of the imports, and the corresponding declines in domestic market share, prices, and capacity utilization, negative profitability, evidence of unemployment, and the decline in capital expenditures. Accordingly, we make an affirmative determination."[5305]

Factors considered by the USITC

Declining domestic demand

Claims and arguments of the parties

10.383 The arguments of the parties are set out in Section VII.H.3(b)(i) *supra*.

Analysis by the Panel

10.384 The Panel notes the USITC statement that: "We thus find that the domestic industry was already injured by increased imports when demand began to decline, and declining demand, while not the cause of the injury found here, contributed to the industry's continued deterioration at the end of the period." We take the statement that declining demand "contributed to the industry's continued deterioration at the end of the period" to amount to an acknowledgement by the USITC that declining demand did, in fact, play a role in causing the injury suffered by the industry, albeit at the end of the period of investigation.

10.385 We note that the USITC discussed demand trends during the period of investigation. That discussion confirms the USITC's statement that demand declined towards the end of the period of investigation. In particular, in the section of the report dealing with conditions of competition for CCFRS, the USITC stated that:

> "By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel.[5306] Apparent domestic consumption of certain

[5304] (original footnote) CR and PR at OVERVIEW-53-54.

[5305] USITC Report, Vol. I, pp. 63-65.

[5306] We are cognizant of the difficulty of measuring consumption, production, capacity, and import penetration in a product for which a significant portion of production is consumed in the production of other, downstream materials also included in the like product. Adding figures for each of the product categories would tend to overstate domestic capacity and production and understate the true impact of imports, while concentrating solely on commercial shipments would be inconsistent with available capacity data. *See* CR at FLAT-18 n.11, FLAT-34 n.13, and FLAT-60 n.14, PR at FLAT-15 n.11, FLAT-30 n.13, and FLAT-44 n.14. We have considered the arguments of both domestic producers and respondents regarding the appropriate

carbon flat-rolled steel, including internally consumed production, climbed steadily during the period, from 203.2 million short tons in 1996 to 219.0 million short tons in 2000, an increase of 7.8 percent.[5307] Apparent domestic consumption of certain carbon flat-rolled steel, including internally consumed production, declined 14.9 percent from interim 2000 to interim 2001.[5308] Net sales of certain carbon flat-rolled steel increased from 58.8 million short tons in 1996 to 65.2 million short tons in 2000, an increase of 10.9 percent.[5309] Net sales of certain carbon flat-rolled steel declined 11.7 percent between interim 2000 and interim 2001.[5310] A decline in demand, however, can be seen at the end of the period examined, as apparent domestic consumption of certain carbon flat-rolled steel was 14.9 percent lower in interim 2001 than in interim 2000.

Similar, though not identical, increases occurred in the consumption of each type of flat-rolled steel. Apparent domestic consumption of slabs rose from 71.4 million short tons in 1996 to 74.4 million short tons in 2000; apparent domestic consumption of slabs in 2000 was the highest level registered in the POI.[5311] Apparent domestic consumption of slabs declined 15.6 percent between interim 2000 and interim 2001.[5312] Apparent domestic consumption of hot-rolled steel increased from 68.5 million short tons in 1996 to 75.1 million short tons in 2000; apparent domestic consumption of hot-rolled steel in 2000 was the highest level registered in the POI.[5313] Apparent domestic consumption of hot-rolled steel declined 17.1 percent between interim 2000 and interim 2001.[5314] Apparent domestic consumption of cold-rolled steel actually peaked in 1999 at 40.6 million short tons. Nonetheless, apparent domestic consumption of cold-rolled steel in 2000, at 40.0 million short tons, was 9.8 percent higher than the 1996 level of 36.4 million short tons.[5315] Apparent domestic consumption of cold-rolled steel declined 12.3 percent between interim 2000 and interim 2001.[5316] Similarly, apparent domestic consumption of coated steel peaked in 1999 at 22.8 million tons, but apparent domestic consumption in 2000, at 22.3 million short tons, was 16.9 percent higher than the 1996 level of 19.1 million short tons.[5317] Apparent domestic consumption of coated steel was 13.0 percent lower in interim 2001 than in interim 2000.[5318] Only plate consumption exhibited a significantly different trend, with apparent consumption in 2000, at 7.1 million short tons, below

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method for determining these indicators, and we have considered a variety of different measurements in reaching our determination. In general, however, we found that the same conclusions were warranted regardless of which measurement was used.

[5307] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5308] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5309] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5310] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5311] (original footnote) CR and PR at Table FLAT-C-2.
[5312] (original footnote) CR and PR at Table FLAT-C-2.
[5313] (original footnote) CR and PR at Table FLAT-C-4.
[5314] (original footnote) CR and PR at Table FLAT-C-4.
[5315] (original footnote) CR and PR at Table FLAT-C-5.
[5316] (original footnote) CR and PR at Table FLAT-C-5.
[5317] (original footnote) CR and PR at Table FLAT-C-7.
[5318] (original footnote) CR and PR at Table FLAT-C-7.

> the 1996 level of 7.8 million short tons.[5319] Apparent domestic consumption of plate was 3.6 percent lower in interim 2001 than in interim 2000."[5320] [5321]

10.386 In addition, in its non-attribution analysis, the USITC stated that:

> "But all evidence suggests that the decline occurred very late in the POI, as late as the fourth quarter of 2000. Demand for certain carbon flat-rolled steel was lower in the first six months of 2001 than in the first six months of 2000.[5322] Apparent domestic demand in 2000 was higher than in 1996 for slabs, hot-rolled, cold-rolled, and coated steel, and apparent domestic demand for all certain carbon flat-rolled steel was higher in 2000 than in 1999.[5323] The domestic industry showed the signs of injury described above well before the latter portion of 2000, when demand began to drop off. The domestic industry first saw its operating income decline in 1998, at a time when demand was increasing and would continue to increase for another two years."[5324] [5325]

10.387 We note that the USITC dismissed this factor in its non-attribution analysis because: "The domestic industry showed the signs of injury … well before the latter portion of 2000, when demand began to drop off". The Panel notes in this regard that the fact that the contribution of a factor to the injury suffered may have only occurred late in the period of investigation or for only a relatively short period within that time-span does not relieve a competent authority of its obligation to ensure that the injury caused by that factor is not attributed to the increased imports. It may be the case that such a factor may inflict considerable damage on the industry, even though its effects appeared late in the period and/or for a relatively short duration. However, the USITC did not consider this possibility in its analysis.

10.388 Accordingly, in our view, the USITC unjustifiably dismissed this factor in its non-attribution analysis despite the fact that it explicitly acknowledged that declines in demand played a role in the injury suffered by the industry, albeit at the end of the period of investigation. The USITC dismissed this factor on the basis that the industry was already injured when demand began to decline. Despite the apparent role played by this factor in causing injury to the industry, we find nothing in the USITC Report to indicate whether and how the injury caused by this factor was not attributed to increased imports.

10.389 In failing to adequately analyse this factor, the Panel finds that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Domestic capacity increases

Claims and arguments of the parties

10.390 The arguments of the parties are set out in Section VII.H.3(b)(i) *supra*.

[5319] (original footnote) CR and PR at Table FLAT-C-3.
[5320] (original footnote) CR and PR at Table FLAT-C-3.
[5321] USITC Report, Vol. I, pp. 56-57.
[5322] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5323] (original footnote) INV-Y-209 at Table FLAT-ALT7 and CR and PR at Tables FLAT-C-2, FLAT-C4-FLAT-C-5, and FLAT-C-7.
[5324] (original footnote) INV-Y-209 at Table FLAT-ALT7.
[5325] USITC Report, Vol. I, p. 63.

Analysis by the Panel

10.391 The Panel considers that the USITC explicitly acknowledged that domestic capacity increases were causing injury to the industry. In particular, the USITC stated:

> "Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined.
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> …
>
> Therefore, we find that increased production capacity, while likely playing a role in the price declines that helped cause injury, was not an important cause of serious injury to the domestic industry equal to or greater than the injury caused by increased imports."[5326]

10.392 We note that, in the first cited paragraph, the USITC links capacity increases to declines in domestic capacity utilization, the latter being an injury factor referred to in Article 4.2(a) of the Agreement on Safeguards. In addition, the second cited paragraph states explicitly that domestic capacity increases likely played a role in causing injury to the industry.

10.393 We note that the USITC identified increases in the level of domestic capacity during the period of investigation. In particular, in the section of the USITC's Report dealing with injury, the USITC stated that:

> "We recognize that the industry's production and capacity both increased from 1996 to 2000 … The sum of all productive capacity for slab, plate, hot-rolled, cold-rolled, and coated steel increased by 15.9 percent between 1996 and 2000.[5327] The sum of all productive capacity for slab, plate, hot-rolled, cold-rolled, and coated steel fell by 0.8 percent between interim 2000 and interim 2001.[5328],[5329]

10.394 Nevertheless, the USITC dismissed domestic capacity increases in its non-attribution analysis on the basis of the assertion that: "If increased domestic capacity were in fact the source of injury to the domestic industry, we would have expected to see the domestic industry lead prices downward,

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[5326] USITC Report, Vol. I, pp. 63-67.

[5327] (original footnote) INV-Y-209 at Table FLAT-ALT7.

[5328] (original footnote) INV-Y-209 at Table FLAT-ALT7. Slab-making capacity increased by 12.2 percent between 1996 and 2000, rising from 66.9 million short tons in 1996 to 75.1 million short tons in 2000. CR and PR at Table FLAT-C-2. Slab-making capacity declined by 2.4 percent between interim 2000 and interim 2001. CR and PR at Table FLAT-C-2. Combined domestic production capacity for hot-rolled and plate increased by 16.9 percent, rising from 76.6 million short tons in 1996 to 89.5 million short tons in 2000. CR and PR at Tables FLAT-C-3 and FLAT-C-4. Some domestic producers suggested that aggregating hot-rolled and plate capacity is an appropriate measure of domestic capacity. Dewey/Skadden Posthearing Brief at 18. Combined domestic production capacity for hot-rolled and plate increased by 1.6 percent between interim 2000 and interim 2001, rising from 44.5 million short tons to 45.2 million short tons. CR and PR at Tables FLAT-C-3 and FLAT-C-4. Capacity for cold-rolled steel production rose by 14.4 percent between 1996 and 2000, but declined 4.3 percent between interim 2000 and interim 2001. CR and PR at Table FLAT-C-5. Domestic capacity for coated steel production rose by 28.1 percent between 1996 and 2000 and rose by 1.8 percent between interim 2000 and interim 2001. CR and PR at Table FLAT-C-7.

[5329] USITC Report, Vol. I, p. 52.

and wrest market share from imports".[5330] In the Panel's opinion, this analysis is simplistic and fails to address the complexities associated with this factor, which the USITC itself acknowledged. In particular, it stated that: "Because domestic production did not increase by an amount as great as the increase in capacity but did increase commensurate with increased consumption, the increase in capacity appears to explain, in significant part, the decline in the rate of domestic capacity utilization that occurred over the period examined".[5331]

10.395 This statement indicates to us that, in its consideration of domestic capacity increases, the USITC recognized the interrelatedness between capacity on the one hand and domestic production and capacity utilization on the other hand, the latter two being injury factors referred to in Article 4.2(a). In addition, the USITC referred on a number of occasions in its injury analysis for CCFRS to "a significant idling of the domestic industry's productive facilities." It would not be implausible to conclude that such idling may have been caused by increased capacity, which the USITC also acknowledged exceeded increases in domestic consumption. Despite these clear inter-linkages between domestic capacity increases and other factors or effects that were observed in the market, the USITC dismissed it in its non-attribution analysis.

10.396 In failing to adequately analyse this factor, the Panel considers that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Intra-industry competition

Claims and arguments of the parties

10.397 The arguments of the parties are set out in Section VII.H.3(b)(i) *supra*.

Analysis by the Panel

10.398 The Panel considers that the USITC explicitly acknowledged that intra-industry competition played a role in causing the injury suffered by the domestic industry. This acknowledgement is contained in the following statement: "[W]e find that minimills were not primarily responsible for the declines in domestic prices or an important cause of serious injury to the domestic industry, which is equal to or greater than the injury caused by increased imports".[5332] We read this statement to mean that while the USITC did not consider that intra-industry competition was "primarily" responsible for the serious injury suffered by the industry, it, nevertheless, considered that this factor played a role in causing such injury. The USITC also explicitly acknowledged that low-cost capacity created by domestic minimill producers had an effect (implicitly, a negative one) on prices. In particular, the USITC stated that: "The addition of a greater volume of lower-cost capacity would be expected to have an effect on prices, and we find that it did".[5333]

10.399 In our view, the USITC did not adequately assess the role played by this factor. It is true that it referred to cost advantages enjoyed by minimills over integrated producers. It is also true that the USITC engaged in a price comparison for products produced both by minimills and integrated producers. However, in our view, this analysis does not provide sufficient insights into the effects that intra-industry competition had on the market.

[5330] See para. 10.382.
[5331] See para. 10.382.
[5332] See para. 10.382.
[5333] See para. 10.382.

10.400 In addition, the USITC appears to have dismissed this factor in its non-attribution analysis merely on the basis that "the cost advantage enjoyed by minimills existed throughout the period of investigation." In the Panel's view, the fact that a factor existed throughout the period of investigation does not necessarily mean that it cannot play a role in causing serious injury. Moreover, changing circumstances in a market may result in a number of factors, that previously seemed harmless, playing a significant role in causing serious injury.

10.401 In failing to adequately analyse this factor, the Panel considers that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Legacy costs

Claims and arguments of the parties

10.402 The arguments of the parties are set out in Section VII.H.3(b)(i) *supra*.

Analysis by the Panel

10.403 It seems to the Panel from the USITC's Report that the USITC considered that legacy costs played a role in causing the injury that was being suffered by the domestic industry. To us, this is apparent from the following comment made by the USITC: "The funding of legacy costs *is* a vexing problem for the domestic industry, and evidence on the record indicates that legacy costs have prevented needed consolidation within the domestic industry from taking place".[5334] We note in this regard that this statement is made in the present tense, indicating that legacy costs are currently a vexing problem and not only a problem of the past.

10.404 The Panel notes that the USITC did consider the effect on the market of legacy costs. Specifically, in pages OVERVIEW 31 – OVERVIEW 35, the USITC describes pensions and other post-employment benefits for steel company retirees. In Table OVERVIEW-9, the USITC sets out post-employment benefit data of selected steelmakers for the fiscal years 1996 – 2000.

10.405 However, even though it effectively acknowledged the role played by legacy costs in causing injury, the USITC appeared to dismiss this factor in its non-attribution analysis merely on the basis that this factor existed prior to the period of investigation. In particular, the USITC stated that "the issue of 'legacy costs' is not a new one to this industry".[5335] In the Panel's view, that a factor pre-dated the period of investigation does not necessarily mean that it cannot play a role in causing serious injury during the period of investigation itself. Nor does the Panel consider that a reduction in the level of legacy costs during the period of investigation will necessarily mean that such costs could not and did not cause injury to the relevant domestic producers.

10.406 The Panel also notes that the USITC stated in its Report that "[t]he difficulties in meeting these [legacy cost] obligations were recognized before the POI, and the domestic industry was able to earn a reasonable rate of return in 1996 and 1997 despite these costs. Respondents have offered no reason why the industry's longstanding problem would cause no injury in 1996 or 1997 but then begin to depress prices and strangle revenue in 1998-2000. Legacy costs may have left certain members of the domestic industry less able to compete with low-priced imports, but are not responsible for the

[5334] See para. 10.382.
[5335] See para. 10.382.

low prices that have injured the industry."[5336] In our view, the foregoing amounts to an acknowledgement that legacy costs compromised the competitive position of certain domestic producers. However, this effect was dismissed on the basis of the rather cursory and unsubstantiated assertion that "legacy costs are not responsible for the low prices that have injured the industry." The Panel considers that given the apparent significance of legacy costs to the situation of the domestic industry, it was incumbent upon the USITC to further examine this issue.

10.407 In failing to adequately analyse this factor, the Panel considers that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Conclusions

10.408 The Panel considers that, with respect to CCFRS, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the relevant domestic industry. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, declining domestic demand, domestic capacity increases, intra-industry competition and legacy costs) in its non-attribution analysis even though it acknowledged that those factors were causing injury to the industry.

10.409 The Panel also recalls that the USITC disregarded the effect of increases in domestic capacity, intra-industry competition and legacy costs because "they were not a cause of serious injury that was equal to or greater than the injury caused by increased imports".[5337] The Panel considers that such an approach is problematic if the cumulative effects of individual factors are not analysed or assessed in cases where, individually, each of them are acknowledged to have caused some injury to the relevant domestic industry. In the case of CCFRS, by discarding factors that individually caused injury to the industry, we consider that the USITC failed to distinguish and assess the nature and extent of the effects of these other factors taken together, as distinct from those injurious effects caused by increased imports.

10.410 Therefore, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by other factors, such as declines in demand, domestic capacity increases, intra-industry competition and legacy costs, together with other factors, was not attributed to increased imports of CCFRS.

(iii) Relevance of the product definition for CCFRS

10.411 The Panel would like to address some of the arguments made by the parties regarding the product definition for CCFRS, particularly relating to the USITC's causation analysis.

Claims and arguments of the parties

10.412 The arguments of the parties are set out in Section VII.H.3(b)(i) *supra*.

[5336] USITC Report, Vol. I , p.64.
[5337] See para. 10.382.

Analysis by the Panel

10.413 The Panel notes that we are not, in this section, evaluating arguments made by complainants that the USITC's grouping of the items of CCFRS is inconsistent with Article 2.1 because it violates the obligation to identify a specific imported product. Nor is the Panel dealing here with the argument that the USITC acted inconsistently with Articles 2.1 and 4.1(c) of the Agreement on Safeguards in its definition of the domestic industry that produces products that are like CCFRS. The Panel will confine its attention in this section to arguments made that the product defined as CCFRS was such that it *could not be subjected to the application of the causation requirements contained in Article 4.2(b).*

10.414 The Panel recalls the text of Article 4.2(b) of the Agreement on Safeguards as the starting-point for its analysis in this respect:

> "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

10.415 We note that, according to Article 4.2(b), the causal link must exist "between increased imports of the product concerned and serious injury or threat thereof". Serious injury is defined in Article 4.1(a) as "a significant overall impairment in the position of a domestic industry." "Domestic industry" is defined, in turn, in Article 4.1(c) as "the producers as a whole of the like or directly competitive products operating within the territory of a Member or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products."

10.416 Reading these provisions together, it is clear that, under Article 4.2(b), a causal link must be established between, on the one hand, increased imports of the product concerned and, on the other hand, serious injury or threat thereof suffered by producers of the like or directly competitive products. In our view, the imported product and the like or directly competitive products must be defined in such a way that the causal link analysis required by Article 4.2(b) can be undertaken. More particularly, they must be defined in such a way that, for example, a coincidence or a conditions of competition analysis may be undertaken. They must also be defined in such a way that it can be established that injury suffered by producers of the like or directly competitive products caused by factors other than increased imports is not attributed to the increased imports. In our view, if the imported products or the like or directly competitive products are defined in such a way that prevents the proper application of the causation requirements contained in Article 4.2(b), the causation determination will necessarily be inconsistent with the prescriptions of Article 4.2(b).

10.417 In our view, CCFRS was defined in such a way that prevented the proper application of the causation requirements contained in Article 4.2(b). We consider that the USITC itself effectively admitted that CCFRS could not be subjected to the application of the causation requirements given the fact that, on a number of occasions, it relied upon data for the items that constituted CCFRS rather than for CCFRS as a whole without explaining why and how such specific data on such items related to the determination concerning CCFRS as a whole. In addition, the USITC itself admitted that the reliance on combined data for "the five types of certain carbon flat-rolled steel … may involve

double-counting."[5338] Finally, as noted above, we do not consider that the grouping of the various products that constituted CCFRS renders it amenable to conditions of competition analysis because it becomes difficult, if not impossible, for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis for the purposes of establishing a causal link for CCFRS.

(iv) Overall conclusion on USITC's determination of a causal link

10.418 As indicated above, the Panel found that the USITC did not provide a reasoned and adequate explanation of how the facts supported its finding that coincidence existed in this case. Nor did the USITC provide a compelling explanation that demonstrated the existence of a causal link between increased imports and serious injury suffered by domestic producers of CCFRS in the absence of coincidence. Further, the USITC's non-attribution analysis failed to separate, distinguish and assess the nature and extent of the injurious effects of declines in demand, domestic capacity increases, intra-industry competition and legacy costs so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.419 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of CCFRS and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

(b) Tin mill products

10.420 As we did in relation to our findings on increased imports for tin mill products (paragraphs 10.191-10.200 above), the Panel needs to address the issue of the divergent findings made by individual USITC Commissioners: four of the six Commissioners made findings on tin mill as a separate product[5339], but the two other Commissioners (Bragg and Devaney) treated tin mill products as part of the larger CCFRS category.[5340] The four who examined tin mill as a separate product made a common affirmative finding on increased imports and on serious injury, but later diverged on the question of causation, for which only Commissioner Miller made an affirmative determination.[5341] Ultimately, therefore, only Commissioner Miller reached positive findings regarding tin mill as a separate product. The two Commissioners who treated tin mill as part of the CCFRS category, reached a positive conclusion on that larger category. Despite the divergent product definitions, the USITC Report concluded that three Commissioners made "an affirmative determination regarding imports of carbon and alloy tin mill products."[5342]

10.421 In the March Proclamation, the President did not select any of the various affirmative determinations on tin mill as the basis of the decision to impose the safeguard measure on tin mill. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the [US]ITC".[5343] It, therefore, is apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Miller), although

[5338] USITC Report, Vol. I, p. 51, note 193.
[5339] USITC Report, Vol. I, pp. 71 et seq.
[5340] USITC Report, Vol. I, p. 71, footnote 368 and p. 279.
[5341] USITC Report, Vol. I, pp. 307-309.
[5342] USITC Report, Vol. I, p. 25.
[5343] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

those three Commissioners did not perform their analysis on the basis of the same like product definition.

10.422 In this regard, the Panel refers to its discussion in the context of its review of the USITC's increased import determination in paragraphs 10.191-10.200 above. In sum, the Panel finds that a Member is not permitted to base its safeguard measures on an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance. Therefore, it is our view that the USITC Report does not contain a reasoned and adequate explanation of how the facts support the determination that increased imports of tin mill products *caused* serious injury to the relevant domestic industry, as required by Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards.

(c) Hot-rolled bar

10.423 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants that, for us, raised the most problematic aspects of the USITC's determinations on causation, that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.424 The USITC's findings read as follows:

> "We find that the increased imports of hot-rolled bar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of hot-rolled bar are a substantial cause of serious injury to the domestic hot-rolled bar industry.
>
> a. Conditions of Competition
>
> We have taken into account a number of factors that affect the competitiveness of domestic and imported hot-rolled bar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.
>
> Market participants generally agree that there are few or no substitutes for long products such as hot-rolled bar.[5344] As discussed in section V.A.1. above, hot-rolled bar is used in construction, automotive equipment, and industrial applications. Hot-rolled bar encompasses a wide range of products including merchant bar, special bar quality steel bars, and light shapes.[5345]

[5344] (original footnote) CR and PR at LONG- 78.
[5345] (original footnote) *See* CR and PR at LONG-1.

The record indicates strong demand during the period examined, with apparent US consumption of hot-rolled bar increasing during every full-year but one of the period. Apparent consumption rose during the first three years of the period, increasing from 10.0 million tons in 1996 to 11.7 million tons in 1998. It then declined to 11.0 million tons in 1999 but increased to 11.2 million tons in 2000. Apparent consumption was lower in interim 2001, at 4.9 million tons, than in interim 2000, when it was 6.0 million tons.[5346]

With regard to supply of hot-rolled bar, US capacity reported in questionnaires increased slightly from 1996 to 2000, but overall industry capacity declined during the period examined. The domestic industry's capacity utilization fluctuated over the period examined. Capacity utilization for full-year periods ranged between 67.2 percent in 1996 to 74.3 percent in 1998. Foreign capacity reported in questionnaires increased from 26.7 million tons in 1996 to 29.8 million tons in 2000, and was higher in interim 2001 than in interim 2000. Foreign capacity utilization for full-year periods ranged from 74.3 percent in 1999 to 79.4 percent in 2000.[5347]

Price is a moderately important factor in purchasing decisions for hot-rolled bar. Price was listed as the top factor in purchasing decisions by 27.8 percent of hot-rolled purchasers in their questionnaire responses. While more purchasers listed quality than price as their top factor in purchasing decisions, they generally deemed domestically-produced hot bar and imports to be comparable with respect to the particular quality considerations most important in their purchasing decisions.[5348]

b. Analysis[5349]

Through price-based competition, the increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling. The resulting loss in revenues led to the poor operating results and plant closures discussed above.

The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges. The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports. The largest increase in hot-rolled bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. Import volumes increased by 29.5 percent from 1997 to 1998.[5350] During 1998, the imports consistently undersold the domestically-produced product. Underselling margins for

[5346] (original footnote) CR and PR, Table LONG-70.

[5347] (original footnote) CR and PR, Table LONG-42. We have relied upon the questionnaires for foreign capacity and capacity utilization data, although such data are not complete. We acknowledge that the domestic producers contended that the questionnaire data understated foreign capacity and overstated foreign capacity utilization.

[5348] (original footnote) INV-Y-212 at 45.

[5349] (original footnote) The Minimill 201 Coalition produced an economic model that attempted to measure the relationship between imports and the domestic industry's prices and profits. We considered this model in making our determination but note its limitations. In particular, there were defects in the manner the model measured import competition, and the model did not adequately address changes in domestic competition.

[5350] (original footnote) CR and PR, Table LONG-5.

the hot-rolled bar product on which the Commission collected pricing data, which hovered around 5.0 percent during the first three quarters of 1998, increased to 7.0 percent in the fourth quarter.[5351]

Domestic producers generally maintained their prices in 1998, but at the cost of market share. The average unit values of US shipments increased by a very slight 0.3 percent from 1997 to 1998.[5352] Prices for the domestically-produced hot-rolled bar product on which the Commission collected data remained generally stable during the first three quarters of 1998. Indeed, prices for the domestically-produced product during these three quarters exceeded prices during any other portion of the period examined. Prices for the domestically-produced product did fall slightly – by 3 percent – between the third and fourth quarters of 1998.[5353]

As a result of maintaining prices, the domestic industry maintained its operating margins, which declined by only three-tenths of a percentage point from 1997 to 1998. However, total operating income declined by 9.3 percent during this period.[5354] The industry also lost 4.1 percentage points of market share to the imports. This was the largest drop in domestic producers' market share over the period examined.[5355]

In 1999 the domestic industry responded to the import competition by reducing prices in an attempt to maintain market share. Import volumes remained high, with import market share rising slightly from 20.1 percent in 1998 to 20.4 percent in 1999.[5356] Moreover, inventories held by US importers had increased sharply in 1998.[5357] Thus, imports continued to be a significant competitive factor in 1999 although the quantity of imports that year was below the level of 1998. Prices for the domestically-produced hot-rolled bar product on which the Commission collected data declined by 7.8 percent from the fourth quarter of 1998 to the first quarter of 1999, and fluctuated within a narrow range during the remaining three quarters of 1999. During this period, the domestic producers' prices were below those of the imports.[5358] Domestic producers' average unit values showed comparable declines.[5359] As a result, in 1999 domestic producers held their loss of market share to three-tenths of a percentage point.[5360] Nevertheless, because declines in the domestic industry's average unit sales values exceeded declines in the average unit costs of goods sold, its operating margin fell.[5361]

In 2000, the domestic industry initially increased prices. Prices for the domestically-produced hot-rolled bar product for which the Commission collected data rose during the first quarter of 2000, although pricing levels remained below those of 1998. In the first half of the year, however, underselling by the imports

[5351] (original footnote) INV-Y-212, Table LONG-ALT-90.
[5352] (original footnote) CR and PR, Table LONG-16.
[5353] (original footnote) INV-Y-212, Table LONG-ALT-90.
[5354] (original footnote) CR and PR, Table LONG-27.
[5355] (original footnote) CR and PR, Table LONG-70.
[5356] (original footnote) CR and PR, Table LONG-70.
[5357] (original footnote) CR and PR, Table LONG-C-3.
[5358] (original footnote) INV-Y-212, Table LONG-ALT-90.
[5359] (original footnote) CR and PR, Table LONG-27.
[5360] (original footnote) CR and PR, Table LONG-70.
[5361] (original footnote) CR and PR, Table LONG-27.

> resumed.[5362] The imports consequently gained 1.7 percentage points of market share from the conclusion of 1999 to June 2000. In response, the domestic producers again cut prices during the second half of 2000. Prices declined by 6.1 percent between the second and third quarters of 2000, and by another 2.3 percent between the third and fourth quarters.[5363]
>
> These price declines mitigated, but did not eliminate, further erosion in the domestic industry's market share.[5364] Indeed, the domestic industry sold less tonnage in 2000 than in 1999, although total US consumption was greater in 2000.[5365] Also, price declines during the second half of the year negated the price increases during the first half of the year – average unit sales values were unchanged in 2000 from 1999.[5366] The combination of lost market share, lower sales volumes, and lower prices during 2000 -- all of which were linked to the increased imports -- led to the industry's poor operating performance and closure of productive facilities. We consequently conclude that the increased imports were an important cause of the serious injury sustained by the domestic hot-rolled bar industry."[5367]

Claims and arguments of the parties

10.425 The arguments of the parties are set out in Section VII.H.2(c) *supra*.

Analysis by the Panel

10.426 The Panel has examined the relevant section of the USITC Report for hot-rolled bar and notes that, in determining causal link, the USITC did not conduct a coincidence analysis. As mentioned previously, the Panel considers that if a competent authority has not examined coincidence of trends, it must, in proving causation, provide a reasoned and adequate explanation as to why such an analysis was not undertaken as well as a compelling explanation establishing the existence of a causal link. We note that for hot-rolled bar, the USITC analysed the conditions of competition in the hot-rolled bar market. Accordingly, we will now proceed to review the conditions of competition analysis undertaken by the USITC for this measure, with a view to determining whether the USITC provided such a compelling explanation.

10.427 As a starting point, we note that the essential premise for the USITC's determination of a causal link between increased imports and serious injury was the existence of price-based competition between imported and domestic products. The USITC conceded that: "The timing of domestic producers' price declines do not correspond precisely to the timing of the import surges". However, it went on to state that: "The record, however, indicates that imports had a negative effect on prices and that the domestic industry used different strategies over the course of the period examined to compete with the imports". Further, the USITC concluded that: "The combination of lost market share, lower sales volumes, and lower prices during 2000 – all of which were linked to the increased imports – led to the industry's poor operating performance and closure of productive facilities. We consequently

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[5362] (original footnote) INV-Y-212, Table LONG-ALT-90.

[5363] (original footnote) INV-Y-212, Table LONG-ALT-90. Price declines continued through the first two quarters of 2001. Ibid.

[5364] (original footnote) The domestic industry's market share was 77.0 percent in the second half of 2000, as opposed to 77.9 in the first half of the year. CR and PR, Table LONG-70.

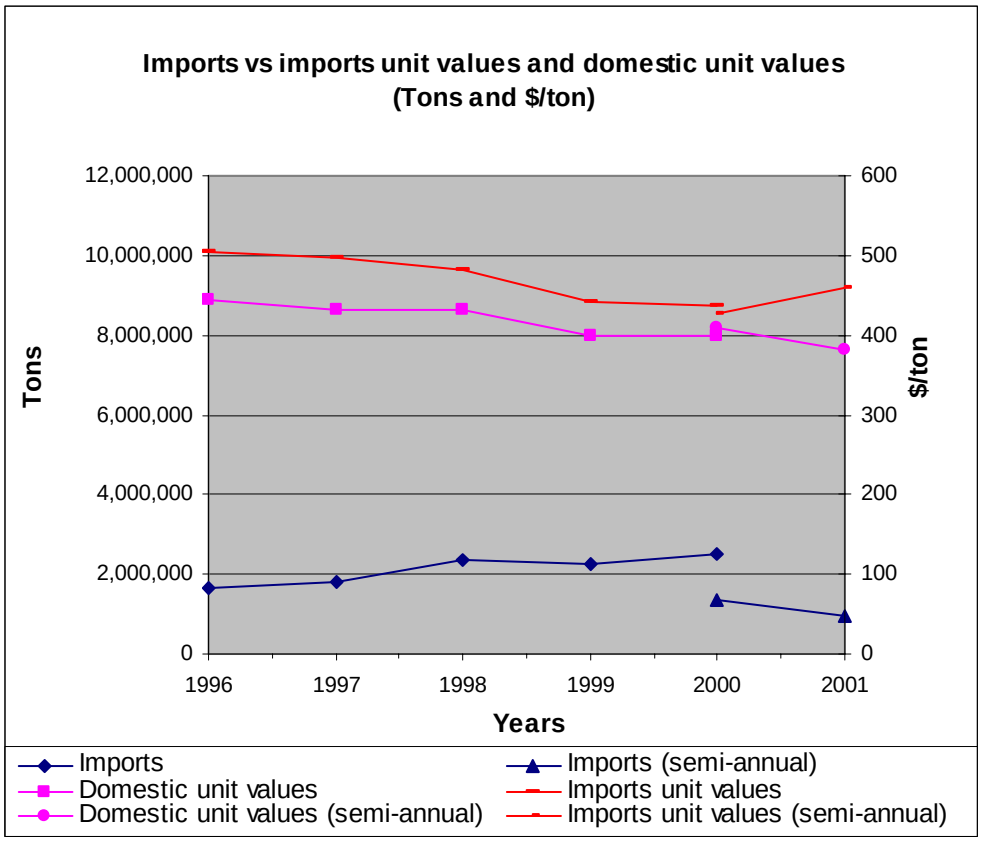
[5365] (original footnote) CR and PR, Table LONG-C-3.

[5366] (original footnote) CR and PR, Table LONG-27.

[5367] USITC Report, Vol. I, pp. 95-97.

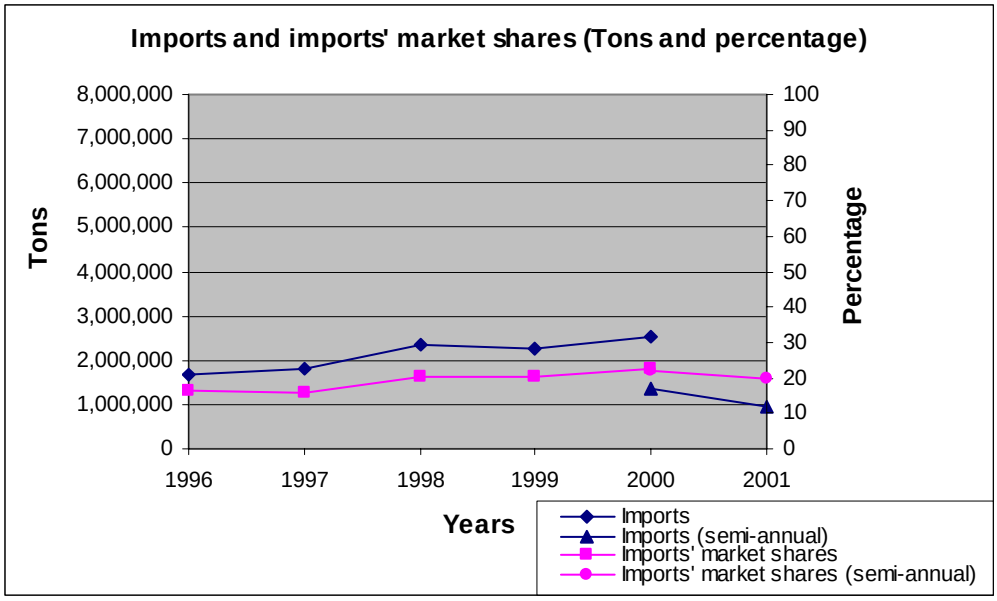
conclude that the increased imports were an important cause of the serious injury sustained by the domestic hot-rolled bar industry".[5368]

10.428 Set out below is a graphical representation of import and domestic pricing trends during the period of investigation. This graph has been generated using USITC data. We note that at every point of the period of investigation, import prices exceeded domestic prices. This is not inconsistent with the overall observations made by the USITC regarding the relative prices for import and domestic products.[5369]



10.429 The USITC explained that domestic prices declined in an effort to mitigate the erosion of market share. Set out below is another graph, again generated using USITC data, indicating the import market share during the course of the period of investigation, which tends to support the USITC's conclusion that the domestic industry lost market share in favour of imports.[5370]

[5368] See para. 10.424.
[5369] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-5 at LONG-9; Table LONG-16 at LONG-21.
[5370] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-5 at LONG-9; Table LONG-70 at LONG-67; Table LONG-C-3.



10.430 On the basis of the foregoing, overall, we find that the USITC's conditions of competition analysis was compelling in providing indications of the existence of a causal link between increased imports of hot-rolled bar and serious injury, subject, of course, to fulfilment of the non-attribution requirement.

(ii) Non-attribution

USITC findings

10.431 The USITC's findings read as follows:

> "We next consider whether there is any other cause of injury to the domestic hot-rolled bar industry as substantial as the increased imports. Respondents initially contend that competition among domestic producers is at least as great a cause of injury to the domestic industry as increased imports. In particular, they assert that domestic producer Nucor is a market leader that drives down prices. They contend that, through its price leadership, Nucor has increased its market share and made its domestic competitors less profitable.[5371]
>
> We observe initially that competition among domestic producers cannot provide any explanation for certain indicia of serious injury. While competition among domestic producers might explain why some individual producers gained market share during the period examined while others lost market share, it cannot explain why the domestic industry as a whole lost market share over the period examined to the imports. The imports' share of the quantity of US apparent consumption rose from 16.5 percent in 1996 to 22.5 percent in 2000, and was higher in 2000 than at any other point during the period examined.[5372] As previously discussed, this loss in market share is a critical component in our causation analysis; the price declines that

[5371] (original footnote) *See* Hot-Rolled Bar Respondents Prehearing Brief at 58-60.
[5372] (original footnote) CR and PR, Table LONG-70.

occurred during the period examined were a function of the industry's efforts to preclude or mitigate losses in market share in the face of increased import volumes.

We additionally examined data concerning Nucor to ascertain the extent to which it was a "price leader" and whether its pricing policies served to increase its market share vis a vis other domestic producers, as respondents contend. The data do not support the notion that Nucor was a primary source of pricing declines. While Nucor's average unit values were ***.[5373] ***.[5374]

The data additionally do not establish that Nucor ***.[5375] We consequently conclude that Nucor's pricing practices cannot provide any explanation for the serious injury experienced by the domestic industry. Moreover, neither Nucor's practices nor internal industry competition in general can explain why the domestic industry as a whole lost market share to the imports.

Respondents next contend that inefficient producers are a larger cause of any serious injury to the domestic industry than increased imports. They contend that domestic producers *** have much higher costs than industry averages and lost money throughout the period examined regardless of market conditions.[5376]

Respondents' theory fails on two accounts. First, if the difficulties of *** were due to their inefficiency relative to other domestic producers, one might expect that they would lose market share to other domestic producers that are more efficient and could therefore offer lower prices for their products. This, however, was not the case. Jointly, *** accounted for a higher proportion of the quantity of US producers' commercial sales in 2000 – at *** percent -- than they did in 1996, when they jointly accounted for *** percent of such sales.[5377] Consequently, the so-called "inefficiency" of *** was not causing them to lose market to their domestic competitors. Second, if *** were aberrational performers, as respondents contend, one would expect their performance trends to differ from the other domestic producers. This was also not the case. Declines in operating performance were pervasive among hot-rolled bar producers. While *** were the only domestic producers to experience operating losses in 1997, four additional firms experienced operating losses in 1998, and four more producers beyond that experienced operating losses in 2000.[5378] Thus, at most *** consistent operating losses served to make overall domestic industry operating performance consistently worse than it would have been had these two firms not been in the domestic industry. These firms' performance, however, cannot explain the overall declines in operating performance among domestic hot-rolled bar producers, the increasing incidence of operating losses, or the industry's overall loss of market share to the imports. Because neither structural problems nor the poor performance of *** can explain the domestic

[5373] (original footnote) Nucor's average unit values were ***. Questionnaire Data, INV-Y-212.
[5374] (original footnote) *See* Producer's Questionnaires.
[5375] (original footnote) Nucor's share of the quantity of domestic hot-rolled bar producers' commercial sales was *** in 1996, *** in 1997, *** in 1998, *** in 1999, and *** in 2000. Questionnaire Data, INV-Y-212.
[5376] (original footnote) *See* Hot-Rolled Bar Respondents Prehearing Brief at 80-81.
[5377] (original footnote) Questionnaire Data, INV-Y-212.
[5378] (original footnote) Questionnaire Data, INV-Y-212. Moreover, as previously stated, three producers that did not respond to the questionnaires declared bankruptcy and shut down production operations altogether in interim 2001.

industry's serious injury, we conclude that the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports.

We have also examined the role of changes in demand in explaining the serious injury of the domestic industry. We observe that US apparent consumption, measured by quantity, increased by 11.7 percent from 1996 to 2000. The increase was not evenly distributed throughout the period examined, and apparent consumption peaked in 1998. We observe, however, that during this period apparent consumption declined only from 1998 to 1999, when the domestic industry maintained profitable operating performance. From 1999 to 2000, however, apparent consumption rose – yet the domestic industry became unprofitable. That domestic performance reached injurious levels in 2000, a time of rising apparent consumption, indicates to us that changes in demand cannot be a cause of the serious injury evident at that time.[5379]

Finally, we have examined changes in input costs as a possible source of serious injury to the domestic industry. We note that costs declined during the period and observe that declines in input costs, in and of themselves, cannot be an alternative "cause" of injury. At most, a decline in input costs may indicate that a factor other than imports may be responsible for price declines.

For hot-rolled bar, unit cost of goods sold (COGS) declined from $399 in 1996 to $362 in 1999, and then increased to $380 in 2000; unit raw material costs declined throughout the period examined.[5380] As previously stated, demand for hot-rolled bar was higher in 1999 than in 1996 and was higher in 2000 than in 1999. In times of increasing demand, producers normally need not cut their prices to reflect fully declines in cost of goods sold. Yet from 1996 to 1999, the domestic industry's declines in average unit sales values outpaced the decline in unit COGS. From 1999 to 2000, when unit COGS increased, unit average sales values remained the same. If the domestic industry could have increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999. As explained above, however, the industry could not sustain whatever price increases it initiated in 2000 because of that year's import surge. Because we cannot attribute the domestic industry's declines in operating performance in 2000 to increases in COGS, we conclude that changes in input costs cannot be as important a cause of serious injury as increased imports.

We consequently conclude that alternative causes cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and the deteriorating operating performance leading to negative operating margins for the domestic industry in 2000.

[5379] (original footnote) CR and PR, Table LONG-C-3. We observe that, during interim 2001, when apparent consumption fell significantly, the domestic industry experienced further declines in operating performance. The interim 2001 data merely indicate that declines in apparent consumption can lead to further deterioration to an industry that was already seriously injured.

[5380] (original footnote) CR and PR, Table LONG-27.

Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic hot-rolled bar industry that is not less than any other cause."[5381]

Factors considered by the USITC

Competition among domestic producers

Claims and arguments of the parties

10.432 The arguments of the parties are set out in Section VII.H.3(b)(iii) *supra*.

Analysis by the Panel

10.433 The Panel agrees with the United States insofar as it stated that the USITC dismissed this factor as a possible cause of injury to the industry. In particular, the USITC stated that: "We observe initially that competition among domestic producers cannot provide any explanation for certain indicia of serious injury". In addition, it stated that: "We consequently conclude that Nucor's pricing practices cannot provide any explanation for the serious injury experienced by the domestic industry. Moreover, neither Nucor's practices nor internal industry competition in general can explain why the domestic industry as a whole lost market share to the imports".[5382]

10.434 We note that the complainants arguments with respect to this factor are premised on the assumption that the USITC acknowledged that competition among domestic producers was a cause of injury. However, as noted above, this assumption is not valid. Further, in our view, the complainants have not put forward an alternative plausible explanation that, in fact, competition among domestic producers was a cause of serious injury.

Inefficient producers

Claims and arguments of the parties

10.435 The arguments of the parties are set out in Section VII.H.3(b)(iii) *supra*.

Analysis by the Panel

10.436 The Panel notes at the outset that the USITC stated that "the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports." It could be concluded from this statement, taken in isolation, that the USITC considered that inefficient producers were a cause of injury, albeit not a cause that was more important than increased imports. However, in the Panel's view, in light of the remainder of the USITC's analysis, it would seem that the USITC made this statement merely in keeping with domestic law requirements. On the contrary, the substance of the USITC's analysis indicates that the USITC dismissed this factor as a possible cause of injury to the industry. In particular, the USITC stated that: "Respondents next contend that inefficient producers are a larger cause of any serious injury to the domestic industry than increased imports…Respondents' theory fails on two accounts…" In addition, the USITC stated that: "These firms' performance, however, cannot explain the overall declines in operating performance among domestic hot-rolled bar producers, the increasing incidence of operating losses, or the industry's overall loss of market share to the imports. Because neither structural problems nor the poor performance of *** can explain the

[5381] USITC Report, Vol. I, pp. 97-99.
[5382] See para. 10.431.

domestic industry's serious injury, we conclude that the alleged inefficiency of these two firms cannot be a more important cause of injury than increased imports."

10.437 We note that the complainants' arguments with respect to this factor are premised on the assumption that the USITC acknowledged that inefficient producers were a cause of injury. However, as noted above, this assumption is not valid. Further, in our view, the complainants have not put forward an alternative plausible explanation that, in fact, inefficient producers were a cause of serious injury.

Changes in input costs

Claims and arguments of the parties

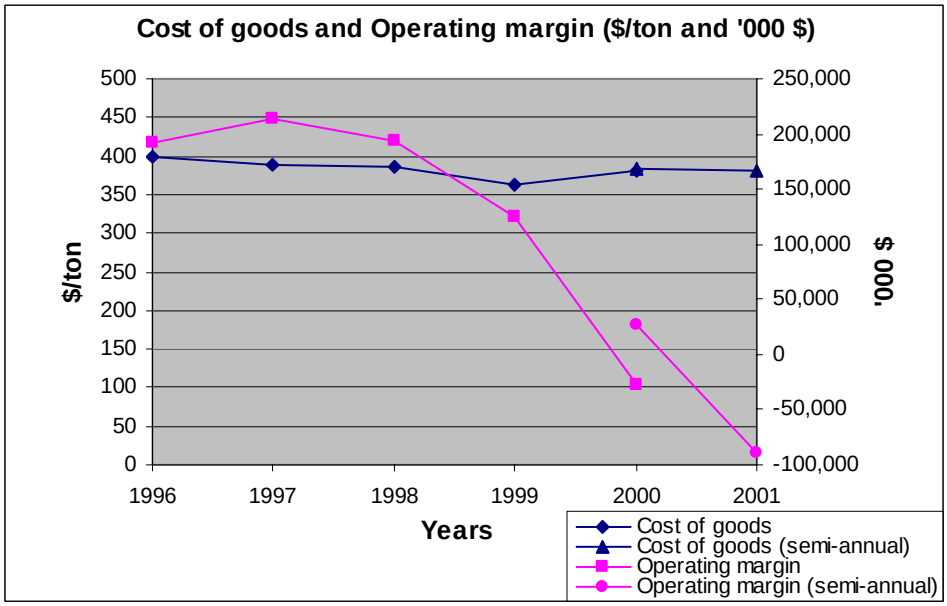
10.438 The arguments of the parties are set out in Section VII.H.3(b)(iii) *supra*.

Analysis by the Panel

10.439 The Panel notes that although the USITC did not expressly state that increases in COGS played a role in the decline in the domestic operating margin, it did explicitly state that COGS increased for hot-rolled bar from 1999 to 2000. In particular, the USITC stated that: "For hot-rolled bar, unit cost of goods sold (COGS) declined from $399 in 1996 to $362 in 1999, and then increased to $380 in 2000". In addition, the USITC stated that: "If the domestic industry could have increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999. As explained above, however, the industry could not sustain whatever price increases it initiated in 2000 because of that year's import surge. Because we cannot attribute the domestic industry's declines in operating performance in 2000 to increases in COGS, we conclude that changes in input costs cannot be as important a cause of serious injury as increased imports".

10.440 In the Panel's view, the USITC's dismissal of the effect of increases in COGS in its non-attribution analysis was not adequately reasoned. In particular, the USITC merely stated that the only reason why the domestic industry did not increase prices to recoup growing COGS was the import surge that occurred in the year 2000. This, in the Panel's view, did not amount to a reasoned and adequate explanation. Nevertheless, the Panel does consider that the USITC was probably correct in concluding that changes in input costs were not a cause of serious injury. If, indeed, COGS was playing a significant role in situation of the domestic industry, one would have expected operating margins to increase while COGS was decreasing, in particular, from 1996 until 1999 inclusive. However, as can be seen from the graph below, which has been generated using USITC data, the trends in operating margin appear to be independent of trends in COGS. While it is true that there appears to be coincidence between, on the one hand, increases in COGS from 1999 until 2000 and, on the other hand, declines in the operating margin during that period, the Panel considers that coincidence during one brief window in the period of investigation cannot detract from a lack of coincidence during the rest of the period of investigation.[5383]

[5383] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-27 at LONG-33.



Declines in demand

Claims and arguments of the parties

10.441 The arguments of the parties are set out in Section VII.H.3(b)(iii) *supra*.

Analysis by the Panel

10.442 The Panel notes that the USITC did not give any indication in its Report that it considered that demand played any role in causing serious injury to the industry. Rather, the USITC explained adequately that US apparent consumption of hot-rolled bar increased by 11.7% from 1996 to 2000, and that it increased on a year-to-year basis for every available comparison except that for 1998 to 1999. The USITC added that apparent US consumption increased from 1999 to 2000, the year that domestic industry performance reached injurious levels. Consequently, it concluded that changes in demand could not explain the industry's condition in 2000.[5384] In the Panel's view the USITC examined the nature and effects of declines in demand when assessing whether increased imports of hot-rolled were causing serious injury to the relevant domestic producers. Accordingly, the Panel rejects the complainants' claims in relation to this factor.

Conclusions

10.443 In the Panel's view, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by increases in COGS, together with other factors, was not attributed to increased imports contrary to the requirements of Article 4.2(b) of the Agreement on Safeguards. Having said this, the Panel notes that the facts do appear to support the USITC's conclusion regarding increases in COGS.

[5384] United States' first written submission, para. 578.

(iii) Overall conclusion on USITC's determination of a causal link

10.444 We conclude that with respect to hot-rolled bar, although the USITC did not conduct any coincidence analysis, its conditions of competition's analysis provided a compelling explanation that indicated the existence of a causal link, subject to fulfilment of the non-attribution requirement. In this regard, we found that the USITC's non-attribution analysis failed to separate, distinguish and assess the nature and extent of the injurious effects of increases in COGS so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.445 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of hot-rolled bar and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

(d) Cold-finished bar

10.446 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants that, for us, raised the most problematic aspects of the USITC's determinations on causation, that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.447 The USITC's findings read as follows:

> "We find that the increased imports of cold-finished bar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of cold-finished bar are a substantial cause of serious injury to the domestic cold-finished bar industry.
>
> a. Conditions of Competition
>
> We have taken into account a number of factors that affect the competitiveness of domestic and imported cold-finished bar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.
>
> Market participants generally agree that there are few or no substitutes for long products such as cold-finished bar.[5385] As discussed in section V.A.2. above, the principal use of cold-finished bar is in automotive applications.

[5385] (original footnote) CR and PR at LONG-78.

The record indicates strong demand during most of the period examined with US apparent consumption of cold-finished bar increasing during every full-year but one. Apparent consumption rose from 1.41 million tons in 1996 to 1.60 million tons in 1997 and then to 1.67 million tons in 1998. Apparent consumption then declined to 1.61 million tons in 1999 but increased to 1.64 million tons in 2000. Apparent consumption was lower in interim 2001, at 700,202 tons, than in interim 2000, when it was 905,184 tons.[5386]

With regard to supply of cold-finished bar, US capacity increased from 1996 to 2000 despite declines since 1998. Domestic industry capacity utilization fluctuated during the period examined. Notwithstanding that the capacity utilization data reported in the questionnaires appear to be understated, it is clear that there was additional productive capacity available to the domestic industry throughout the period examined. Foreign capacity reported in questionnaires increased from 1.6 million tons in 1996 to 2.0 million tons in 2000, and was higher in interim 2001 than in interim 2000. Foreign capacity utilization for full-year periods ranged from 75.2 percent in 1999 to 84.3 percent in 2000.[5387]

The record indicates that price is an important factor in purchasing decisions for cold-finished bar. Purchasers listed price second most-frequently, after quality, as the top factor in purchasing decisions, and listed price most frequently as the number two factor. Most purchasers evaluated the imports and domestically-produced cold-finished bar as comparable with respect to product consistency and product quality.[5388]

b. Analysis[5389]

Aggressive pricing by the imports during the latter portion of the period examined caused the domestic industry to lose market share and revenues. This resulted in the poor operating performance and serious injury discussed above.

Average unit values of the imports trended downward from 1996 to 1998, and the decline accelerated in 1999. Import average unit values declined by 1.3 percent from 1996 to 1997 and by 0.1 percent from 1997 to 1998. They then fell by 7.7 percent from 1998 to 1999.[5390] Additional evidence that import prices declined dramatically in 1999 is provided by data for one-inch round C12L14, the cold-finished bar product for which the Commission obtained significant pricing data concerning imports.[5391] Between the fourth quarter of 1998 and the first quarter of

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[5386] (original footnote) CR and PR, Table LONG-71.

[5387] (original footnote) CR and PR, Table LONG-45. We have relied upon the questionnaires for foreign capacity and capacity utilization data, although such data are not complete. We acknowledge that the domestic producers contended that the questionnaire data understated foreign capacity and overstated foreign capacity utilization.

[5388](original footnote) INV-Y-212 at 46.

[5389] (original footnote) The Minimill 201 Coalition produced an economic model that attempted to measure the relationship between imports and the domestic industry's prices and profits. In particular, there were defects in the manner the model measured import competition, and the model did not adequately address changes in domestic competition.

[5390] (original footnote) CR and PR, Table LONG-6.

[5391] (original footnote) The Commission collected pricing data concerning two cold-finished bar products. For one of the products, however, the reported data covered very small import volumes: less than 500

1999, import prices for this product declined by *** percent. They fell an additional *** percent between the first and second quarters of 1999, the largest quarterly decline to that point in the period examined. Although prices rose during the next two quarters, the fourth quarter 1999 price remained 8.2 percent below the fourth quarter 1998 price.[5392]

Prices for domestically-produced C12L14 declined by 3.9 percent between the fourth quarter of 1998 and the first quarter of 1999 but fluctuated in a narrow range during the remainder of 1999. As a result, underselling margins were higher in the last three quarters of 1999 than in earlier periods. Between the first quarter of 1996 and the first quarter of 1999, the margin of underselling or overselling by the imports was no greater than 1.8 percent in any quarter. The underselling margin increased to 8.1 percent in the second quarter of 1999, however, and remained above 5.8 percent for the remaining quarters of that year.[5393]

The market did not react immediately to the price reductions by the imports. Indeed, neither the absolute volume of the imports nor their market share increased in 1999.[5394] The lack of immediate reaction by the market may reflect extensive contract sales: over 40 percent of cold-finished bar purchasers made over 90 percent of their purchases on a contract basis, with contracts commonly six months to over one year in length.[5395] However, the aggressive pricing by the imports continued in 2000. Compared to 1999, average unit values for all imports declined by 5.1 percent.[5396] Prices for imported C12L14 declined during all but one quarter in 2000, and the price for the fourth quarter of 2000 was 14.0 percent below the price for the fourth quarter of 1999.[5397]

Domestic prices also declined in 2000. Average unit values for US shipments of all cold-finished bar products were lower in 2000 than in 1999.[5398] Prices for domestically-produced C12L14 were 4.2 percent lower in the fourth quarter of 2000 than in the fourth quarter of 1999. Nevertheless, underselling by the

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tons of imports in each quarter, and less than 100 tons of imports for each of the last six quarters for which data were collected. INV-Y-212, Table LONG-91. By contrast, reported import volume for one-inch round CL12L14 was at least 1,166 tons in every quarter during the entire period examined, and at least 2,636 tons for every quarter during 1999 and interim 2000. INV-Y-212, Table LONG-ALT92. Consequently, in our analysis of pricing we have focused on the latter, more complete data set. We also observe that, in an analysis of whether there is overselling or underselling, pricing data for a specific product can provide more probative information than average unit value data, where comparisons between values for imports and domestically-produced products can reflect variations in product mix. This is particularly true for a product such as cold-finished bar which covers a broad range of product types and values.

[5392] (original footnote) INV-Y-212, Table LONG-ALT92.

[5393] (original footnote) INV-Y-212, Table LONG-ALT92.

[5394] (original footnote) *See* CR and PR, Tables LONG-6, LONG-71. A substantial increase in cold-finished bar imports occurred in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries.

[5395] (original footnote) Purchaser Questionnaire Responses.

[5396] (original footnote) CR and PR, Table LONG-6.

[5397] (original footnote) INV-Y-212, Table LONG-ALT92.

[5398] (original footnote) CR and PR, Table LONG-17.

imports persisted, with quarterly underselling margins in 2000 ranging from 3.9 percent to 15.5 percent.[5399]

In 2000, the continued underselling by the imports led to significant increases in both import volume and market share. As previously stated, import quantities were 33.6 percent higher in 2000 than in 1999.[5400] The imports' share of US apparent consumption, measured by quantity, increased from 14.7 percent in 1999 to 19.2 percent in 2000.[5401]

Because the imports succeeded in increasing their share of the US market in 2000, the domestic industry's production and shipments declined from 1999 levels notwithstanding the increase in US apparent consumption.[5402] The decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent.[5403],[5404]

Claims and arguments of the parties

10.448 The arguments of the parties are set out in Section VII.H.2(d) *supra*.

Analysis by the Panel

10.449 The Panel has considered the relevant section of the USITC Report for cold-finished bar and notes that, in determining whether a causal link existed between increased imports and serious injury, the USITC did not conduct a coincidence analysis. As mentioned previously, the Panel considers that if a competent authority has not examined coincidence of trends, it must, in proving causation, provide a reasoned and adequate explanation as to why such an analysis was not undertaken as well as a compelling explanation establishing the existence of a causal link. We note that the USITC analysed the conditions of competition. Accordingly, we will now proceed to review the conditions of competition analysis undertaken by the USITC for this measure, with a view to determining whether the USITC provided such a compelling explanation.

10.450 We note as a preliminary point that the USITC considered that "[a]ggressive pricing by the imports during the latter portion of the period examined caused the domestic industry to lose market share and revenues. This resulted in the poor operating performance and serious injury discussed above." The USITC ultimately concluded that "[t]he decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent."

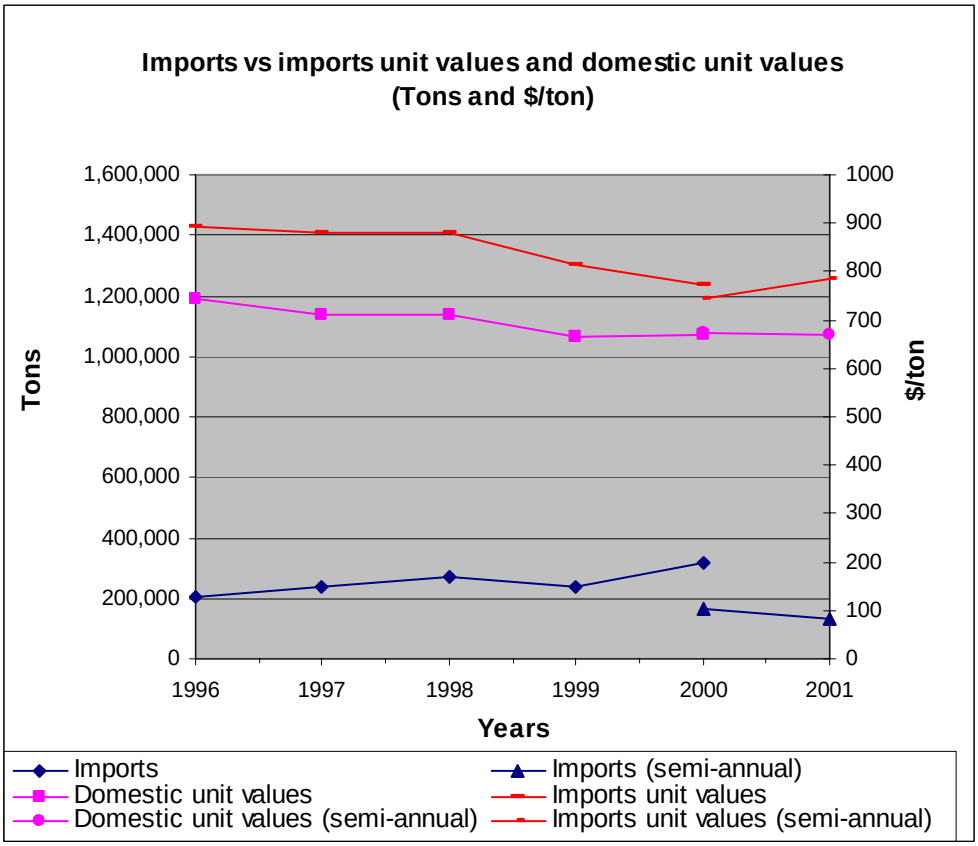
10.451 It is apparent from the USITC's analysis that the essential premise for its conclusion that "increased imports of cold-finished bar are a substantial cause of serious injury to the domestic cold-finished bar industry" was that "aggressive" pricing by imports caused the domestic industry to lose market share and revenues. In assessing whether the USITC has provided a reasoned and adequate explanation of how the facts support such a finding, the Panel will first consider whether import pricing can be labelled as "aggressive".

[5399] (original footnote) INV-Y-212, Table LONG-ALT92.
[5400] (original footnote) CR and PR, Table LONG-6.
[5401] (original footnote) CR and PR, Table LONG-71.
[5402] (original footnote) CR and PR, Tables LONG-17, LONG-71.
[5403] (original footnote) CR and PR, Table LONG-28.
[5404] USITC Report, Vol. I, pp. 104-106.

10.452 As a starting point, the Panel notes that the USITC pointed to underselling during the period, presumably in justification of its assertion that import pricing had been aggressive. Specifically, it stated that: "[U]nderselling by the imports persisted, with quarterly underselling margins in 2000 ranging from 3.9 percent to 15.5 percent.[5405] In 2000, the continued underselling by the imports led to significant increases in both import volume and market share. As previously stated, import quantities were 33.6 percent higher in 2000 than in 1999.[5406]" The Panel notes firstly that the USITC, without any explanation as to why it did so, relied upon *quarterly* data for individual cold-bar products[5407] when *annual* average data was available and such annual data had been used by the USITC in relation to other products, when available.[5408] Unlike the quarterly data, the annual data indicated that imports did not undersell domestic products at any point in the period of investigation. For us, the lack of explanation regarding the data relied upon by the USITC calls into question whether "underselling" actually existed and, therefore, whether import pricing was, in fact, "aggressive" at all.

10.453 Further, we note that at no point during the period of investigation did average unit values for imports undersell average unit values for domestic products. In other words, import prices exceeded domestic prices throughout the period of investigation. This is evident from the graph below, which represents in graphical form USITC data. In the Panel's view, the fact that import prices exceeded domestic prices throughout the period of investigation tends to detract from the conclusion that import pricing was "aggressive". This is not to say, however, that the absence of underselling by imports means that pricing cannot be labelled as "aggressive". On the contrary, we concede that import overselling may, in certain circumstances, drive domestic prices downwards. However, in this case, the USITC relied upon the existence of import underselling as the basis for its assertion that import pricing was "aggressive". As noted, in fact, average unit values were always higher than domestic prices.[5409]

[5405] (original footnote) INV-Y-212, Table LONG-ALT92.
[5406] (original footnote) CR and PR, Table LONG-6.
[5407] Table LONG-91 and Table LONG-ALT92.
[5408] Table LONG-C-4.
[5409] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-17 at LONG-22.

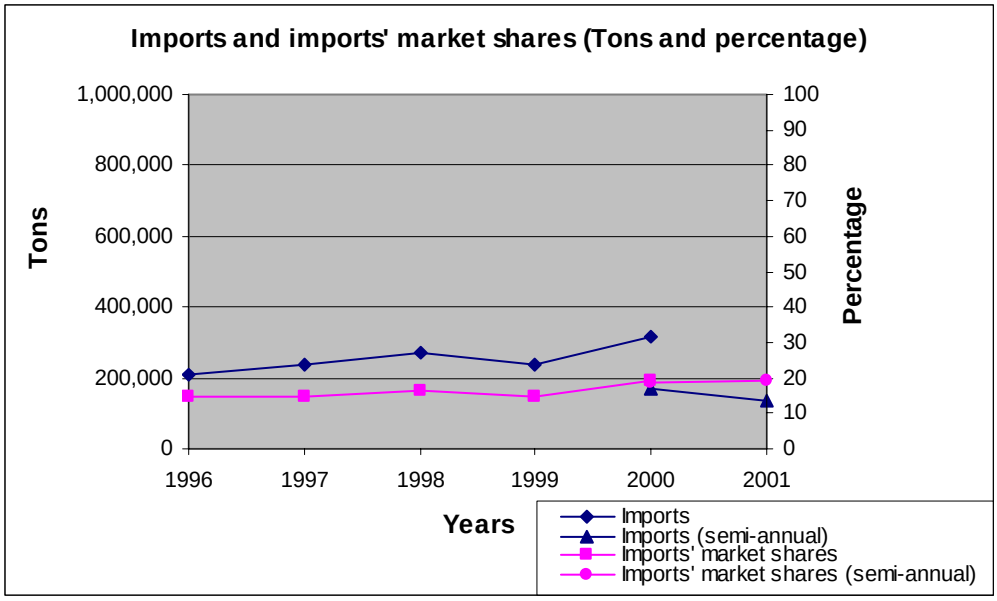


10.454 Putting aside the difficulties with the data relied upon by the USITC, the Panel notes the conclusions drawn by the USITC in its conditions of competition analysis:

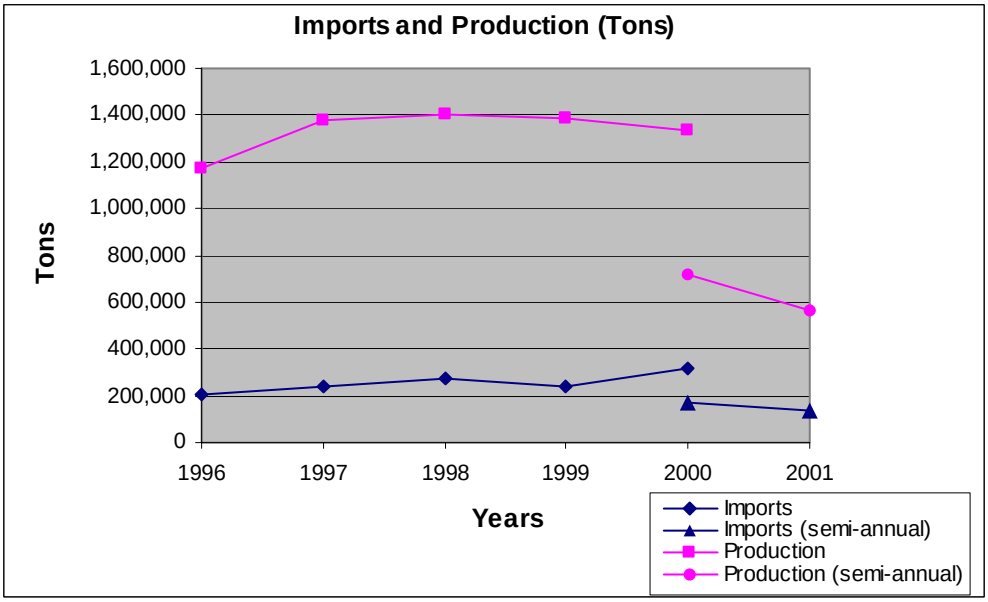
> "Because the imports succeeded in increasing their share of the US market in 2000, the domestic industry's production and shipments declined from 1999 levels notwithstanding the increase in US apparent consumption.[5410] The decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent.[5411],[5412]

10.455 The facts do appear to bear out the conclusion that "the imports succeeded in increasing their share of the United States' market in 2000," as is evident from the graph below generated using USITC data.[5413]

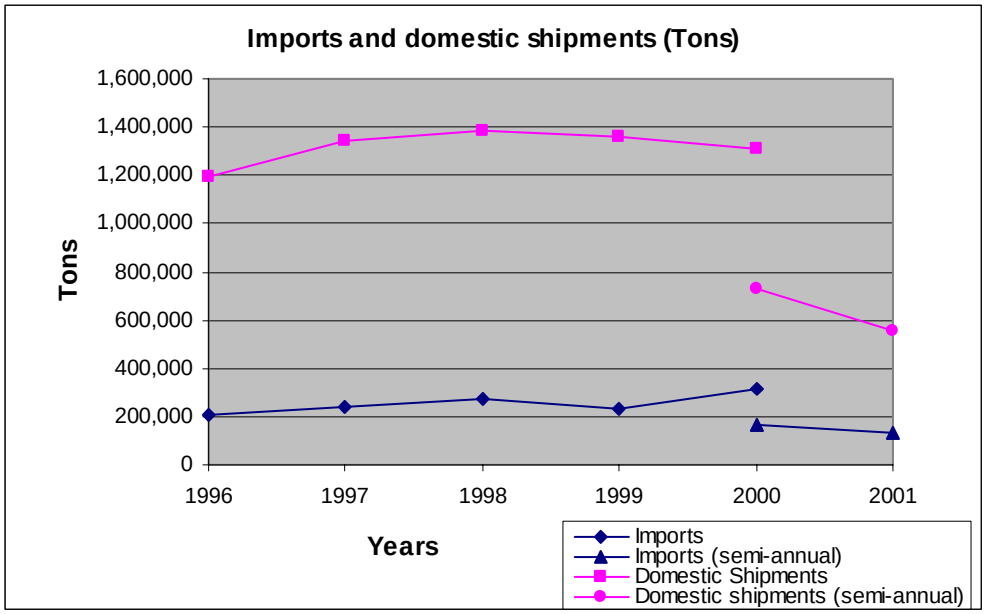
[5410] (original footnote) CR and PR, Tables LONG-17, LONG-71.
[5411] (original footnote) CR and PR, Table LONG-28.
[5412] See para. 10.447.
[5413] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-71 at LONG-68; Table LONG-C-4.



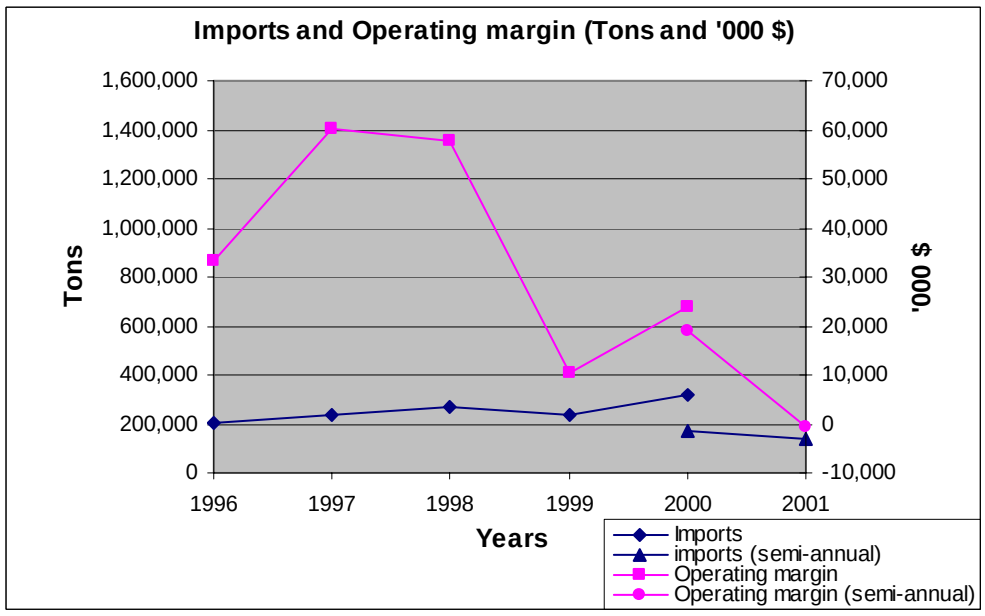
10.456 The facts also appear to bear out the conclusion that production and shipments declined from 1999 levels as is evident from the graphs below, also generated using USITC data.[5414]



[5414] The data represented in the two graphs below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-17 at LONG-22; Table LONG-C-4.



10.457 Despite the foregoing, we find limited support for the conclusion that "[t]he decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent." Indeed, we note that significant declines in revenues and operating margin began well in advance of 2000, the year when, according to the USITC "the continued underselling by the imports led to significant increases in both import volume and market share." This is evident from the graph below, based on USITC data, which illustrates the trends in operating margin together with import trends.[5415]



[5415] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-28 at LONG-34; Table LONG-C-4.

10.458 In light of the foregoing, the Panel finds that the USITC has not provided a compelling explanation that a causal link existed between increased imports of cold-finished bar and injury suffered by the relevant domestic industry. In particular, aside from the difficulties we have identified in relation to the data upon which the USITC relied in undertaking its conditions of competition analysis, we consider that the USITC has not provided a reasoned and adequate explanation of how the facts supported its conclusion that "[t]he decline in output, together with the decline in prices, led to declining revenues and poor operating performance, with an operating margin in 2000 of only 2.8 percent".

(ii) Non-attribution

USITC findings

10.459 The USITC's findings read as follows:

> "The domestic industry's experience in 2000 serves to rebut one of the principal arguments of respondents – that declines in demand were a greater cause of the substantial injury to the domestic industry than increased imports. The domestic industry acknowledges that prices for cold-finished bar have historically tracked demand conditions.[5416] Indeed, the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year.
>
> However, in 2000 demand increased above the level of 1999. Nevertheless, as previously discussed, prices for US-produced product did not recover with demand, but instead declined further in the face of the import surge. The per unit difference between average unit values and COGS, although slightly higher in 2000 than in 1999, was well below the levels of any of the prior years of the period examined. Similarly, the industry's operating margin, while slightly above the level of 1999, was only 2.8 percent, less than half the levels of 1997 and 1998. The number of producers experiencing operating losses increased. When demand again declined in interim 2001, the imports maintained their significant presence in the market, and the domestic industry's performance further deteriorated. The domestic industry's poor performance despite increasing demand in 2000 indicates that it is the imports, not changes in demand, that explain the serious injury the domestic industry is experiencing.
>
> We have also considered respondents' arguments that the domestic industry's poor performance was due more to the presence of a purportedly inefficient producer with structural problems, RTI, than to increased imports.[5417] RTI's structural difficulties, however, ***.[5418] ***. We consequently reject the proposition that RTI's performance was somehow anomalous or served to skew overall data for the domestic industry.
>
> We consequently conclude that alternative causes proffered by respondents cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and

[5416] (original footnote) *See* CFTC Prehearing Brief at 7.
[5417] (original footnote) *See* Cold-Finished Bar Respondents Prehearing Brief at 18-23.
[5418] (original footnote) *** Producer's Questionnaire Response.

> the poor operating performance in 2000. Accordingly, we find that increased imports are a substantial cause of serious injury to the domestic cold-finished bar industry that is not less than any other cause."[5419]

Factors considered by the USITC

Declines in demand

Claims and arguments of the parties

10.460 The arguments of the parties are set out in Section VII.H.3(b)(iv) *supra*.

Analysis by the Panel

10.461 In the Panel's view, the USITC clearly acknowledged that decline in demand contributed to injury that was being suffered by the domestic industry. In particular, the USITC stated that: "The domestic industry acknowledges that prices for cold-finished bar have historically tracked demand conditions.[5420] Indeed, the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year." As is apparent from this last statement, the USITC made a clear linkage between declines in demand and operating performance, the latter being an important injury factor referred to in Article 4.2(a) of the Agreement on Safeguards.

10.462 We note that the USITC considered demand changes that occurred during the period of investigation. In particular, it noted demand declines and increases during the period of investigation. In addition, in the section in which it analysed the conditions of competition, the USITC stated that:

> "The record indicates strong demand during most of the period examined with US apparent consumption of cold-finished bar increasing during every full-year but one. Apparent consumption rose from 1.41 million tons in 1996 to 1.60 million tons in 1997 and then to 1.67 million tons in 1998. Apparent consumption then declined to 1.61 million tons in 1999 but increased to 1.64 million tons in 2000. Apparent consumption was lower in interim 2001, at 700,202 tons, than in interim 2000, when it was 905,184 tons.[5421]"[5422]

10.463 Having acknowledged that demand declines contributed to the state of the domestic industry, the USITC dismissed this factor in its non-attribution analysis on the basis of the assertion that: "The domestic industry's poor performance despite increasing demand in 2000 indicates that it is the imports, not changes in demand, that explain the serious injury the domestic industry is experiencing." In the Panel's view, the mere fact that demand increased during a segment of the period of investigation during which injury persisted does not detract from the conclusion reached by the USITC itself that decline in demand contributed to injury that was being suffered by the domestic industry.

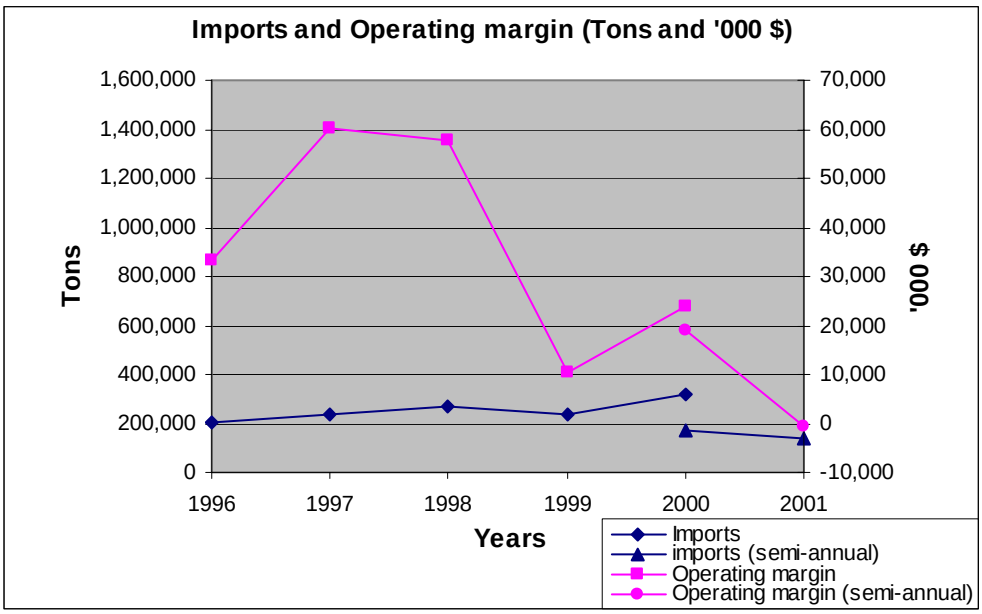
10.464 We find nothing in the report to indicate whether and how the injury caused by this factor was not attributed to increased imports. In our view, the need to separate and distinguish the effects of

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[5419] USITC Report, Vol. I, p. 107.
[5420] (original footnote) *See* CFTC Prehearing Brief at 7.
[5421] (original footnote) CR and PR, Table LONG-71.
[5422] See para. 10.446.

declines in demand was particularly important in this case given the acknowledgement by the USITC itself that "the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year."

10.465 The significance of this decline in operating performance in 1999 that was "to a large extent attributable to declines in demand" should be viewed in context. Below is a graph that has been generated using USITC data. This graph illustrates that the industry's operating margin dropped precipitously in 1999. Prior to 1999, the operating margin was significantly higher. Following 1999, the operating margin began to increase again.[5423]



10.466 Clearly, 1999 was a significant year in terms of the industry's operating performance. Given that "the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year", we consider that this illustrates that declines in demand potentially played a significant role in causing injury to the domestic industry.

Conclusions

10.467 The Panel considers that, with respect to cold-finished bar, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic industry. This, to us, is clear from the fact that the USITC dismissed one factor (namely, declining domestic demand) of the two that it considered in its non-attribution analysis even though it acknowledged the importance of that factor in causing injury to the industry.

[5423] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-6 at LONG-10; Table LONG-28 at LONG-34; Table LONG-C-4.

(iii) Overall conclusion on USITC's determination of a causal link

10.468 The Panel finds that the USITC failed to explain why it did not conduct a coincidence analysis and did not provide a compelling explanation indicating the existence of a causal link between increased imports of cold-finished bar and serious injury to the relevant domestic producers. Further, the Panel found that the USITC's non-attribution analysis for cold-finished bar was flawed because the USITC failed to separate, distinguish and assess the nature and extent of the injurious effects of declines in demand so that the injury caused by these factors, together with other factors, was not attributed to increased imports. We found this flaw to be significant given the acknowledgement by the USITC itself that "the domestic industry's decline in operating performance in 1999, a year when import volume and market penetration declined, appears to a large extent attributable to the declines in demand during that year." Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.469 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of cold-finished bar and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

(e) Rebar

10.470 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants that, for us, raised the most problematic aspects of the USITC's determinations on causation, that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.471 The USITC's findings read as follows:

> "We find that the increased imports of rebar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of rebar are a substantial cause of serious injury to the domestic rebar industry.
>
> a. Conditions of Competition
>
> We have taken into account a number of factors that affect the competitiveness of domestic and imported rebar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

Market participants generally agree that there are few or no substitutes for long products such as rebar.[5424] Rebar is used solely for structural reinforcement within cast concrete structures.[5425]

US apparent consumption of rebar increased throughout the period examined. Apparent consumption rose every year from 1996, when it was 5.5 million tons, to 2000, when it was 8.1 million tons, a net increase of 48.1 percent. Apparent consumption was also higher in interim 2001, at 4.2 million tons, than in interim 2000, when it was 4.1 million tons.[5426]

With regard to supply of rebar, US capacity increased throughout the period examined. Capacity utilization fluctuated; for full-year periods it ranged between 64.9 percent in 1996 to 68.5 percent in 2000. Foreign capacity reported in questionnaires increased from 24.0 million tons in 1996 to 29.6 million tons in 2000, and was higher in interim 2001 than in interim 2000. Foreign capacity utilization for full-year periods ranged from 81.7 percent in 1996 to 86.5 percent in 2000.[5427]

Price is a very important purchasing factor in purchasing decisions for rebar. A majority of all purchasers listed price as the number one factor in purchasing decisions for rebar, and price was named over three times more often than any other individual factor.[5428] One purchaser testified at the Commission hearing that rebar was a commodity product sold on the basis of price, a proposition not disputed by any respondent.[5429]

Finally, rebar imports from several countries were subject to antidumping duties during portions of the period examined. In particular, Commerce imposed provisional antidumping duties on rebar from Turkey on October 10, 1996 and issued an antidumping order on these imports on April 17, 1997.[5430] Commerce imposed provisional antidumping duties on rebar from Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine on January 30, 2001 and issued an antidumping order on imports from these eight countries on September 7, 2001.[5431]

[5424] (original footnote) CR and PR at LONG-78.

[5425] (original footnote) CR and PR at LONG- 2.

[5426] (original footnote) CR and PR, Table LONG-72.

[5427] (original footnote) CR and PR, Table LONG-48. We have relied upon the questionnaires for foreign capacity and capacity utilization data, although such data are not complete. We acknowledge that the domestic producers contended that the questionnaire data understated foreign capacity and overstated foreign capacity utilization.

[5428] (original footnote) INV-Y-212 at 47.

[5429] (original footnote) Tr. at 1316 (Koch).

[5430] (original footnote) *See* 61 Fed. Reg. 53203 (Oct. 10, 1996), 62 Fed. Reg. 18748 (April 17, 1997).

[5431] (original footnote) *See* 66 Fed. Reg. 8324, 8329, 8333, 8339, 8343 (Jan. 30, 2001); 66 Fed. Reg. 46777 (Sept. 7, 2001).

b. Analysis[5432]

The increased imports put price pressure on domestic producers. This price pressure prevented domestic producers from fully achieving the benefits of cost reductions during certain portions of the period examined and from fully recovering increasing costs during others. It also prevented domestic producers from fully benefitting from the large increase in domestic consumption over the period examined. As a result, operating margins declined and by 2000 the industry's operating income was negative.

Rebar imports increased significantly in 1998, shortly following the financial crisis that led to sharply decreased steel consumption in several Asian countries. As has been observed with other long products, domestic producers did not immediately change their pricing strategy in response to the initial import surge. The average unit value of the domestic industry's US shipments declined by only one dollar per ton from 1997 to 1998.[5433] For the rebar product on which the Commission collected pricing data, prices for the domestically-produced product were higher during the first three quarters of 1998 than they were during the comparable quarter of 1997. Prices did begin to fall for the domestically-produced product during the fourth quarter of 1998. Throughout 1998, however, imports undersold the domestically-produced product by margins exceeding 20 percent.[5434] The imports in 1998 took nearly six percentage points of market share away from the domestic industry.[5435]

During 1999, imports again increased by substantial margins. The quantity of imports was 49.1 percent higher in 1999 than in 1998.[5436] This surge was accompanied by price declines for both the imports and the domestically-produced product. Average unit values of the imports declined by 23.6 percent from 1998 to 1999, and average unit values of US shipments of domestically produced rebar declined by 8.9 percent.[5437] For the rebar product on which the Commission collected pricing data, import prices fell by 8.8 percent from the fourth quarter of 1998 to the first quarter of 1999, and the first quarter 1999 price was 11.5 percent below the first quarter 1998 price. Similarly, for the domestically-produced product, prices declined by 5.0 percent from the fourth quarter of 1998 to the first quarter of 1999, and the first quarter 1999 price was 10.6 percent below the first quarter 1998 price. There were further price declines in the second quarter of 1999 before prices stabilized during the final two quarters of the year; the second quarter 1999 price was below the second quarter 1998 price by 12.7 percent for the domestically-produced product and by 15.6 percent for the imports.[5438]

[5432] (original footnote) The Minimill 201 Coalition produced an economic model that attempted to measure the relationship between imports and the domestic industry's prices and profits.. We considered this model in making our determination but note its limitations. In particular, there were defects in the manner the model measured import competition, and the model did not adequately address changes in domestic competition.

[5433] (original footnote) CR and PR, Table LONG-18.

[5434] (original footnote) INV-Y-212, Table LONG-ALT93.

[5435] (original footnote) CR and PR, Table LONG-72.

[5436] (original footnote) CR and PR, Table LONG-7.

[5437] (original footnote) CR and PR, Tables LONG-7, LONG-18.

[5438] (original footnote) INV-Y-212, Table LONG-ALT93.

We can discern no reason other than the imports for the magnitude of price and average unit value declines during 1999. The decline was not a function of demand changes, because US apparent consumption for rebar increased by 14.1 percent from 1998 to 1999.[5439] Indeed, in light of these demand conditions, we would ordinarily expect prices to have stayed stable or risen, and not to have declined by such large amounts. Changes in input costs also cannot explain the magnitude of the price decline. While there was a reduction in per unit COGS from 1998 to 1999, this reduction was less than the per unit decline in average sales values.[5440] In any event, in a period of sharply increasing demand, producers normally need not cut their prices to reflect fully declines in costs of goods sold.[5441] Thus the price pressure imposed by the surging volume of imports prevented the domestic rebar producers from achieving the full benefits of declining input costs in a growing market.

The imports undersold domestically-produced rebar by quarterly margins between *** and *** percent during 1999.[5442] During that year, the imports gained another five percentage points of market share.[5443] Nevertheless, because of the strong growth in demand, the domestic industry continued to perform profitably, although operating margins were below the levels of 1998.[5444]

There was not a further import surge in 2000, when import quantity and market share declined somewhat from 1999 levels. Imports did maintain a significant presence in the market in 2000, however. Import quantity and market penetration in 2000 were still both significantly above 1998 levels, not to mention those of earlier years; import quantity in 2000 was considerably more than twice the 1996 level and market penetration was nearly twice the 1996 level.[5445]

Imports maintained their pricing pressure as well in 2000. Average unit values of imports in 2000 increased only incrementally from their depressed levels of 1999, while the average unit values for the domestically-produced product declined further from 1999 to 2000.[5446] Prices for both the domestically-produced and the imported rebar product on which the Commission collected data fluctuated within a fairly narrow range, with prices for the domestic product generally being slightly below the 1999 levels. Imports continued to undersell the domestically-produced product by margins of over 20 percent.[5447]

As was the case in 1999, factors in the market other than imports cannot explain why rebar pricing in 2000 continued to be at depressed levels. Demand for

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[5439] (original footnote) CR and PR, Table LONG-72.

[5440] (original footnote) CR and PR, Table LONG-29.

[5441] (original footnote) Additionally, competition between domestic producers cannot be a cause for price declines of the magnitude observed. While cost differentials do exist among domestic producers, even the domestic producer with the lowest cost structure had per-unit COGS that was considerably above the average unit sales values of the imports. *See* Producers' Questionnaires. Given the importance of price in rebar purchasing decisions, the commodity nature of rebar and the magnitude of underselling by the imports, it is clear that price leadership was exerted by the imports, rather than any domestic producer.

[5442] (original footnote) INV-Y-212, Table LONG-ALT93.

[5443] (original footnote) CR and PR, Table LONG-72.

[5444] (original footnote) CR and PR, Table LONG-29.

[5445] (original footnote) CR and PR, Tables LONG-7, LONG-72.

[5446] (original footnote) CR and PR, Tables LONG-7, LONG-18.

[5447] (original footnote) INV-Y-212, Table LONG-ALT93.

> rebar continued to increase in 2000, although this increase was less than that of the preceding years.[5448] Additionally, per unit COGS increased in 2000 from 1999 levels.[5449] The combination of rising demand and rising costs should have led prices of domestically-produced rebar to increase in 2000. Instead, prices generally declined -- a result we conclude is attributable to the intense price-based competition from imported rebar.[5450] This decline in prices led to the poor financial performance, most notably the negative operating margins discussed above.
>
> The data for interim 2001 indicate a continuation of the trends observed during 2000. Imports continued to maintain their presence in the market. Although import average unit values in interim 2001 were above those for interim 2000, they were still far below those from 1996 to 1998. The average unit values for US shipments of domestically-produced rebar also remained depressed, notwithstanding increasing demand. Underselling by the imports persisted. Operating performance was poor and below the level of interim 2000."[5451]

Claims and arguments of the parties

10.472 The arguments of the parties are set out in Section VII.H.2(e) *supra*.

Analysis by the Panel

10.473 The Panel has considered the relevant section of the USITC Report for rebar and notes that, in determining causal link, the USITC did not conduct a coincidence analysis. As mentioned previously, the Panel considers that if a competent authority has not examined coincidence of trends, it must, in proving causation, provide a reasoned and adequate explanation why such an analysis was not undertaken as well as a compelling explanation establishing the existence of a causal link. We note that the USITC analysed the conditions of competition. Accordingly, we will now proceed to review the conditions of competition analysis undertaken by the USITC for this measure, with a view to determining whether the USITC provided such a compelling explanation.

10.474 The Panel considers that the facts before the USITC did not preclude a finding that "the increased imports put price pressure on domestic producers. This price pressure prevented domestic producers from fully achieving the benefits of cost reductions during certain portions of the period examined and from fully recovering increasing costs during others." In coming to this conclusion, we first examined average unit value data for imports and domestic products. The graph below, which has been generated using USITC data, indicates that imports undersold domestic products throughout the period of investigation and quite significantly so from 1999 onwards. This is consistent with the USITC's pricing trends findings.[5452]

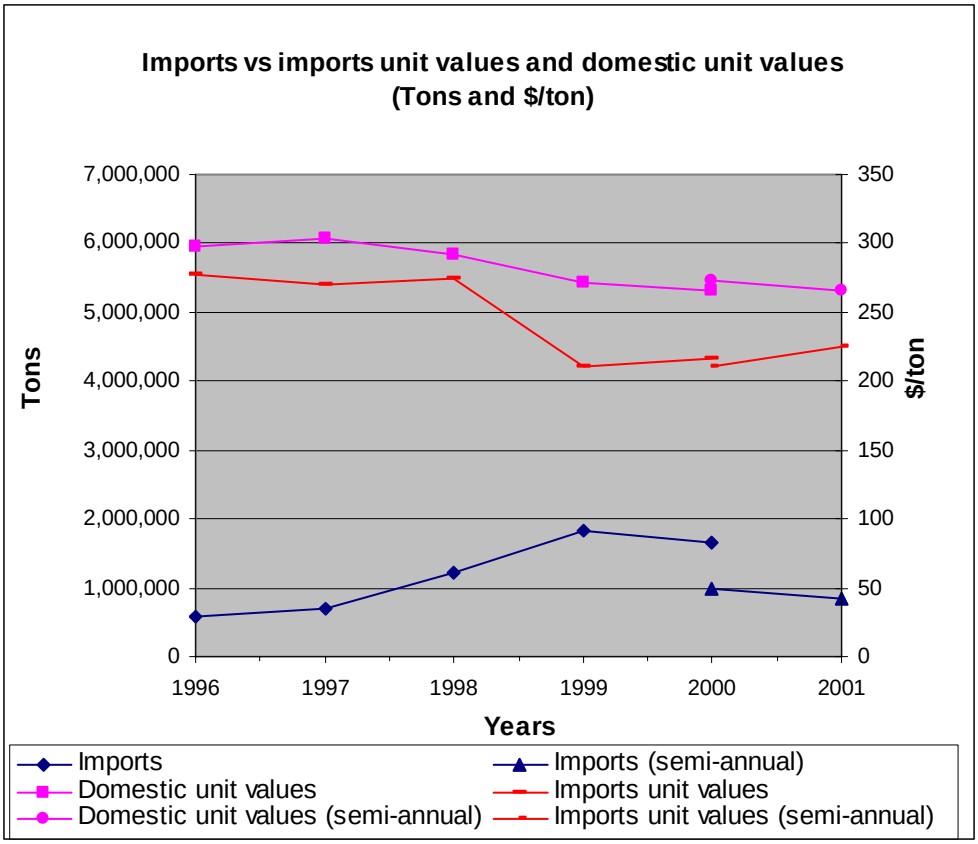
[5448] (original footnote) CR and PR, Table LONG-72.

[5449] (original footnote) CR and PR, Table LONG-29.

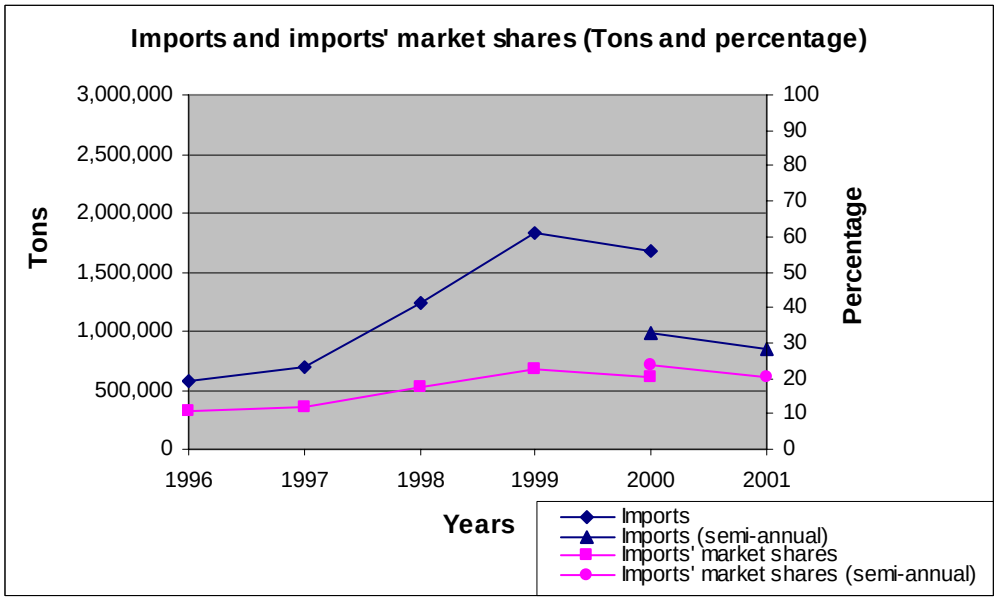
[5450] (original footnote) Moreover, although the largest individual component of COGS – raw materials costs – declined from 1999 to 2000 on a per unit basis, this decline was still not as great as the per unit decline in average commercial sales values. CR and PR, Table LONG-29.

[5451] USITC Report, Vol. I, pp. 111-114.

[5452] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-7 at LONG-11; Table LONG-18 at LONG-23.

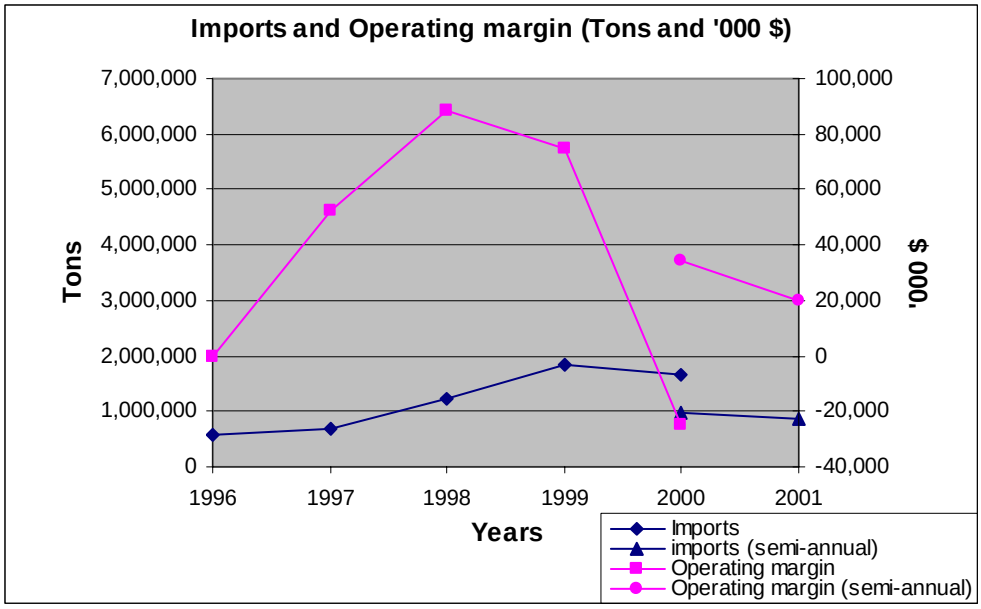


10.475 We also considered the import market share during the period of investigation. As is evident from the graph below, as imports increased from 1997 onwards, the import market share also progressively increased.[5453]



[5453] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-7 at LONG-11; Table LONG-72 at LONG-68; Table LONG-C-5.

10.476 In addition, the graph below illustrating import trends and trends in the operating margin seems to indicate that some coincidence between increases in imports from 1997 onwards and declining operating margin existed from 1998 onwards.[5454]



10.477 Taken together, it is our view that the above data supports the USITC finding that increased imports exerted downward pressure on domestic prices and that this, in turn, had an impact upon the financial performance of domestic producers. In our view, the USITC provided a compelling explanation indicating the existence of a causal link between increased imports and serious injury, subject, of course, to fulfilment of the non-attribution requirement. Therefore, we reject the complainants' claims and arguments in this regard.

(ii) Non-attribution

USITC findings

10.478 The USITC's finding reads as follows:

> "In our discussion above, we have already considered and rejected several alternative causes advanced by the respondents to explain the condition of the domestic rebar industry. As discussed in the section on serious injury, the domestic industry's capacity increases cannot be deemed to be an alternative cause of injury because capacity increased far less than did US apparent consumption of rebar during the period examined; indeed, capacity utilization generally increased during the period examined. We have also discussed changes in input costs and demand and found that they cannot explain the changes in pricing that occurred during the period examined; if anything, these factors indicate that prices should have been stable to increasing

[5454] The data represented in the graph below are contained in the USITC Report, in particular in Table LONG-7 at LONG-11; Table LONG-29 at LONG-35; Table LONG-C-5.

during the latter portion of the period examined. Instead, because of competition from the increased imports, prices declined."[5455]

Factors considered by the USITC

Domestic capacity increases

Claims and arguments of the parties

10.479 The arguments of the parties are set out in Section VII.H.3(b)(v) *supra*.

Analysis by the Panel

10.480 The Panel agrees with the United States that the USITC dismissed this factor in its non-attribution analysis. In particular, during its causation analysis, the USITC stated that: "[T]he domestic industry's capacity increases cannot be deemed to be an alternative cause of injury because capacity increased far less than did US apparent consumption of rebar during the period examined; indeed, capacity utilization generally increased during the period examined." In addition, during its injury analysis, the USITC stated that: "Reported capacity also increased during each year of the period examined, rising from 7.6 million tons in 1996 to 9.7 million tons in 2000. Capacity was higher in interim 2001, when it was 4.8 million tons, than in interim 2000, when it was 4.7 million tons in 2000.[5456] The increases in capacity, however, must be viewed in the context of the increases in demand for rebar during the period examined. The 26.6 percent increase in productive capacity between 1996 and 2000 was far smaller than the 48.1 percent increase in US apparent consumption over that period. Moreover, notwithstanding the overall increases in capacity, several firms that produce rebar have shuttered production facilities during the period examined.[5457]"[5458]

10.481 We consider that the USITC provided a reasoned and adequate explanation as to why domestic capacity increases were not a cause of serious injury. In the Panel's view, the complainants have not put forward a plausible alternative explanation as to why this factor was a cause of serious injury.

Changes in input costs

Claims and arguments of the parties

10.482 The arguments of the parties are set out in Section VII.H.3(b)(v) *supra*.

Analysis by the Panel

10.483 The USITC dismissed this factor as a possible cause of injury to the industry. In particular, during its analysis of the conditions of competition, the USITC stated that: "Changes in input costs also cannot explain the magnitude of the price decline. While there was a reduction in per unit COGS from 1998 to 1999, this reduction was less than the per unit decline in average sales values.[5459]" Further, it stated that: "Additionally, per unit COGS increased in 2000 from 1999 levels.[5460] The

[5455] USITC report, Vol. I, pp. 114-115.
[5456] (original footnote) CR and PR, Table LONG-18.
[5457](original footnote) *See* Minimill 201 Coalition Posthearing Brief, vol. 3 at 5-6.
[5458] USITC Report, Vol. I, p. 109.
[5459] (original footnote) CR and PR, Table LONG-29.
[5460] (original footnote) CR and PR, Table LONG-29.

combination of rising demand and rising costs should have led prices of domestically-produced rebar to increase in 2000. Instead, prices generally declined – a result we conclude is attributable to the intense price-based competition from imported rebar.[5461],[5462] Finally, in its causation analysis, the USITC stated that: "We have also discussed changes in input costs… and found that they cannot explain the changes in pricing that occurred during the period examined; if anything, these factors indicate that prices should have been stable to increasing during the latter portion of the period examined. Instead, because of competition from the increased imports, prices declined."

10.484 The question remains as to whether the USITC was correct in discounting changes in input costs as a possible cause of injury without further analysis. It is evident from Table-LONG 29 that COGS increased quite significantly between 1999 and 2000. In addition, SG&A expenses increased significantly between 1998 and 2000.[5463] Notably, the domestic industry's operating margin rose until 1998 and declined quite precipitously thereafter. In our view, at the least, the USITC should have explained why these increases in costs and expenses were not a cause of injury. It was not enough, in our view, to dismiss the effects of these increases on the mere basis that they could not account for domestic price declines.

Conclusions

10.485 In the Panel's view, the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of increases in COGS and SG&A expenses, contrary to the requirements of Article 4.2(b) of the Agreement on Safeguards. The Panel finds that, in failing to adequately analyse increases in COGS and SG&A, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by these factors, together with other factors, was not attributed to increased imports.

(iii) Overall conclusion on USITC's determination of a causal link

10.486 As indicated above, the Panel found that, although the USITC did not explain why it did not undertake a coincidence analysis, it nonetheless provided a compelling explanation that indicated, leaving aside the issue of compliance with the non-attribution requirement, the existence of a causal link. However, we found that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by increases in COGS and SG&A, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.487 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of rebar and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

[5461] (original footnote) Moreover, although the largest individual component of COGS – raw materials costs – declined from 1999 to 2000 on a per unit basis, this decline was still not as great as the per unit decline in average commercial sales values. CR and PR, Table LONG-29.

[5462] See para. 10.471.

[5463] Even if SG&A expenses cannot be regarded as "input costs", we consider that such expenses should have been taken into account by the USITC.

(f) Welded pipe

10.488 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants that, for us, raised the most problematic aspects of the USITC's determinations on causation, that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

10.489 We note that the complainants have not challenged the USITC's coincidence and conditions of competition analyses. Accordingly, we will proceed directly to a review of the USITC's non-attribution analysis.

(i) Non-attribution

USITC findings

10.490 The USITC's findings read as follows:

> "We find that increased imports of welded pipe are a substantial cause of the threat of serious injury: that is, we find that serious injury – a "significant overall impairment in the position" of the domestic industry – due to imports is "clearly imminent," and that increased imports of welded pipe are an important cause, and a cause not less than any other cause, of the threat of serious injury to the domestic industry.
>
> …
>
> We also considered other possible causes of the current condition of the domestic industry, as well as respondents' arguments that no future threat of serious injury exists. Several respondents argued that increased domestic capacity had a negative impact on prices and therefore on the condition of the domestic industry.[5464] The increase in capacity (1.5 million tons) was only modestly higher than the increase in domestic consumption of welded pipe (1.2 million tons) over the period examined. Thus, the increase was not inconsistent with the overall increase in consumption during the period examined – apparent US consumption increased by 73 percent of the amount of the increase in capacity. We do not view this differential as excessive or as contributing in more than a minor way to the condition of the industry in 2000 or interim 2001.
>
> Joint Respondents argue that the declining profitability is explained by events pertaining to a significant domestic producer that raised the company's costs but are unrelated to imports.[5465] While certain company costs appear to have increased, the main reason for the decline in the company's financial performance was the substantial drop in the unit value of company sales beginning in 1999.[5466] As discussed above, this decline was largely the result of the substantial increased

[5464] (original footnote) *See, e.g.*, Joint Respondents Prehearing Injury Brief on Welded Tubular Products Other Than OCTG at 45.

[5465] (original footnote) Joint Respondents Prehearing Injury Brief on Welded Tubular Products Other Than OCTG at 14-15. Our discussion of this issue is framed in general terms to avoid referencing business proprietary information.

[5466] (original footnote) OINV-Y-212.

imports. Moreover, excluding this company does not substantially alter the downward trend in industry profitability described earlier.

We considered whether the antidumping orders in place on some welded non-OCTG products from several countries reduce the current or likely imminent impact of imports. The orders cover only a limited number of welded pipe products and, of those, only imports from a limited number of countries. Moreover, the orders were issued between 1984 and 1989 and thus were in place before the start of the period examined.[5467] They clearly did not preclude the surge in imports in 2000 and continued high level of imports in 2001, or even prevent a surge in imports from countries covered by the orders.[5468] Given these increases despite the existence of the orders, these pre-existing orders do not provide a basis to conclude that imports would not continue to increase in the imminent future.[5469]

Several respondents argue that the industry is not threatened with serious injury because the market for large diameter line pipe has begun to surge and will continue to expand in the imminent future.[5470] We agree with respondents that available information indicates that there has been a recent increase in demand for large diameter line pipe and that projections are for continued growth due to rising demand for pipeline projects. We also agree that rising demand tends to ameliorate the impact of a given volume of imports. However, large diameter line pipe is only a portion of this industry -- an estimated 20 to 30 percent of the overall welded product category.[5471] Indeed, even with a recent rise in large diameter line pipe demand, overall demand for covered welded tubular products has been relatively constant on a full-year basis since 1998, as well as between interim periods. Thus, we do not consider the likely increased demand for large diameter line pipe as eliminating the threat of serious injury.

For all of the reasons we have discussed, we conclude that increased imports pose a real and imminent threat of serious injury to the welded pipe industry."[5472]

[5467] (original footnote) CR and PR at Table OVERVIEW-1.

[5468] (original footnote) For example, imports from Thailand, which are covered by the orders, increased by 69,621 tons, or 248.2 percent, between 1998 and 2000 and undersold the domestic product by double digit margins in 2000 and the first half of 2001. Committee on Pipe and Tube Imports Posthearing Injury Brief at 19, exhibits 3, 5. Imports have also increased by significant amounts since 1998 from Korea (68,418 tons, or 19.5 percent), Taiwan (18,762 tons, or 40.1 percent), and Turkey (30,440 tons, or 317.9 percent). In the case of Korea, such imports undersold the domestic product by margins up to 8.8 percent in 2000 and the first half of 2001, and in the case of Taiwan and Turkey generally undersold the domestic product by double digit margins in 2000 and the first half of 2001 in quarters for which data were reported. Committee on Pipe and Tube Imports Posthearing Injury Brief at 15-17, 21-22.

[5469] (original footnote) The pending antidumping investigation on welded non-alloy steel pipe from China is not a basis to conclude that imports will not increase. It would be speculative to attempt to determine the outcome of that investigation or its effect on any imports in the imminent future. The Commission made an affirmative determination in the preliminary phase of this investigation in July 2001, and made negative determinations in the other investigations considered at that time. *See Circular Welded Non-Alloy Steel Pipe From China, Indonesia, Malaysia, Romania, and South Africa,* Invs. Nos. 731-TA-943-947 (Preliminary), USITC Pub. 3439 (July 2001).

[5470] (original footnote) *See, e.g.,* European Steel Tube Association Prehearing Injury Brief at 11-13.

[5471] (original footnote) CR at TUBULAR-55; PR at TUBULAR-43.

[5472] USITC Report, Vol. I, pp. 165-166.

Factors considered by the USITC

Domestic industry overcapacity

Claims and arguments of the parties

10.491 The arguments of the parties are set out in Section VII.H.3(b)(vi) *supra*.

Analysis by the Panel

10.492 In the Panel's view, the USITC clearly considered that domestic industry overcapacity played some role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "The increase in capacity (1.5 million tons) was only modestly higher than the increase in domestic consumption of welded pipe (1.2 million tons) over the period examined. Thus, the increase was not inconsistent with the overall increase in consumption during the period examined – apparent US consumption increased by 73 percent of the amount of the increase in capacity. We do not view this differential as excessive or as contributing in more than a minor way to the condition of the industry in 2000 or interim 2001."

10.493 We note that the USITC identified and considered changes in domestic capacity during the period of investigation. In particular, the USITC stated that:

> "Domestic capacity rose 22 percent during the period examined, from 6.86 million short tons in 1996 to 8.37 million short tons in 2000, with the largest one-year increase occurring in the middle of the period, between 1997 and 1998 (7.1 percent). Domestic capacity has increased by smaller amounts recently (by 4.4 percent between 1999 and 2000, and by 0.5 percent between interim 2000 and interim 2001).[5473]
>
> …
>
> Domestic welded pipe capacity increased during the period examined, and was at its highest level in 2000.[5474] US capacity growth largely tracked the increase in apparent US consumption of welded pipe.[5475] However, the recent decline in domestic production coupled with the increase in domestic capacity resulted in a significant decline in capacity utilization beginning in 1999 and continuing through 2000, and in interim 2001 compared to interim 2000. The capacity utilization rate for the industry fluctuated during the first three years of the period examined (66.7 percent in 1996, 71.9 percent in 1997, and 70.7 percent in 1998), and then declined sharply to 63.8

[5473] (original footnote) CR and PR at TUBULAR-C-4.

[5474] (original footnote) US producers' average capacity was 6.86 million short tons in 1996, and increased to 7.04 million short tons in 1997, 7.54 million short tons in 1998, 8.02 million short tons in 1999, and 8.38 million short tons in 2000. US producers' average capacity was 4.69 million short tons in interim 2001 (half year basis), virtually the same as in the same period of 2000 (4.67 million short tons). CR and PR at Table TUBULAR-C-4.

[5475] (original footnote) The increase in average annual capacity of approximately 1.5 million short tons during the period examined was slightly above the 1.2 million short ton increase in domestic consumption that occurred during that period. We note that US producers maintain capacity to export, and that exports have accounted for as much as 475,000 tons of production during the period examined. CR and PR at Table TUBULAR-C-4.

> percent in 1999 and 56.2 percent in 2000. This rate was 53.2 percent in interim 2001 as compared to 53.4 percent in the same period of 2000.[5476]"

10.494 The Panel further notes that the USITC dismissed this factor in its non-attribution analysis on the basis that it was not regarded as contributing to injury suffered by the domestic industry in "more than a minor way." In our view, that a factor contributes to injury in no "more than a minor way" does not detract from the implicit acknowledgement that it, nevertheless, contributes to the injury. In our view, the need to separate and distinguish the effects of domestic industry over-capacity was particularly pertinent in this case given its apparent inter-relationship with a number of the injury factors referred to in Article 4.2(a), namely, domestic production and capacity utilization. This relationship was referred to by the USITC itself when it stated that: "However, the recent decline in domestic production coupled with the increase in domestic capacity resulted in a significant decline in capacity utilization beginning in 1999 and continuing through 2000, and in interim 2001 compared to interim 2000."

10.495 As a further point, the Panel notes that the apparent premise upon which the USITC dismissed domestic industry overcapacity in its non-attribution analysis was that: "The increase in capacity (1.5 million tons) was only modestly higher than the increase in domestic consumption of welded pipe (1.2 million tons) over the period examined." Even though the USITC dismissed this factor on the basis that it contributed to injury in no "more than a minor way", the Panel considers that the USITC implicitly acknowledged the importance of this factor. In particular, it noted that capacity increased by a not insubstantial amount of 22% during the period of investigation.

10.496 The Panel considers that in dismissing this factor in its non-attribution analysis, the USITC failed to meet its obligation to establish, through a reasoned and adequate explanation, that the injury caused by it, together with other factors, was properly distinguished and not attributed to increased imports. At the very least, the USITC should have specifically identified what it considered to be the "minor" contribution that domestic industry over-capacity played in causing serious injury to the industry.

Aberrational performance of one member of the industry

Claims and arguments of the parties

10.497 The arguments of the parties are set out in Section VII.H.3(b)(vi) *supra*.

Analysis by the Panel

10.498 The Panel notes that the USITC addressed the aberrational performance of one member of the domestic industry in its Report. In particular, it stated that:

> "Joint Respondents argue that the declining profitability is explained by events pertaining to a significant domestic producer that raised the company's costs but are unrelated to imports.[5477] While certain company costs appear to have increased, the main reason for the decline in the company's financial performance was the

[5476] (original footnote) CR and PR at Table TUBULAR-C-4.

[5477] (original footnote) Joint Respondents Prehearing Injury Brief on Welded Tubular Products Other Than OCTG at 14-15. Our discussion of this issue is framed in general terms to avoid referencing business proprietary information.

> substantial drop in the unit value of company sales beginning in 1999.[5478] As discussed above, this decline was largely the result of the substantial increased imports. Moreover, excluding this company does not substantially alter the downward trend in industry profitability described earlier."

10.499 The Panel considers that the USITC's decision to dismiss the aberrational performance of one member of the domestic industry in its non-attribution analysis was not adequately reasoned. The USITC states that the "main" reason for the decline in the company's financial performance was the drop in units sales caused "largely" by imports. In our view, words such as "main" and "largely" indicate subjective judgement on the part of the USITC, which should have been the subject of further explanation. We believe that the USITC should have identified and considered possible reasons other than the asserted "main" one for the company's decline, which apparently were identified in the Joint Respondents Prehearing Injury Brief for welded pipe.[5479] In addition, we note that the USITC stated that excluding the poor performer from the analysis would not have "substantially" affected the downward trend in profitability. By implication, the exclusion had some effect, albeit not substantial. In the Panel's view, this effect should have been identified, evaluated and explained.

Conclusions

10.500 The Panel considers that, with respect to welded pipe, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic industry. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, domestic industry overcapacity and aberrational performance of one member of the industry) in its non-attribution analysis even though it acknowledged that those factors were causing injury to the industry.

10.501 We thus find that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by other factors such as domestic industry overcapacity and aberrational performance of one member of the industry, together with other factors, was not attributed to increased imports.

(ii) Overall conclusion on USITC's determination of a causal link

10.502 In the Panel's view, the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of domestic industry overcapacity and the aberrational performance of one member of the industry, contrary to the requirements of Article 4.2(b) of the Agreement on Safeguards. The USITC, therefore, failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.503 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of welded pipe and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

[5478] (original footnote) INV-Y-212.
[5479] See the complainants' Common Exhibit CC-78.

(g) FFTJ

10.504 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants that, for us, raised the most problematic aspects of the USITC's determinations on causation, that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.505 The USITC's findings read as follows:

> "We find that the increased imports of fittings, flanges, and tool joints are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of fittings, flanges, and tool joints are a substantial cause of serious injury to the domestic industry.
>
> a. Conditions of Competition
>
> Pipe connection products are diverse (flanges, butt-weld fittings, other fittings, including couplings and nipples, and tool joints), but in general are used to join or cap pipe. Many of the products are commodity grade, produced to standards and specifications established by standards and testing bodies such as ASTM, API, and AWWA. Fittings and flanges are often distributed with other tubular products, and purchasers stated that demand for them is driven by utilities, automotive products, and import competition in downstream markets.[5480] Demand for tool joints is connected with OCTG demand, since tool joints are used in manufacturing finished drill pipe.[5481] Purchasers of fittings and flanges reported that imported and domestically produced fittings and flanges produced to the same grade and specification are used in the same applications.[5482] Once the standards are met, price and cost competitiveness often become the most important factor.[5483]
>
> Apparent US consumption of fittings and flanges increased by 9.7 percent between 1996 and 2000, with most of this increase occurring between 1996 and 1997. Demand was less volatile thereafter, until interim 2001, when it rose by 10.4 percent over interim 2000.[5484]
>
> Domestic producers' capacity increased by 7.4 percent over the period examined, somewhat less than the growth rate in consumption. Domestic capacity reached its highest level of the period examined in 1999, and declined by 5.2 percent in 2000, and by an additional 4.6 percent in interim 2001 compared to interim 2000.[5485] As indicated above, Trinity Fitting Group, a domestic producer, has closed plants in

[5480] (original footnote) CR at TUBULAR-55; PR at TUBULAR-43.
[5481] (original footnote) CR at TUBULAR-55; PR at TUBULAR-43.
[5482] (original footnote) CR at TUBULAR-62; PR at TUBULAR-50.
[5483] (original footnote) CR at TUBULAR-59; PR at TUBULAR-47; Tr. at 2514 (Berger); Tr. at 2516 (Zidell); Tr. at 2524 (Keilers).
[5484] (original footnote) CR and PR at Table TUBULAR-C-6.
[5485] (original footnote) CR and PR at Table TUBULAR-C-6.

Kentucky, Arkansas, Mississippi, and in early 2001, Texas, effectively exiting the flange business. Domestic production fluctuated during the period examined, and was 5.3 percent lower in 2000 than in 1996; domestic production was 11.6 percent lower in interim 2001.[5486]

Foreign producers' reported capacity increased throughout the period examined, and was 19.5 percent higher in 2000 than in 1996. It rose in interim 2001 compared to interim 2000. Foreign producers' production, on the other hand, fluctuated, and was higher in 2000 than in 1996, and higher in interim 2001 than in interim 2000. Foreign producers became more export-oriented during the period examined. Their share of total shipments exported also fluctuated, but was higher in 2000 at 60.5 percent (60.6 percent in interim 2001) than at the beginning of the period examined (58.9 percent in 1996). The share shipped to the US market also fluctuated but was at its highest level at the end of the period examined, 19.0 percent in 2000 and 19.2 percent in interim 2001. Foreign producers' capacity utilization rate also fluctuated during the period examined, and was 58.4 percent in 2000 and 70.4 percent in interim 2001[5487], indicating available capacity for additional production.

b. Analysis of Factors

As indicated above, imports of fittings and flanges have increased in both actual terms and relative to domestic production. Imports increased in actual terms by 30.8 percent (as measured in quantity) during the course of the investigation, and by 15.3 percent between 1999 and 2000. Imports were 32.1 percent higher in interim 2001 than in the same period of 2000. Imports increased in each year of the period examined and were at their highest level of the period in 2000.[5488]

Imports have taken an increasingly larger share of the domestic market each year since 1997, with the largest increase occurring in 2000. The market share captured by imports also increased sharply in interim 2001 as compared to the same period of 2000. The share of the domestic market held by imports was 35.0 percent in 1996 and fell to 32.9 percent in 1997 and then rose to 35.5 percent in 1998, 37.7 percent in 1999, and 41.7 percent in 2000. The share of the market held by imports was 46.7 percent in interim 2001, well above the market share of 39.0 percent in the same period of 2000.[5489] The steady increase in volume of imports, and the increase in import market share, especially since 1997, coincided with the deterioration of the condition of the domestic industry described above.

Information on prices was mixed. The AUVs of domestic shipments fluctuated from 1996 to 1998, then fell somewhat from 1998 to 2000; they were lower in interim 2001 compared to interim 2000. The AUVs of imports fluctuated but increased

[5486] (original footnote) CR and PR at Table TUBULAR-C-6.

[5487] (original footnote) CR and PR at Table TUBULAR-36.

[5488] (original footnote) The ratio of imports to domestic production also increased significantly during the period examined, from 50.5 percent in 1996 to 69.7 percent in 2000, and was at its highest full-year level in 2000. This was significantly above the level of 55.3 percent in 1998 and 63.0 percent in 1999. The ratio in interim 2001 (88.8 percent) was substantially above the level of the same period of 2000 (59.4 percent). CR and PR at Table TUBULAR-15.

[5489] (original footnote) CR and PR at Table TUBULAR-C-6.

overall during the period. Import AUVs were generally above domestic AUVs.[5490] By contrast, pricing information gathered by the Commission on a butt weld fitting product[5491] showed that imports from non-NAFTA sources and Mexico (there were no reported imports from Canada) undersold the domestic product in each quarterly period for which data were provided. The data further showed that the margin of underselling was at its highest level in 2000 and January-June 2001. Non-NAFTA imports have been priced at more than 20 percent below the domestic product since the fourth quarter of 1999.[5492] Domestic prices for the butt-weld product fell slightly during the period, before rising in the final quarter.[5493] Import prices for this product fell significantly over the period, particularly since 1998.

Purchasers of tubular products indicated that price was a key factor in their purchasing decisions, behind only quality.[5494] Moreover, nearly all purchasers indicated that imported and domestic fittings and flanges made to the same grade and specification may be used in the same applications. We find that such broad interchangeability indicates that price plays an important role in the market. In light of these facts, we find the product-specific evidence of underselling to be significant.

In sum, the steady and large increase in imports, which captured an increasing share of the US market, led to erosions in such industry indicators as production, capacity utilization, shipments, and employment indicators. Lower production and shipments meant fewer sales over which to spread fixed costs, contributing to increased unit costs. The increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices; instead, prices fell somewhat over the period. Accordingly, we find that imports are a substantial cause of serious injury.[5495]

Respondents argued that none of the injury data in the Commission prehearing staff report can be correlated to import volumes. They allege that when import volumes increased by the greatest margin, domestic industry operating income increased by the greatest margin.[5496] The evidence in the record does not support respondents' contentions. Imports increased by the greatest margin of the period examined in 2000

[5490] (original footnote) We are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix.

[5491] (original footnote) Carbon steel butt-weld fitting, 6 inch nominal diameter, 90 degree elbow, long radius, standard weight, meeting ASTM A-234, grade WPB or equivalent specification.

[5492] (original footnote) CR and PR at Table TUBULAR-61.

[5493] (original footnote) We observe that the domestic producers' attempt to raise prices in that final quarter, even in a period of rising demand, resulted in a substantial loss of volume.

[5494] (original footnote) CR and PR at Table TUBULAR-53. Domestic producers of fittings and flanges and a distributor of fittings testified that price was an important consideration in customer purchasing decisions. Tr. at 2516 (Zidell); Tr. at 2518 (Graham); Tr. at 2520 (Ketchum); Tr. at 2523 (Bernobich).

[5495] (original footnote) Domestic producers cited increased imports as the cause of injury to the domestic industry. In the questionnaire sent to fittings producers, the Commission asked recipients to identify the factors, from a list of 13, including imports, that are adversely impacting the domestic industry. Recipients were given the option of identifying more than one factor. Of those responding, 16 producers identified imports, and one identified the general economic downturn. No other factors were identified. Persons testifying at the public hearing also cited imports. One company official asserted that declining sales volumes and profits caused by imports have forced his firm to shelve plans for capital investment, severely impairing the firm's competitiveness and efficiency. Tr. at 2517 (Zidell).

[5496] (original footnote) Bebitz et al. posthearing brief at 11-17.

(15.3 percent), and the domestic industry operated at a loss that year, its worst year of the period examined. This occurred notwithstanding a 4.3 percent increase in apparent US consumption of fittings and related products that year.[5497] While it is true that industry profit margins also fell sharply in 1999 when the quantity of imports increased by only a small amount (0.3 percent), the unit value of imports fell that year by 7.1 percent, domestic consumption fell by 5.5 percent, and the share of the market held by imports that year increased to 37.7 percent from 35.5 percent in 1998.[5498]

Respondents also contend that segments of the market are wholly or partially closed to imports due to Approved Manufacturers' Lists.[5499] However, it is questionable how much, if any, impact that such lists have on limiting import competition in fittings and flanges. Domestic fittings and flanges producers who appeared at the Commission's injury hearing testified that approved manufacturer lists have been expanded to include many foreign producers of fittings and flanges, and approved lists of butt-weld pipe fittings suppliers include firms in Italy, Thailand, Japan, the United Kingdom, Austria, France, Germany, Canada, and Mexico.[5500] More generally, approved manufacturer lists do not appear to have been an insurmountable hurdle to imports entering the US market, as they increased by over 30 percent from 1996 to 2000, and by another 32 percent between interim 2000 and 2001."[5501]

Claims and arguments of the parties

10.506 The arguments of the parties are set out in Section VII.H.2(f) *supra*.

Analysis by the Panel

10.507 At the outset, the Panel notes that the USITC undertook a coincidence analysis for FFTJ and concluded that coincidence existed. Accordingly, we will consider whether these findings provide a reasoned and adequate explanation of how the facts support this finding.

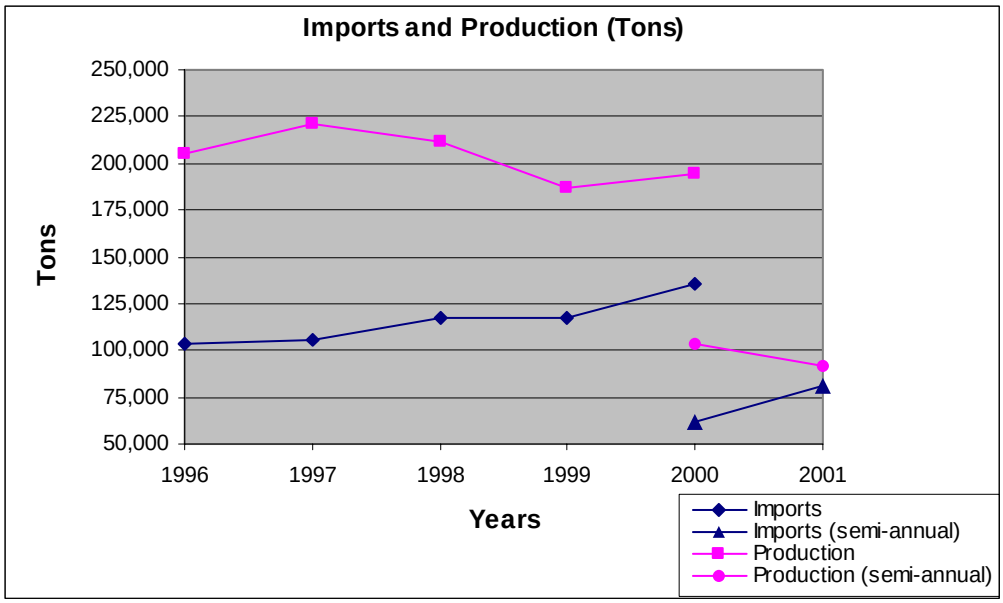
10.508 In particular, we note that USITC found that:

"Imports have taken an increasingly larger share of the domestic market each year since 1997, with the largest increase occurring in 2000. The market share captured by imports also increased sharply in interim 2001 as compared to the same period of 2000. The share of the domestic market held by imports was 35.0 percent in 1996 and fell to 32.9 percent in 1997 and then rose to 35.5 percent in 1998, 37.7 percent in 1999, and 41.7 percent in 2000. The share of the market held by imports was 46.7 percent in interim 2001, well above the market share of 39.0 percent in the same period of 2000.[5502] The steady increase in volume of imports, and the increase in import market share, especially since 1997, coincided with the deterioration of the condition of the domestic industry described above."[5503]

[5497] (original footnote) CR and PR at Table TUBULAR-C-6.
[5498] (original footnote) CR and PR at Table TUBULAR-C-6.
[5499] (original footnote) Bebitz et al. Posthearing Injury Brief at 11-17.
[5500] (original footnote) Tr. at 2516-17 (Zidell); at 2522-23 (Bernovich).
[5501] USITC Report, Vol. I, pp. 174-177.
[5502] (original footnote) CR and PR at Table TUBULAR-C-6.
[5503] See para. 10.505.

10.509 The Panel recalls that, when examined, coincidence needs to be established between the movements or trends in imports and the movements or trends in injury factors. The Panel has considered coincidence between a number of the injury factors mentioned in Article 4.2(a), including those referred to by the USITC, and imports on the basis of facts that were available to the USITC in making its determination.

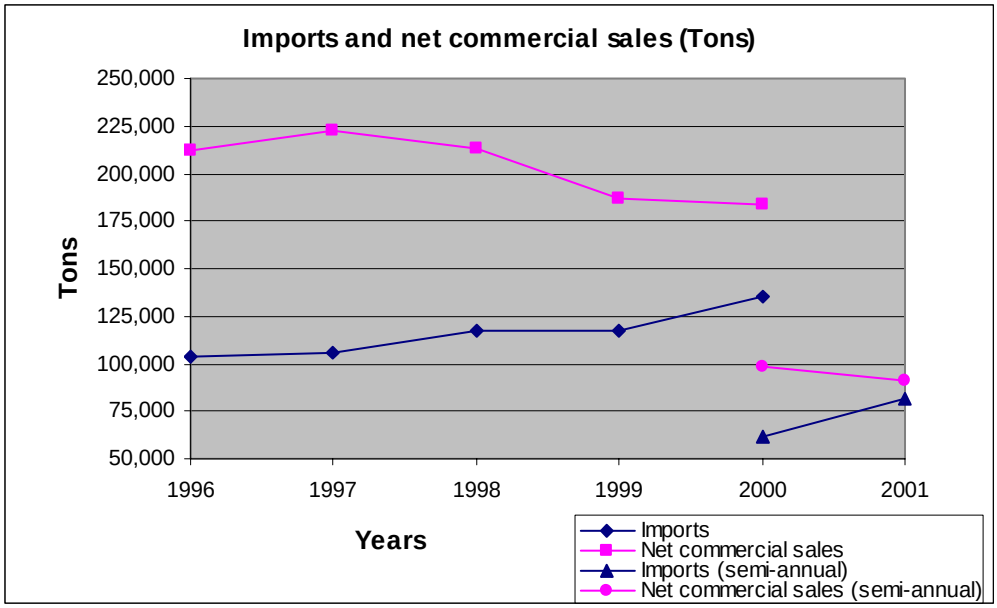
10.510 First, the Panel considers that coincidence does appear to exist between upward trends in imports and downward trends in production for the duration of the period of investigation.[5504]



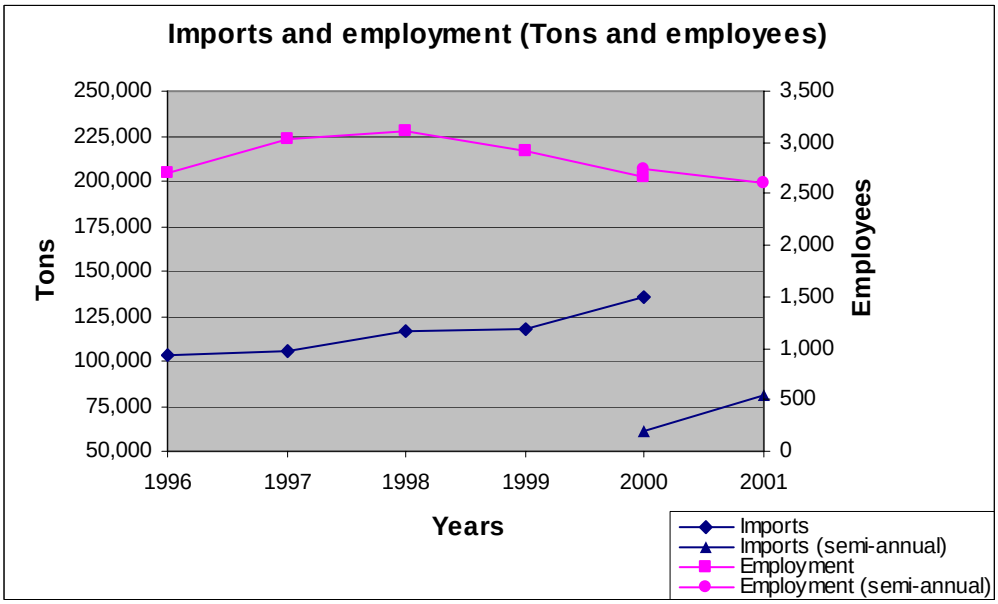
10.511 With respect to the relationship between increased imports and net commercial sales, the Panel again considers that coincidence does appear to exist between upward trends in imports and downward trends in net commercial sales during the period of investigation.[5505]

[5504] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

[5505] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-20 at TUBULAR-24; Table TUBULAR-C-6.



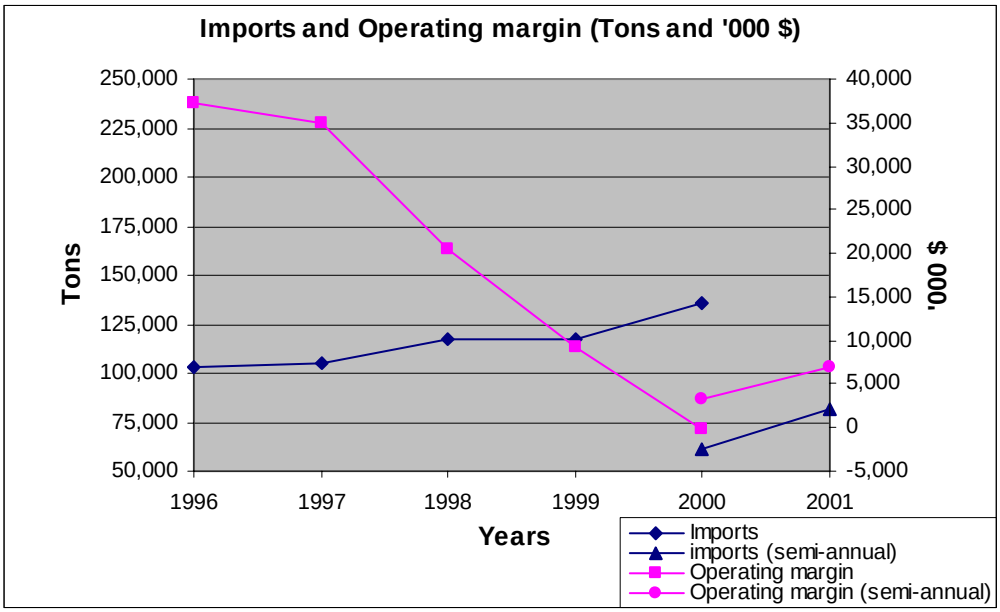
10.512 Similarly, the Panel considers that coincidence does appear to exist between upward trends in imports and overall downward trends in employment during the period of investigation.[5506]



10.513 The Panel also considers that coincidence does appear to exist between upward trends in imports and downward trends in operating margin during the period of investigation. More particularly, the level of operating margin dropped quite precipitously from 1997 onwards as import

[5506] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

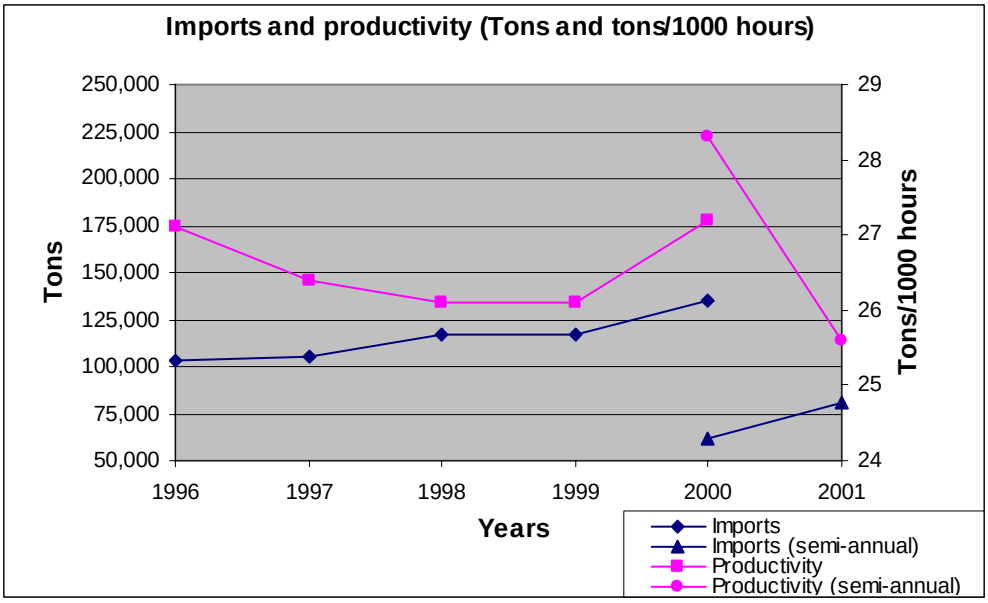
levels started to rise. In this regard, the Panel does not consider that rising operating margin during interim 2001, which was accompanied by rising imports, detracts from our conclusion.[5507]



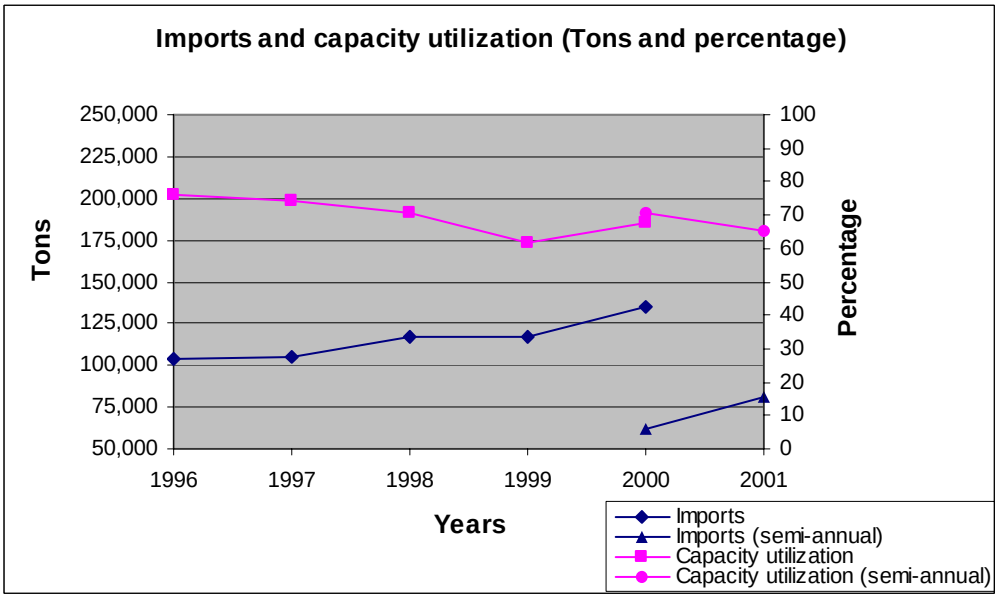
10.514 The Panel does not discern coincidence between productivity trends and imports trends. While it is true that coincidence can be discerned at the very end of the period of investigation when productivity declined quite significantly and imports increased, the Panel considers that the trends during the rest of the period of investigation do not demonstrate any coincidence. In particular, between 1997 and 1999 when imports started to rise, productivity levels remained more or less unchanged. From 1999 until 2000, as import levels increased further, productivity also increased.[5508]

[5507] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-20 at TUBULAR-24; Table TUBULAR-C-6.

[5508] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.



10.515 The Panel considers that coincidence does appear to exist between upward trends in imports and downward trends in capacity utilization during the period of investigation. More particularly, as import levels started to rise from 1997 onwards, capacity utilization also declined.[5509]



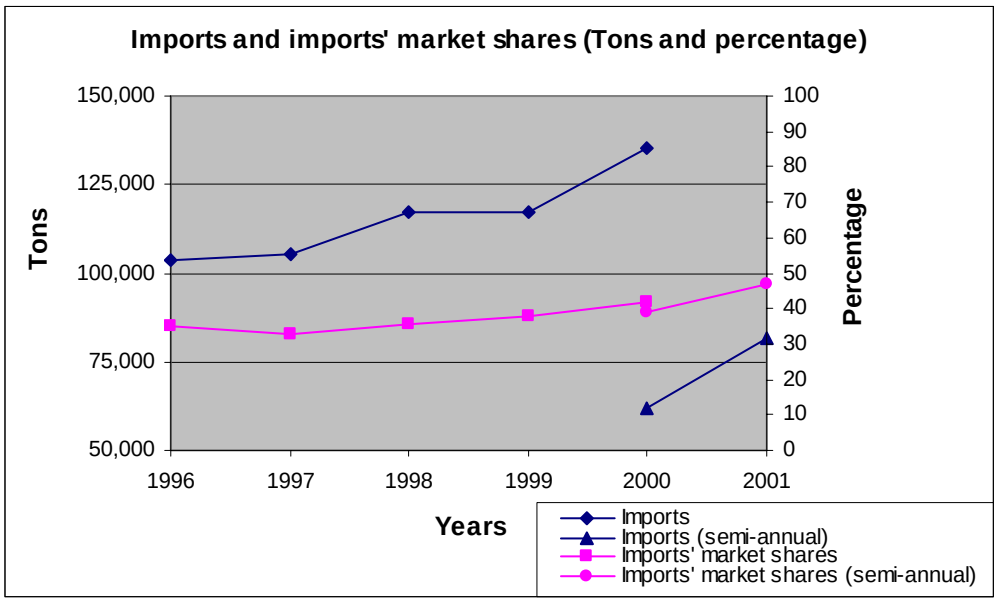
Conclusions

10.516 On the basis of the foregoing, the Panel concludes that, overall, clear coincidence exists between the upward trend in imports and the downward trend in the injury factors, except for productivity. Accordingly, we consider that the USITC was justified in concluding that: "The steady increase in volume of imports, and the increase in import market share, especially since 1997,

[5509] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

coincided with the deterioration of the condition of the domestic industry." We note, however, that the USITC did not provide a reasoned and adequate explanation of how the facts support the finding that that coincidence existed. Indeed, apart from the quoted sentence from the USITC Report (at paragraph 10.508), we cannot find anything further in the USITC Report that demonstrates that movements in imports coincided with movements in injury factors. Given that the USITC failed to provide a reasoned and adequate explanation that demonstrated the existence of coincidence between movements in imports and movements in injury factors, it was for the USITC to provide a compelling explanation as to why a causal link was considered, nevertheless, to exist. We proceed now to the USITC's analysis of the conditions of competition for FFTJ.

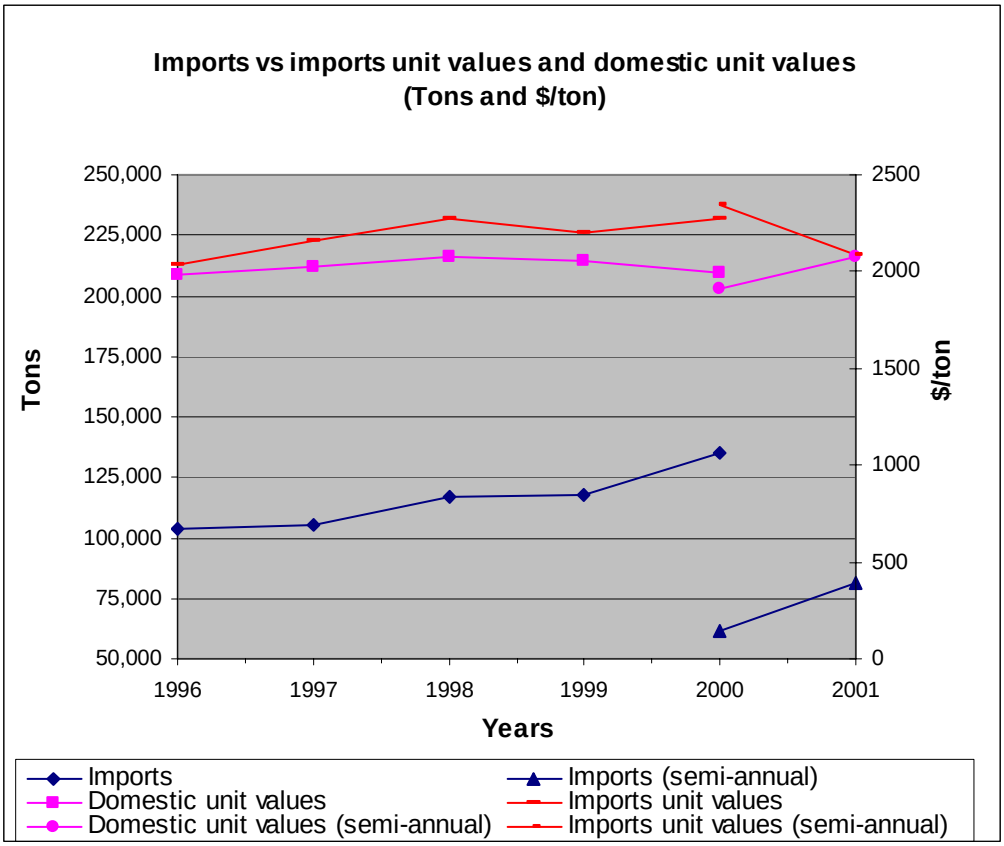
10.517 The Panel considers that the following observations made by the USITC are seminal to its conditions of competition analysis. First, the USITC stated that "[i]mports have taken an increasingly larger share of the domestic market each year since 1997". We agree with this observation on the basis of the graph below, which has been generated using USITC data.[5510]



10.518 Secondly, the USITC observed that "Import AUVs were generally above domestic AUVs. By contrast, pricing information gathered by the Commission on a butt weld fitting product showed that imports from non-NAFTA sources and Mexico (there were no reported imports from Canada) undersold the domestic product in each quarterly period for which data were provided." We also agree with the USITC's observation that import average unit values were generally above domestic average unit values on the basis of the graph below, which, again, has been generated using USITC data.[5511]

[5510] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-45 at TUBULAR-38; Table TUBULAR-C-6.

[5511] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-14 at TUBULAR-17; Table TUBULAR-C-6.

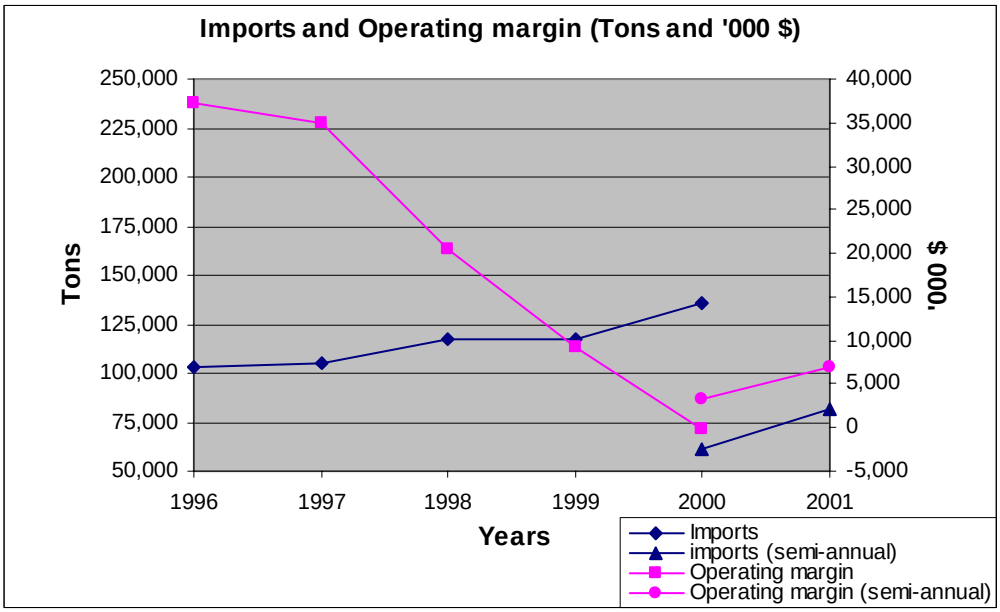


10.519 We note that the USITC questioned the relevance of average unit values in the context of its conditions of competition analysis, stating that: "We are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix." While we consider that the USITC should have provided a more detailed explanation of why it so readily dismissed such data, we do not necessarily consider that the USITC was wrong to rely upon data for the "butt weld fitting product " to the exclusion of the average unit value data. Indeed, at page TUBULAR-54 of Volume II of the USITC Report, it is stated that this product, otherwise referred to as "Product 22", is a "high volume" fitting product. This suggests to us that Product 22 was a reasonably representative basis for the USITC's conditions of competition analysis. We also agree with the USITC's observation that "pricing information gathered by the Commission on a butt weld fitting product showed that imports … undersold the domestic product in each quarterly period for which data were provided." This much is evident from Table TUBULAR-61.[5512]

10.520 Finally, we note that the USITC found "the product-specific evidence of underselling to be significant" and concluded that "[t]he increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices; instead, prices fell somewhat over the period. Accordingly, we find that imports are a substantial cause of serious injury." As noted above, there was evidence of import underselling for Product 22, which we consider to be sufficiently representative to have formed the basis of the USITC's conditions of competition analysis. We find that the existence of underselling together with the increasing level (and market share) of imports, as evidenced above in relation to our review of the

[5512] USITC Report, Vol. II, TUBULAR-61.

USITC's coincidence analysis, coincided with the decline in the situation of the domestic industry and tends to support the USITC finding above.[5513]



10.521 Therefore, on the basis of the foregoing, the Panel concludes that the USITC provided a compelling explanation that indicated, subject to the fulfilment of the non-attribution requirement, that a causal link existed between increased imports and serious injury.

(ii) Non-attribution

USITC findings

10.522 The USITC's findings read as follows:

> "Respondents also alleged that causes other than imports were responsible for any injury experienced by the domestic industry. First, respondents assert that the industry's performance is related to factors such as the business cycle in the oil and gas industry.[5514] A certain portion of domestic production is used for oil- and gas-related purposes and thus would be affected by market dynamics in that sector. However, to the extent that the industry's performance is related to the business cycle in the oil and gas industry, this should mean that the industry's financial performance should have been strong in 2000 and into 2001 because demand for OCTG and other oil and gas related products was very strong during that period. In fact, consumption of fittings and flanges was 4.3 percent higher in 2000 than in 1999, and was 10.4 percent higher in interim 2001 than in interim 2000. However, the financial performance of the fittings industry was at its lowest level in 2000, and the profit

[5513] The data represented in the graph below are contained in the USITC Report, in particular in Table TUBULAR-8 at TUBULAR-10; Table TUBULAR-20 at TUBULAR-24; Table TUBULAR-C-6.

[5514] (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 49.

level in interim 2001, while positive, remained well below the level of earlier years in the period examined on an annualized basis.[5515]

Respondents also claim that the domestic industry's capacity expansion and intra-industry price competition led to injury.[5516] The industry did add capacity over the period examined, but at a rate less than the increase in apparent consumption.[5517] Thus, the increase in capacity would not be expected to place substantial pressure on domestic prices. Nor have respondents identified what has changed over the period examined such that competition among domestic producers alone would turn a solidly profitable industry into one experiencing operating losses.

Respondents allege that the decreasing profitability of the domestic has resulted from industry facilities that are inefficient or outdated, and that domestic producers are unable to obtain sufficient forgings used in domestic production.[5518] These allegations are not supported by record information.

Respondents also claim that the industry suffered from a shortage of qualified workers.[5519] While a few producers noted worker shortages at certain times, the claim of a worker shortage is inconsistent with the fact that the domestic industry reduced its production workers by 6 percent from 1998 to 1999, another 8.7 percent from 1999 to 2000, and by 4.5 percent between interim 2000 and interim 2001. These reductions coincided with reduced industry production, shipments, and market share, as imports increased.

Finally, respondents claim that purchaser consolidation explains any negative price effects experienced by the industry.[5520] In support, respondents cite one domestic producer who indicated that consolidation had negatively impacted price levels, but also had the benefit of reducing shipping costs. In general, purchaser consolidation would be expected to place some pressure on domestic prices. However, any consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined.

In summary, we find that the increase in imports of fittings is an important cause of the serious injury to the domestic fittings industry and not less important than any other cause, and therefore have made an affirmative determination."[5521]

[5515] (original footnote) CR and PR at Table TUBULAR-C-6.

[5516] (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 53, 59.

[5517] (original footnote) CR and PR at Table TUBULAR-C-6.

[5518] (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 51, 53.

[5519] (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 58.

[5520] (original footnote) Joint Respondents Prehearing Injury Brief on Product 22, Carbon Steel Flanges, Fittings, and Tool Joints, at 52.

[5521] USITC Report, Vol. I, pp. 177-178

Factors considered by the USITC

Increased capacity

Claims and arguments of the parties

10.523 The arguments of the parties are set out in Section VII.H.3(b)(vii) *supra*.

Analysis by the Panel

10.524 The Panel considers that the USITC acknowledged that domestic capacity increases played a role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "Thus, the increase in capacity would not be expected to place substantial pressure on domestic prices." In our view, this statement implies that increases in capacity would be expected to place some pressure on domestic prices, even if not "substantial".

10.525 That the USITC considered pricing to be important is evident from the following statement contained in its analysis of the conditions of competition for FFTJ:

> "Purchasers of tubular products indicated that price was a key factor in their purchasing decisions, behind only quality.[5522] Moreover, nearly all purchasers indicated that imported and domestic fittings and flanges made to the same grade and specification may be used in the same applications. We find that such broad interchangeability indicates that price plays an important role in the market."[5523]

10.526 In addition, in the same section of its report, the USITC stated that:

> "The increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices; instead, prices fell somewhat over the period. Accordingly, we find that imports are a substantial cause of serious injury.[5524]"[5525]

10.527 It is clear to the Panel from the foregoing that the USITC considered that downward pressure on prices played an important role in causing the injury that was suffered by the domestic industry. Accordingly, it can be deduced from the foregoing that the USITC conceded that increases in capacity lead, at least in part, to downward pressure on domestic prices, which, in turn, impacted upon the state of the domestic industry. Indeed, the Panel considers that downward pressure *was* exerted by increases in capacity on prices, regardless of how one interprets "substantial" (the adjective used by

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[5522] (original footnote) CR and PR at Table TUBULAR-53. Domestic producers of fittings and flanges and a distributor of fittings testified that price was an important consideration in customer purchasing decisions. Tr. at 2516 (Zidell); Tr. at 2518 (Graham); Tr. at 2520 (Ketchum); Tr. at 2523 (Bernobich).

[5523] See para. 10.505.

[5524] (original footnote) Domestic producers cited increased imports as the cause of injury to the domestic industry. In the questionnaire sent to fittings producers, the Commission asked recipients to identify the factors, from a list of 13, including imports, that are adversely impacting the domestic industry. Recipients were given the option of identifying more than one factor. Of those responding, 16 producers identified imports, and one identified the general economic downturn. No other factors were identified. Persons testifying at the public hearing also cited imports. One company official asserted that declining sales volumes and profits caused by imports have forced his firm to shelve plans for capital investment, severely impairing the firm's competitiveness and efficiency. Tr. at 2517 (Zidell).

[5525] See para. 10.505.

the USITC). The Panel is of the view that all relevant "other factors" – even those with limited injurious effects on the domestic industry – must, together with other relevant factors, be identified, distinguished and assessed with a view to reaching an overall conclusion that increased imports have a genuine and substantial relationship of cause and effect with the injury suffered by the relevant domestic producers.

10.528 The Panel notes that the USITC considered trends in domestic industry capacity during the period of investigation, noting that domestic producer's capacity increased by 7.4% over the period of investigation. In particular, it stated that:

> "Domestic producers' capacity increased by 7.4 percent over the period examined, somewhat less than the growth rate in consumption. Domestic capacity reached its highest level of the period examined in 1999, and declined by 5.2 percent in 2000, and by an additional 4.6 percent in interim 2001 compared to interim 2000.[5526]"

10.529 Despite the fact that the USITC acknowledged the role played by this factor in causing injury to the industry, it appeared to dismiss it in its non-attribution analysis. In our view, in dismissing increased capacity in its non-attribution analysis, the USITC did not, through a reasoned and adequate explanation, separate, distinguish and assess the nature and extent of the injurious effects caused by increased capacity so that the injury caused by this factor, together with other factors, was not attributed to increased imports.

Purchaser consolidation

Claims and arguments of the parties

10.530 The arguments of the parties are set out in Sections VII.H.3(b)(vii) *supra*.

Analysis by the Panel

10.531 The Panel also considers that the USITC acknowledged that purchaser consolidation played a role in the injury that was suffered by the domestic industry. In particular, the USITC stated that: "[i]n general, purchaser consolidation would be expected to place some pressure on domestic prices. However, any consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined." In our view, although this statement indicates that the USITC did not consider that purchaser consolidation would explain declines in all injury factors, it nevertheless implicitly accepted that purchaser consolidation would place "some" pressure on domestic prices. For the reasons explained below, we consider that this effectively amounts to an acknowledgement that purchaser consolidation played a role in causing injury to the industry.

10.532 As mentioned above, it is clear to the Panel that the USITC considered that downward pressure on prices played an important role in causing the injury that was suffered by the domestic industry. Also pointed out above, the USITC stated that purchaser consolidation exerted downward pressure on prices. Therefore, following the USITC's logic, we consider that there is a link between purchaser consolidation and injury suffered by the domestic industry.

10.533 However, despite this link, the USITC dismissed this factor in its non-attribution analysis on the basis of the assertion that "any consolidation would not explain the reduction in domestic

[5526] (original footnote) CR and PR at Table TUBULAR-C-6.

production, shipments, employment, and other non-price indicators that occurred during the period examined." Other than this statement, the USITC did not provide any explanation of why "consolidation would not explain the reduction in domestic production, shipments, employment, and other non-price indicators that occurred during the period examined." Accordingly, in the Panel's view, the USITC's explanation of its analysis of purchaser consolidation was not adequately reasoned. Further, it is our view that in failing to adequately explain this factor, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by purchaser consolidation, together with other factors, was properly separated and distinguished and not attributed to increased imports.

Conclusions

10.534 The Panel considers that, with respect to FFTJ, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic industry on the basis of a reasoned and adequate explanation. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, increased capacity and purchaser consolidation) in its non-attribution analysis even though it effectively acknowledged that those factors were causing injury to the industry.

(iii) Overall conclusion on USITC's determination of a causal link

10.535 Notwithstanding the fact that the USITC did not provide an adequate and reasoned explanation of how the facts supported its finding of coincidence, the Panel was of the view that clear coincidence existed between the upward trend in imports and the downward trend in injury factors. The Panel proceeded to review the USITC's examination of the condition of competition and concluded that the USITC provided a compelling explanation that indicated, subject to fulfilment of the non-attribution requirement, a causal link existed between increased imports of FFTJs and serious injury to the relevant domestic producers. Further, we found that the USITC's non-attribution analysis failed to separate, distinguish and assess the nature and extent injurious effects of purchaser consolidation and increased capacity so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.536 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of FFTJ and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

(h) Stainless steel bar

10.537 The Panel notes at the outset that it has focused in this section on the arguments made by the complainants that, for us, raised the most problematic aspects of the USITC's determinations on causation, that is, those aspects that more obviously entailed violations of the Agreement on Safeguards. Since we will dispose of the complainants' claims in our review below, the Panel sees no need to deal with the other arguments.

(i) Coincidence and conditions of competition

USITC findings

10.538 The USITC's findings read as follows:

"We find that the increased imports of stainless bar are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of stainless bar are a substantial cause of serious injury to the domestic stainless bar industry.

a. Conditions of Competition

We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless bar in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, and market conditions. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.

First, demand for stainless bar fluctuated somewhat but grew overall during the five full-years of the period of investigation. Apparent US consumption of stainless bar increased from 276.6 thousand short tons in 1996 to 294.4 thousand short tons in 1997 but then declined to 280.3 thousand short tons in 1998 and to 265.5 thousand short tons in 1999. In 2000, however, apparent consumption of bar increased by 22.2 percent, growing to 324.2 thousand short tons.[5527] This level of consumption was 17.2 percent larger than in 1996.[5528] As the overall economy declined in 2001, apparent consumption of bar declined by 13 percent between interim 2000 and interim 2001.[5529]

Second, stainless steel bar is used in the aerospace, automotive, chemical processing, dairy, food processing, pharmaceutical equipment, marine application, and other fluid handling industries.[5530] The large majority of market participants indicate that there are no known substitutes for stainless bar.[5531]

Third, although fourteen domestic firms reported producing stainless steel bar in 2000[5532], four firms accounted for the large majority of domestic production of stainless bar in 2000: Carpenter/Talley, Crucible Specialty Metals, AvestaPolarit, and Slater Steels Corp.[5533] The domestic bar industry became more concentrated during the period of investigation. In 1997, Carpenter Technology, the *** domestic

[5527] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5528] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5529] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5530] (original footnote) CR at STAINLESS-2, PR at STAINLESS-1.
[5531] (original footnote) EC-Y-046 at Table STAINLESS-6.
[5532] (original footnote) CR and PR at Table STAINLESS-1.
[5533] (original footnote) In 2000, these four firms accounted for *** percent of reported domestic production of stainless bar. CR and PR at Table STAINLESS-1.

producer of stainless bar in 2000[5534], purchased Talley, the *** largest producer in 2000.[5535] In addition, Empire Specialty Steel, the *** largest bar producer in 2000, shut down its stainless operations in June 2001.[5536]

The industry's aggregate capacity level increased during the period of investigation, growing by 5.5 percent from 1996 to 2000.[5537] Capacity was 2.2 percent higher in interim 2001 than in interim 2000.[5538] Capacity utilization declined from 63.0 percent in 1996 to 52.1 percent in 1999 but increased to 55.8 percent in 2000.[5539] Industry capacity utilization then declined from 59.5 percent to 49.6 percent between interim 2000 and 2001.[5540]

Fourth, price is an important factor in purchasing decisions for stainless bar. Although quality was generally ranked by the majority of responding purchasers as the most important factor in the purchasing decision for stainless bar, the large majority of purchasers reported price as being one of the three most important factors in the purchase decision.[5541]

Fifth, like many stainless steel products, the price of stainless bar is directly affected by the price of nickel.[5542] To account for fluctuations in the cost of nickel, stainless steel producers impose a surcharge on the price of their stainless bar products whenever the price of nickel reaches a certain level.[5543] Generally, after declining during the first three years of the period of investigation, nickel prices increased significantly throughout 1999 and the first half of 2000. Nickel prices fell thereafter, declining through interim 2001.[5544] The price of domestic stainless bar followed this trend somewhat during the period of investigation, with average unit values of domestic bar shipments and sales declining through the end 1999, recovering in 2000, and then declining in interim 2001.[5545]

Sixth, during the period of investigation, there were imports of stainless bar from over 40 countries, although not every country exported stainless bar to the United States in every year.[5546] The quantity of imports of stainless bar from sources other than Mexico increased by 54 percent from 1996 to 2000 but fell by 17 percent

[5534] (original footnote) Carpenter accounted for *** percent of reported domestic production of stainless bar in 2000. CR and PR at Table STAINLESS-1.
[5535] (original footnote) Talley accounted for *** percent of reported domestic production of stainless bar in 2000. CR and PR at Table STAINLESS-1.
[5536] (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment.
[5537] (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.
[5538] (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.
[5539] (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.
[5540] (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.
[5541] (original footnote) INV-Y-212 at 95.
[5542] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.
[5543] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.
[5544] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.
[5545] (original footnote) CR and PR at Tables STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.
[5546] (original footnote) INV-Y-180 at Table G25 – Stainless Bar and Light Shapes.

between interim 2000 and interim 2001.[5547] The record indicates that domestic and imported stainless bar are comparable in most respects.[5548]

The aggregate capacity of foreign producers of stainless bar in countries other than Mexico increased by 10.5 percent during the period examined. The capacity utilization of these producers increased from 74.2 percent in 1996 to 82.3 percent in 1998, declined to 77.2 percent in 1999, and then increased to 87.1 percent in 2000. Aggregate foreign capacity utilization increased from 89.2 percent to 90 percent in interim 2001.[5549]

Seventh, antidumping duty orders were imposed on imports of stainless bar from Brazil, India, Japan, and Spain in 1995.[5550] Antidumping duty orders were imposed against imports of stainless steel angle from Japan, Korea, and Spain in May 2001.[5551]

b. Analysis

We find first that the import increases between 1996 and 2000 had a serious adverse impact on the production levels, shipments, commercial sales and market share of the domestic industry. As we described above, the quantity and market share of imports both increased considerably during the period of investigation, with the quantity of imports increasing by 53.8 percent during the period from 1996 to 2000 and import market share increasing by 11 percentage points during that period as well.[5552] Despite the fact that these import increases occurred during a period of growing demand, the industry's production volumes, shipment levels and sales revenues all declined significantly as a result of increases in import volume during the period.[5553]

In particular, the industry's production levels fell by 10 thousand short tons (or 5.5 percent) during the period between 1996 and 2000[5554], its net commercial sales fell by *** short tons (or *** percent) during that period[5555], and the value of its net commercial sales declined by *** percent during the period.[5556] As a result of these production and sales declines, the industry's capacity utilization rates fell considerably as well, dropping from 63.0 percent in 1996 to 55.8 percent in 2000.[5557]

[5547] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.
[5548] (original footnote) EC-Y-046 at Table STAINLESS-24; *see generally* EC-Y-046 at 14-28.
[5549] (original footnote) CR and PR at Table STAINLESS-45.
[5550] (original footnote) CR and PR at Table OVERVIEW-1.
[5551] (original footnote) CR and PR at Table OVERVIEW-1.
[5552] (original footnote) CR and PR at Tables STAINLESS-67 & STAINLESS-C-4.
[5553] (original footnote) CR and PR at Tables STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.
[5554] (original footnote) CR and PR at Tables STAINLESS-18 & STAINLESS-C-4.
[5555] (original footnote) CR and PR at Tables STAINLESS-30 & STAINLESS-C-4.
[5556] (original footnote) CR and PR at Tables STAINLESS-30 & STAINLESS-C-4.
[5557] (original footnote) In this regard, purchasers in the market reported that there was a moderately high level of substitutability between the imported and domestic merchandise, suggesting that the volume increase on the part of imports came directly out of domestic market share.

Moreover, the industry's share of the market also fell considerably, dropping from 64.6 percent in 1996 to 59.8 percent in 1999 and then to 53.5 percent in 2000.[5558]

In fact, the declines in the industry's production, shipment and market share levels occurred despite the fact that the industry added significant amounts of capacity during a period of reasonably strong growth in demand for stainless bar. Even with this increased capacity, the industry was unable to take advantage of the growth in demand for stainless bar as imports obtained an increasingly larger share of the domestic market for bar over the period of investigation. In particular, while apparent consumption of stainless bar grew by 48 thousand short tons between 1996 and 2000, the quantity of imports grew at a more accelerated rate, increasing by nearly 53 thousand short tons during this same period. This growth in imports effectively foreclosed the domestic industry from participating in the growth in demand during the period of investigation. In sum, the import increases that occurred during the period clearly had a serious adverse impact on the production volumes, sales levels, sales revenues, and market share of the industry during the period.

The record also indicates that imports affected domestic prices of stainless bar negatively during the period of investigation. The record in this investigation shows that most purchasers consider domestic and imported stainless bar to be comparable in most respects[5559], indicating that there is a high degree of substitutability between the products. Moreover, the record of this investigation also indicates that price is an important part of the purchasing decision.[5560] Finally, we note that imports undersold the domestic merchandise throughout the period of investigation in 47 of 53 possible quarterly comparisons at underselling margins of up to 51 percent.[5561]

We find that this underselling depressed and suppressed domestic prices during the period of investigation. Although the price of stainless bar is expected by market participants to track the price of nickel, the net sales revenues of the domestic stainless bar industry failed to keep pace with movements in the cost of nickel during the second half of the period of investigation, particularly during the latter half of 1999 and 2000, when the price of nickel increased substantially.[5562] While the average unit value of the industry's net commercial sales increased in 2000 and interim 2001, the industry's cost of goods sold rose from *** percent of its net sales revenues in 1998 to *** percent of its net commercial values in 1999, *** percent of net commercial sales in 2000, and *** percent in interim 2001. As a result of these

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[5558] (original footnote) CR and PR at Tables STAINLESS-67 & STAINLESS-C-4. Indeed, the most significant adverse impact of imports in quantity terms occurred during the last full-year of the period of investigation, when apparent consumption of stainless bar grew by 22.1 percent and import quantities grew by 41.3 percent. In that year, the industry lost 6.3 percentage points of market share and experienced the most significant declines in its capacity utilization rates of the entire period of investigation. CR and PR at Tables STAINLESS-18, STAINLESS-30, STAINLESS-67, & STAINLESS-C-4.

[5559] (original footnote) INV-Y-212 at 95.

[5560] (original footnote) INV-Y-212 at 95.

[5561] (original footnote) CR and PR at Tables STAINLESS-87, STAINLESS-99, & Figure STAINLESS-9. These consistent underselling figures are supported by an examination of the average unit value for domestic and imported merchandise, which also show imports being priced at consistently lower levels than domestic merchandise during the period. CR and PR at Table STAINLESS-C-4.

[5562] (original footnote) CR and PR at 95-96, PR at STAINLESS-70-71 & Tables STAINLESS-6, STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.

> decreasing margins between the industry's cost of goods sold and its net sales values, the industry's operating income levels declined from a profit of *** percent in 1998 to a loss of *** percent in 1999, recovered only slightly to a minimal profit of *** percent in 2000, and then fell to a loss of *** percent in interim 2001.[5563] Moreover, the overall declines in the industry's operating levels in the last two-and-a-half years of the period occurred when imports were at their highest market share levels during the period[5564] and when imports were consistently underselling the domestic merchandise.[5565] Therefore, we find that consistent and significant price underselling by imports during the latter half of the period of investigation suppressed and depressed domestic prices to a serious degree, despite the fact that nickel prices and the industry's average unit values also increased significantly during this period.
>
> In sum, we find that increased quantities of imports of stainless bar during the period were a substantial cause of the declines in the industry's trade and financial condition during the period. …"[5566]

Claims and arguments of the parties

10.539 The arguments of the parties are set out in Section VII.H.2(g) *supra*.

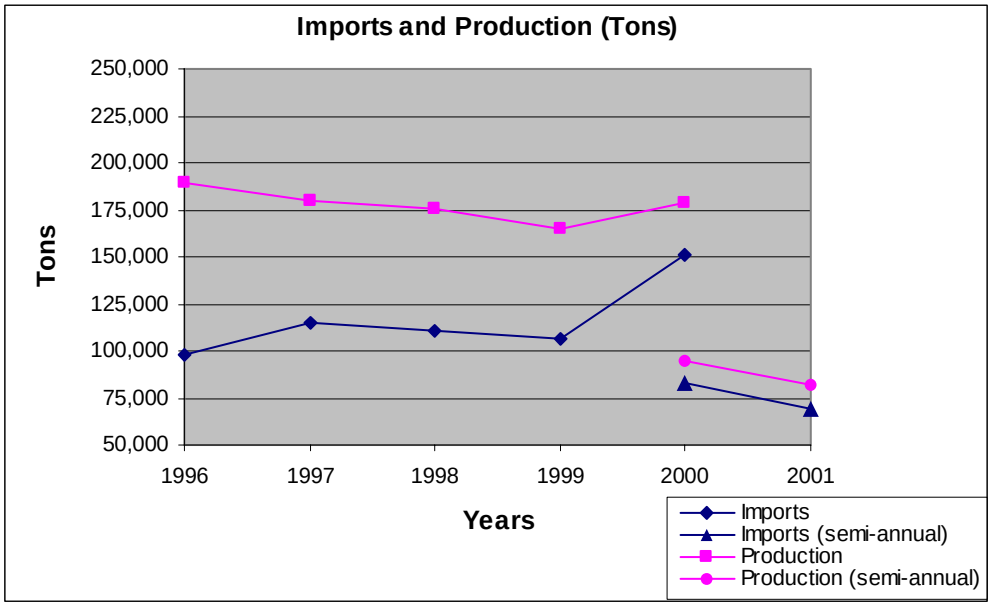
Analysis by the Panel

10.540 At the outset, the Panel notes that the USITC undertook a coincidence analysis for stainless steel bar and concluded that coincidence existed. Accordingly, we will consider whether these findings provide a reasoned and adequate explanation of how the facts support this finding.

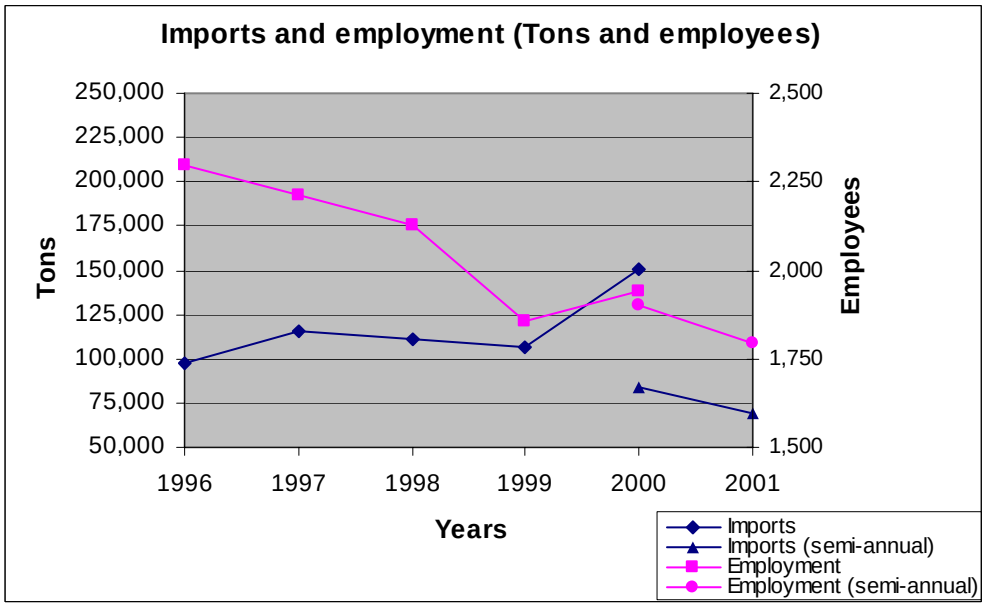
10.541 The Panel again recalls that coincidence, when examined, needs to be established between the movements or trends in imports and the movements or trends in injury factors. Applying our standard of review, the Panel has considered coincidence between a number of the injury factors mentioned in Article 4.2(a), including those referred to by the USITC, and imports on the basis of facts that were available to the USITC in making its determination.

10.542 First, with regard to import trends and production trends, the Panel notes that there does not appear to be any coincidence. In particular, production declined between 1997 and 1999, when import levels declined during the same period. Similarly, as imports increased from 1999 to 2000, so too did production. Finally, as imports decreased at the very end of the period of investigation, so too did production.[5567]

[5563] (original footnote) CR and PR at Table STAINLESS-30 & STAINLESS-C-4.
[5564] (original footnote) CR and PR at Table STAINLESS-67 & STAINLESS-C-4.
[5565] (original footnote) CR and PR at Tables STAINLESS-86-87 & STAINLESS-Figures 9-10.
[5566] USITC Report, Vol. I, pp. 208-212.
[5567] The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.



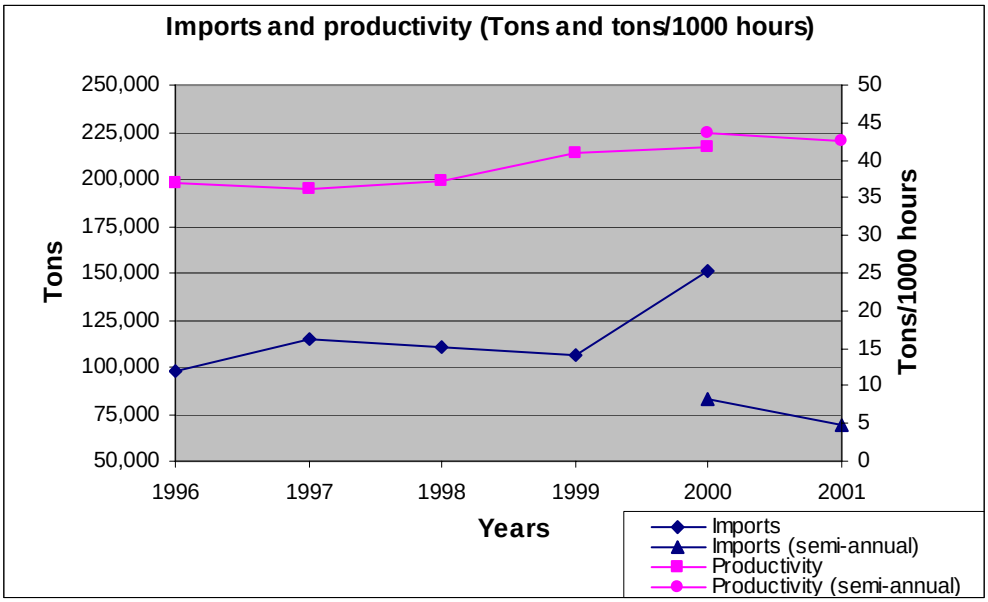
10.543 There appears to be a similar disconnect between import trends and trends in employment as that detected in relation to production. In particular, employment declined between 1997 and 1999. During the same period, import levels declined. Similarly, as imports increased from 1999 to 2000, so too did employment. Finally, as imports decreased at the very end of the period of investigation, so too did employment.[5568]



10.544 We also discern no coincidence between import trends and productivity trends. In particular, productivity progressively climbed from 1997 onwards. Apparently, this occurred independently of trends in imports, which declined between 1997 and 1999 and then increased between 1999 and 2000.

[5568] The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.

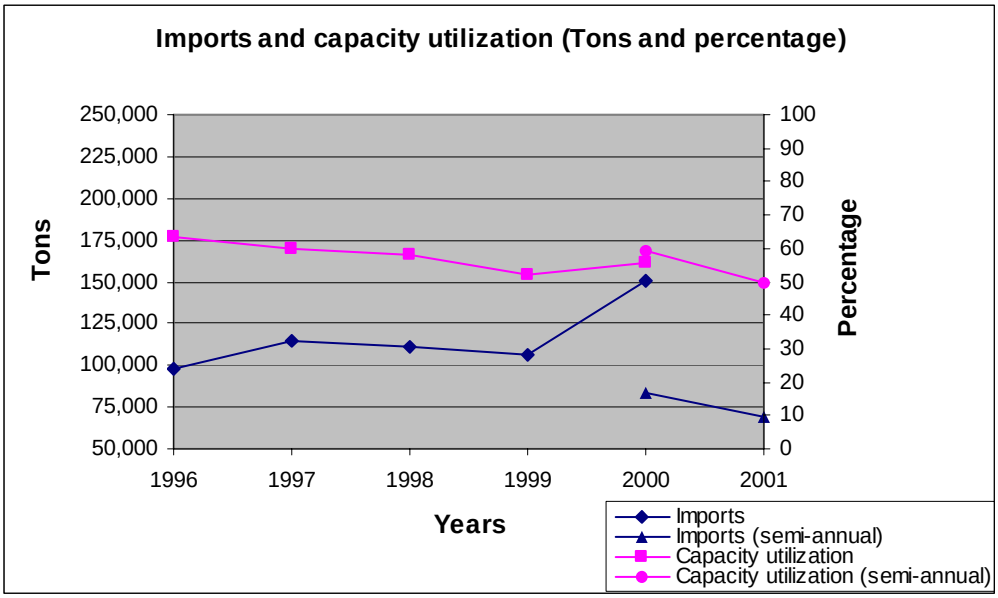
Finally, as imports decreased at the very end of the period of investigation, so too did productivity, albeit slightly.[5569]



10.545 Similarly, there does not appear to be any coincidence between increases in imports and capacity utilization. In particular, capacity utilization declined between 1997 and 1999 despite the fact that imports also declined during that period. Capacity utilization increased (albeit slightly) between 1999 and 2000, during which time imports also increased. Finally, as imports decreased at the very end of the period of investigation, so too did capacity utilization.[5570]

[5569] The data represented in the two graphs below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS-18 at STAINLESS-24; Table STAINLESS-C-4.

[5570] The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-15; Table STAINLES-18 at STAINLESS-24; Table STAINLESS-C-4.



10.546 While our evaluation is that coincidence does not exist between, on the one hand, import trends and, on the other hand, trends in production, employment, productivity and capacity utilization, this does not necessarily mean that, overall, coincidence did not exist. In this regard, we note that we were unable to consider whether the facts indicated that coincidence existed between the import trends and trends in operating margin and net commercial sales, given that data relating to the latter two factors had been redacted from the USITC Report on the ground of confidentiality. Such facts may affect the overall conclusion as to the existence or otherwise of coincidence in trends in imports and injury factors. Accordingly, the Panel is unable to come to a definitive conclusion as to whether, overall, coincidence existed.

10.547 As stated previously, in cases where, as part of an overall demonstration of causal link, a coincidence analysis has been undertaken but does not demonstrate a causal link, the Panel will continue its review turning to the conditions of competition analysis to assess whether the USITC, nevertheless, managed to provide a compelling analysis that a genuine and substantial relationship between cause and effect existed. We note that the USITC analysed the conditions of competition in addition to undertaking a coincidence analysis.

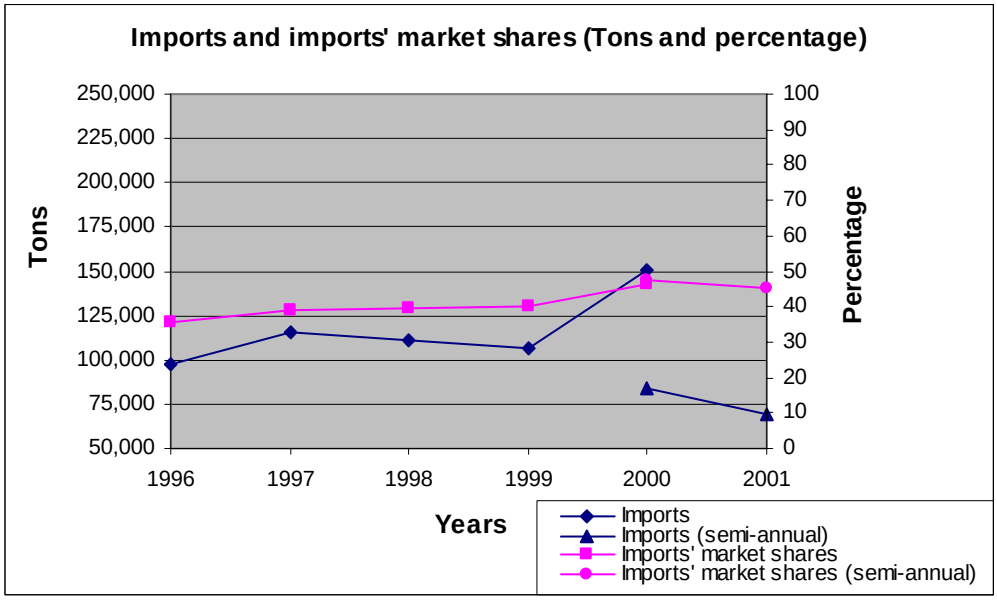
10.548 The Panel notes that the USITC considered that "imports affected domestic prices of stainless bar negatively during the period of investigation." The USITC additionally stated that "imports undersold the domestic merchandise throughout the period of investigation in 47 of 53 possible quarterly comparisons at underselling margins of up to 51 percent." Finally, it found that "this underselling depressed and suppressed domestic prices during the period of investigation … . Therefore, we find that consistent and significant price underselling by imports during the latter half of the period of investigation suppressed and depressed domestic prices to a serious degree, despite the fact that nickel prices and the industry's average unit values also increased significantly during this period."

10.549 We note as a preliminary point that the relevant domestic prices have been redacted from the USITC record, on the ground of confidentiality The Panel agrees that, in some circumstances, Members have the obligation, pursuant to Article 3.2 of the Agreement on Safeguards, to confidentialize certain information although the competent authorities can base their determination on

such confidentialized information.[5571] Such an obligation should not reduce Members' rights to take safeguard actions. In cases where information has been confidentialized, the Panel will examine whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data.[5572]

10.550 We note in this regard in relation to stainless steel bar that Table STAINLESS-99 summarizes the number of instances of underselling and provides a range of the margins of underselling that occurred for all of those instances. In particular, that Table indicates that there were 40 instances of underselling by non-NAFTA imports and that the range of underselling was between 0.1%-51.8%. We note also that this factual allegation – that there were 40 instances of underselling by non-NAFTA imports – is not contested by the complainants and it is contrary to our standard of review to reassess the quality of this evidence in the absence of any prima facie challenge. In our view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information in Table STAINLESS-99 that sought to substitute the redacted data. In light of the foregoing, the Panel concludes that the facts that are available to us tend to support the USITC's conclusion that there was import underselling during the period of investigation.

10.551 We note that trends in import market share are illustrated in the graph below, which has been generated using USITC data.[5573]



10.552 The Panel notes that the facts indicate that import market share increased quite significantly during the period of investigation, which would be consistent with a finding of import underselling. In particular, the USITC found that "consistent and significant price underselling by imports during the latter half of the period of investigation suppressed and depressed domestic prices to a serious degree". In our view, given the facts referred to above, the USITC provided a compelling explanation indicating that, subject to the fulfilment of the non-attribution requirement, a causal link existed between increased imports and serious injury.

[5571] Appellate Body Report, *Thailand – H-Beams*, paras. 111, 112 and 119.
[5572] See our discussions in paras. 10.272-10.275.
[5573] The data represented in the graph below are contained in the USITC Report, in particular in Table STAINLESS-6 at STAINLESS-11; Table STAINLESS 67 at STAINLESS-55; Table STAINLESS-C-4.

10.553 In conclusion, the Panel considers that the USITC's conditions of competitions analysis provided a compelling explanation that a causal link existed between increased imports and serious injury caused to the relevant domestic industry.

(ii) Non-attribution

USITC findings

10.554 The USITC's findings read as follows:

> "In fact, the declines in the industry's production, shipment and market share levels occurred despite the fact that the industry added significant amounts of capacity during a period of reasonably strong growth in demand for stainless bar. Even with this increased capacity, the industry was unable to take advantage of the growth in demand for stainless bar as imports obtained an increasingly larger share of the domestic market for bar over the period of investigation. In particular, while apparent consumption of stainless bar grew by 48 thousand short tons between 1996 and 2000, the quantity of imports grew at a more accelerated rate, increasing by nearly 53 thousand short tons during this same period. This growth in imports effectively foreclosed the domestic industry from participating in the growth in demand during the period of investigation. In sum, the import increases that occurred during the period clearly had a serious adverse impact on the production volumes, sales levels, sales revenues, and market share of the industry during the period.
>
> …
>
> In sum, we find that increased quantities of imports of stainless bar during the period were a substantial cause of the declines in the industry's trade and financial condition during the period. In making this finding, we considered the argument of the respondents that the adverse changes in the industry's condition during the latter half of the period were caused primarily by a downturn in the demand for stainless steel bar in late 2000 and in interim 2001, as well as an increase in energy costs during the same period.[5574] Although we agree with Eurofer that there was a downturn in demand for stainless bar and an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes. Given this, we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increases, especially given that import volumes and market share both increased significantly in 2000. In fact, we find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period.
>
> In addition, we have considered respondents' argument that the industry's condition during the period was affected significantly by the poor operations of the domestic

[5574] (original footnote) Eurofer Prehearing Brief on Injury at 3.

producers AL Tech/Empire and Republic, whose stainless bar operations suffered during the period of investigation -- they assert -- for reasons having little to do with imports.[5575] We note, however, that ***.[5576] We further note that, even if these two producers were excluded from our analysis, the record indicates that the remaining domestic producers of stainless bar also experienced substantial declines in their operating income levels, net commercial sales values, unit sales values, and employment levels during the period.[5577]

Finally, we note that antidumping duty orders were put in place against imports of stainless bar from Brazil, India, Japan, and Spain in 1995.[5578] While these orders are intended to offset dumping margins on sales of these imports, we note that the record of this investigation indicates that the orders did not limit the ability of producers in these countries to continue shipping substantial, and even increasing, volumes of stainless bar to the United States during the period of investigation.[5579]

In light of the foregoing, we conclude that increased imports of stainless steel bar are an important cause, and a cause not less important than any other cause, of serious injury to the domestic industry producing stainless steel bar. Accordingly, we find that the increased imports are a substantial cause of serious injury to the domestic industry."[5580]

Factors considered by the USITC

Downturn in demand

Claims and arguments of the parties

10.555 The arguments of the parties are set out in Section VII.H.3(b)(viii) *supra*.

Analysis by the Panel

10.556 The Panel considers that the USITC acknowledged that declines in demand played a role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "Although we agree with Eurofer that there was a downturn in demand for stainless bar … in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001." In our view, had the decline in demand not been a cause of injury at all, the USITC would have stated as much. Instead, it stated that: "we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than demand declines."

[5575] (original footnote) Eurofer Prehearing Brief on Injury at 10-17.
[5576] (original footnote) ***.
[5577] (original footnote) Finally, we also note that, although the statute directs us to assess whether a significant number of producers have been able to operate at reasonable levels of profits, it ultimately requires us to assess whether increased imports have been a substantial cause of serious injury to the industry "as a whole". 19 U.S.C. §2252(c)(6).
[5578] (original footnote) CR and PR at Table OVERVIEW-1. We also note that antidumping order were put in place against imports of stainless steel angle from Japan, Korea, and Spain in May 2001. We note that it is too early to assess whether these orders will significantly reduce the level of imports from these countries.
[5579] (original footnote) INV-Y-180 at G25 – Stainless Bar and Light Shapes.
[5580] USITC Report, Vol. I, pp. 211-213.

10.557 The Panel notes that the USITC considered demand trends during the period of investigation. It noted that while demand increased between 1996 and 1997, it declined again in 1998 and 1999. Demand picked up again in 2000 but declined again during interim 2001. More particularly, in the section containing its analysis of the conditions of competition, the USITC found that:

> "First, demand for stainless bar fluctuated somewhat but grew overall during the five full-years of the period of investigation. Apparent US consumption of stainless bar increased from 276.6 thousand short tons in 1996 to 294.4 thousand short tons in 1997 but then declined to 280.3 thousand short tons in 1998 and to 265.5 thousand short tons in 1999. In 2000, however, apparent consumption of bar increased by 22.2 percent, growing to 324.2 thousand short tons.[5581] This level of consumption was 17.2 percent larger than in 1996.[5582] As the overall economy declined in 2001, apparent consumption of bar declined by 13 percent between interim 2000 and interim 2001.[5583],[5584]

10.558 Although the USITC acknowledged that declines in demand played a role in the injury that was suffered by the domestic industry, it appeared to dismiss this factor in its non-attribution analysis stating that "We find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period." In our view, this is not a reasoned and adequate explanation. While the Panel is reluctant to prescribe what may amount to a reasoned and adequate explanation, the Panel considers that the USITC could have, for example, demonstrated that there was no linkage between demand declines during the period of investigation and injury suffered in this particular case. More particularly, the USITC could have explained that operating margin, perhaps the most relevant injury factor in this regard, declined irrespective of demand trends. This analysis could have been bolstered by an explanation that declines in operating margin coincided with increases in imports rather than declines in demand.

10.559 We note that the USITC stated that "[a]lthough we agree with Eurofer that there was a downturn in demand for stainless bar … in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years *prior* to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes." In our view, the fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that that factor may still play a role in causing injury beyond that point.

10.560 By dismissing downturn in demand in its non-attribution analysis, the Panel finds that the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was properly separated and distinguished and not attributed to increased imports.

[5581] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5582] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5583] (original footnote) CR and PR at Tables STAINLESS-67 and STAINLESS-C-4.
[5584] See para. 10.538.

Increases in energy costs

Claims and arguments of the parties

10.561 The arguments of the parties are set out in Section VII.H.3(b)(viii) *supra*.

Analysis by the Panel

10.562 The Panel considers that the USITC acknowledged that increases in energy costs played a role in causing the injury that was suffered by the domestic industry. In particular, the USITC stated that: "Although we agree with Eurofer that there was … an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and 2001". In our view, had energy costs not been a cause of injury at all, the USITC would have stated as much. Instead, it stated that "we find that imports were a more important cause of the declines in the industry's condition in 2000 and interim 2001 than energy cost increases".

10.563 We note that the USITC discussed changes in energy costs during the period of investigation. In particular, it stated that there was "an increase in energy costs in late 2000 and interim 2001". However, having acknowledged that this factor played a role in causing the injury that was suffered by the domestic industry, the USITC appeared to dismiss this factor in its non-attribution analysis on the basis of the assertion that "We find that the industry's inability to maintain its operating profits in the face of these demand and energy cost changes is a direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period." As we stated in relation to declines in demand, the Panel considers that the USITC could have demonstrated that there was no linkage between increases in energy costs during the period of investigation and injury suffered in this particular case. More particularly, the USITC could have explained that operating margin declined irrespective of energy cost trends. This analysis could have been bolstered by an explanation that declines in operating margin coincided with increases in imports rather than increases in energy costs.

10.564 We note that the USITC stated that "[a]lthough we agree with Eurofer that there was … an increase in energy costs in late 2000 and interim 2001, the record indicates that there were substantial declines in the industry's production, sales, and profitability levels during the years *prior* to 2000 and 2001. In particular, we note that the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increasing import volumes." In our view, the fact that injury occurred prior to the point at which a factor comes into play does not detract from the conclusion that that factor may still play a role in causing injury beyond that point.

10.565 In our view, by dismissing increases in energy costs in its non-attribution analysis, the USITC failed to meet its obligation to establish explicitly, through a reasoned and adequate explanation, that the injury caused by this factor, together with other factors, was properly distinguished and not attributed to increased imports.

Conclusions

10.566 The Panel considers that, with respect to stainless steel bar, the USITC failed to comply with its non-attribution obligation contained in the second sentence of Article 4.2(b). In particular, we consider that the USITC failed to properly separate, distinguish and assess the nature and extent of the injurious effects of factors other than increased imports that were causing injury to the domestic

industry. This, to us, is clear from the fact that the USITC dismissed a number of factors (namely, downturn in demand and increases in energy costs) in its non-attribution analysis even though it acknowledged that those factors were causing injury to the industry.

10.567 The Panel also recalls that the USITC disregarded the effect of downturn in demand and increases in energy costs because "imports were a more important cause of the declines." The Panel considers that such an approach is problematic because the cumulative effect of individual other factors was not analyzed or assessed despite the fact that the USITC had acknowledged that, individually, each of the factors caused some injury to the relevant domestic industry. Therefore, by discarding factors that individually caused injury to the industry, the USITC failed to distinguish and assess the nature and extent of the injurious effects of these other factors taken together, as distinct from the effects caused by increased imports.

(iii) Overall conclusion on USITC's determination of a causal link

10.568 In conclusion it is the Panel's view, that while the Panel was unable to come to a definitive conclusion as to whether, overall, coincidence existed, we, nevertheless, found that the USITC's conditions of competition analysis provided a compelleing explanation indicating that a causal link existed between increased imports and serious injury subject to fulfilment of the non-attribution requirement. In this regard, the Panel found that the USITC's non-attribution analysis for stainless steel bar failed to separate, distinguish and assess the nature and extent of the injurious effects of declines in demand and increases in energy costs so that the injury caused by these factors, together with other factors, was not attributed to increased imports. Thus, the USITC did not provide a reasoned and adequate explanation supporting a determination that there was a genuine and substantial relationship of cause and effect between increased imports and serious injury to the relevant domestic producers.

10.569 Therefore, the Panel concludes that the USITC's finding that a causal link existed between imports of stainless steel bar and injury caused to the relevant domestic producers is inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards.

(i) Stainless steel wire

10.570 As we did in relation to our findings on causation for tin mill products (see paragraphs 10.420-10.422 above), the Panel needs to address the issue of divergent findings made by individual commissioners for stainless steel wire. The Panel notes that, in its defence, the United States relies not only on the causation findings made by Commissioner Koplan, but also on those made by Commissioners Bragg and Devaney. The former made affirmative findings on stainless steel wire as a separate product whereas the latter two made affirmative findings with regard to a broader product category than stainless steel wire, namely, stainless steel wire and rope. In this regard, the situation is equivalent to that encountered in the context of tin mill products, because the Commissioners who defined stainless steel wire as a separate product, did not reach an affirmative result.

10.571 In the March Proclamation, the President did not select any of the various affirmative determinations as the basis of the decision to impose the safeguard measure on stainless steel wire. Rather, pursuant to domestic law, the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the USITC".[5585] It is, therefore, apparent that the President based his determination on the findings of all three Commissioners (Bragg, Devaney and Koplan), although

[5585] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

those three Commissioners did not perform their respective analyses on the basis of the same like product definition.

10.572 For the reasons set out above in relation to the USITC's determination(s) on tin mill[5586], the Panel believes that the Agreement on Safeguards does not permit the combination of findings reached on the basis of differently defined products. Such findings cannot be reconciled with each other and they cannot simultaneously form the basis of a determination. In conclusion, the Panel finds that an explanation that consists of alternative explanations which, given the different products upon which such explanations are based, cannot be reconciled as a matter of substance, amounts to a violation of the obligations under Articles 2.1, 4.2(b) and 3.1 to provide a reasoned and adequate explanation of how the facts support the determination of causation.

10.573 Therefore, it is our view that the USITC Report did not contain a a reasoned and adequate explanation of how the facts support the determination that increased imports of stainless steel wire *caused* serious injury to the relevant domestic industry as required by Articles 2.1, 4.2(b), and 3.1 of the Agreement on Safeguards.

(j) Stainless steel rod

(i) Coincidence and conditions of competition

USITC findings

10.574 The USITC's findings read as follows:

> "We find that the increased imports of stainless rod are an important cause, and a cause not less than any other cause, of serious injury to the domestic industry. Accordingly, we find that increased imports of stainless rod are a substantial cause of serious injury to the domestic stainless rod industry.
>
> a. Conditions of Competition
>
> We have taken into account a number of factors that affect the competitiveness of domestic and imported stainless rod in the US market, including factors related to the product itself, the degree of substitutability between the domestic and imported articles, changes in world capacity and production, market conditions, and exchange rates. These factors affect prices and other considerations taken into account by purchasers in determining whether to purchase domestically-produced or imported articles.
>
> First, demand for stainless rod remained essentially stable during the period of investigation. Apparent US consumption of stainless rod was *** thousand short tons in 1996, *** thousand short tons in 1997, *** thousand short tons in 1998 and 1999, and *** thousand short tons in 2000.[5587] With the overall decline in the economy in interim 2001, apparent consumption of stainless rod also declined, falling by *** percent between interim 2000 and interim 2001.[5588]

[5586] See paras. 10.420-10.422.
[5587] (original footnote) CR and PR at Tables STAINLESS-68 and STAINLESS-C-5.
[5588] (original footnote) CR and PR at Tables STAINLESS-68 and STAINLESS-C-5.

Second, stainless rod is primarily used in the production of stainless steel wire but may also be fabricated into various downstream products, like industrial fasteners, springs, medical and dental instruments, automotive parts, and welding electrodes.[5589] The large majority of market participants indicate that there are no known substitutes for stainless steel rod.[5590]

Third, the domestic stainless rod industry became increasingly concentrated during the period of investigation. Only four domestic firms reported producing stainless steel rod in 2000.[5591] In 1997, Carpenter Technology, the dominant domestic producer of stainless rod in 2000[5592], purchased Talley, the *** largest producer of stainless rod.[5593] In addition, Empire Specialty Steel, the *** largest rod producer in 2000, shut down its stainless rod operations in June 2001.[5594] With the acquisition of Talley by Carpenter in 1997 and the exit of Empire from the market, Carpenter/Talley remains the only large domestic producer of stainless rod in the market.

The industry's aggregate capacity level increased during the period of investigation, growing by *** percent from 1996 to 2000.[5595] Domestic capacity was *** percent higher in interim 2001 than in interim 2000.[5596] The industry's capacity utilization rate declined from *** percent in 1996 to *** percent in 1999, and then to *** percent in 2000. Capacity utilization also declined between interim periods, dropping from *** percent to *** percent.[5597] Moreover, the stainless rod industry captively consumes more than *** of its stainless rod production in the downstream production of wire and other stainless products.[5598]

Fourth, price is an important factor in purchasing decisions for stainless rod. Although quality was generally ranked by the majority of responding purchasers as the most important factor in the purchasing decision for stainless rod, the large majority of purchasers reported price as being one of the three most important factors in the purchase decision.[5599]

Fifth, like many stainless steel products, the price of stainless rod is related to the price of nickel.[5600] To account for fluctuations in the cost of nickel, stainless steel rod producers impose a surcharge on the price of their products whenever the price of nickel reaches a certain level.[5601] Generally, after declining during the first three

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[5589] (original footnote) CR and PR at STAINLESS-3.
[5590] (original footnote) EC-Y-046 at Table STAINLESS-6.
[5591] (original footnote) CR and PR at Table STAINLESS-1.
[5592] (original footnote) Carpenter accounted for *** percent of reported domestic production of stainless rod in 2000. CR and PR at Table STAINLESS-1.
[5593] (original footnote) Eurofer Prehearing Brief on Injury at 2. Talley accounted for *** percent of reported domestic production of stainless rod in 2000. CR and PR at Table STAINLESS-1.
[5594] (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment.
[5595] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5596] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5597] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5598] (original footnote) CR and PR at Table STAINLESS-19.
[5599] (original footnote) INV-Y-212 at 95.
[5600] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.
[5601] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

years of the period of investigation, nickel prices increased significantly throughout 1999 and the first half of 2000. Nickel prices fell thereafter, declining through interim 2001.[5602] The price of domestic stainless rod generally followed this trend during the period of investigation, with the average unit values of domestic rod shipments and sales declining through the end of 1999, recovering in 2000, and then declining again in interim 2001.[5603]

Sixth, during the period of investigation, there were imports of stainless rod from over 30 countries, although not every country exported stainless rod in every year.[5604] The quantity of imports of stainless steel rod from sources other than Canada and Mexico increased by 36 percent from 1996 to 2000 but fell by 31 percent between interim 2000 and interim 2001.[5605] The record indicates that purchasers generally perceive domestically-produced and imported stainless rod to be comparable in most respects, which indicates that they are at least reasonably substitutable.[5606] The level of substitutability is reduced somewhat by the significant degree of captive consumption of stainless rod by the domestic industry.[5607]

The aggregate capacity of foreign producers of stainless steel rod from sources other than Mexico and Canada increased by 16.5 percent during the period of investigation. The capacity utilization rates of these producers increased from 70.8 percent in 1996 to 83.7 percent in 1997 and remained essentially stable thereafter, with capacity utilization being 84.3 percent in 2000 and 82.2 percent in interim 2001.[5608]

Seventh, antidumping and countervailing duty orders were imposed against imports of stainless rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan in 1993, 1994, and 1998.[5609]

b. Analysis

We find that the increased quantities of stainless rod imports during the period of investigation had a direct and serious adverse impact on the production levels, shipments, commercial sales, and market share of the domestic industry. With demand remaining essentially flat during the period of investigation[5610], the increases in import volumes during the period (particularly the surge that occurred in the last year of the period) resulted in a dramatic increase in the market share of stainless rod imports.[5611] With the growth in the quantity and market share of imports during the

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[5602] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71.

[5603] (original footnote) CR and PR at Tables STAINLESS-19, STAINLESS-88, & STAINLESS-C-5.

[5604] (original footnote) INV-Y-180, Table G26- Stainless Steel Rod.

[5605] (original footnote) CR and PR at Tables STAINLESS-6 & STAINLESS-C-4.

[5606] (original footnote) EC-Y-046 at Table STAINLESS-25; *see generally* EC-Y-046 at STAINLESS-14-28..

[5607] (original footnote) EC-Y-046 at STAINLESS-31.

[5608] (original footnote) CR and PR at Table STAINLESS-47.

[5609] (original footnote) CR and PR at Table OVERVIEW-1.

[5610] (original footnote) We note that apparent consumption fell by *** percent between interim periods.

[5611] (original footnote) CR and PR at Tables STAINLESS-68 & STAINLESS-C-5. The market share of imports increased from *** percent in 1996 to *** percent in 1997, declined in 1998 to *** percent, but then increased to *** percent in 1999 and *** percent in 2000. Id. It then declined slightly to *** percent in interim 2001. Id.

period of investigation, especially during the last year of the period, the industry's production levels, shipment volumes, net commercial sales, and net commercial sales revenues all fell considerably, especially in the last full-year of the period. In particular, the industry's production levels declined by *** percent during the period from 1996 to 2000, its US shipment volumes fell by *** percent during the period, its net commercial sales fell by *** percent during the period, and its net commercial sales revenues fell by *** percent.[5612] Moreover, the industry's capacity utilization rates were impacted as well, falling from *** percent in 1996 to *** percent in 2000, and then to *** percent in interim 2001.[5613] Further, as import quantity and market share increased during the period of investigation, the share of the market held by the domestic industry declined dramatically as well, falling from *** percent in 1996 to *** percent in 1999 and to *** percent in 2000.[5614]

Indeed, the most serious adverse impact of imports in quantity terms occurred during the last full-year of the period of investigation, when import quantities reached their highest level during the period, growing by 25.0 percent from the previous year.[5615] With growth in imports in that year, the market share of the industry fell by *** percentage points, its production volumes fell by *** percent, its US shipment levels fell by *** percent, and its net commercial sales quantities fell by *** percent from the prior year's levels.[5616] Moreover, partly as a direct result of these volume declines[5617], the industry's profitability levels declined by *** percentage points in that year from the previous year's level.[5618] In our view, the increases in import quantities during the period of investigation, particularly its last full-year, have had a serious and adverse impact on the sales revenue and production volumes of the industry.

The record also indicates that imports had a negative effect on domestic prices of stainless rod during the period of investigation. Purchasers generally consider domestic and imported stainless rod to be comparable in most respects, [5619] which indicates that there is a high degree of substitutability between the products. Moreover, the record shows that price is an important part of the purchasing decision[5620] and that imports consistently and significantly undersold the domestic merchandise throughout the period of investigation.[5621] In addition to causing

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[5612] (original footnote) CR and PR at Tables STAINLESS-19, STAINLESS-31 & STAINLESS-C-5. Declines in these indicators continued in interim 2001, as well, when demand for stainless rod fell considerably from its prior levels. Id.

[5613] (original footnote) CR and PR at Tables STAINLESS-19 and STAINLESS-C-5. As noted earlier, we are cognizant of the fact that the industry increased its capacity during the period. Nonetheless, despite this increase, the industry's production volumes fell by *** percent during the period from 1998 to 2000 and by an additional *** percent in interim 2001. *Id.* Thus, the industry's capacity utilization rates would have declined substantially even in the absence of these capacity increases.

[5614] (original footnote) CR and PR at Tables STAINLESS-68 & STAINLESS-C-5.

[5615] (original footnote) CR and PR at Tables STAINLESS-7, STAINLESS-68, & STAINLESS-C-5.

[5616] (original footnote) CR and PR at Tables STAINLESS-19, STAINLESS-68, & STAINLESS-C-5.

[5617] (original footnote) As we describe below, the decline in the industry's profitability was also the result of price-suppression and depression by imports during the period of investigation.

[5618] (original footnote) CR and PR at Tables STAINLESS-31 & STAINLESS-C-5.

[5619] (original footnote) INV-Y-212 at 96.

[5620] (original footnote) INV-Y-212 at 96.

[5621] (original footnote) CR and PR at Tables STAINLESS-88, STAINLESS-100, & Figure STAINLESS-11. The price comparison data indicate that imports undersold the domestic merchandise in every

purchasers to shift a significant volume of their purchases from domestic to imported product, we find that this underselling also depressed and suppressed domestic prices during the period of investigation.

In this regard, although trends in the price of stainless rod are expected to follow trends in the price of nickel, prices of domestic stainless rod failed to keep pace with movements in the cost of nickel during the second half of the period of investigation, particularly during the latter half 1999 and 2000, when the price of nickel (and the nickel surcharge) increased substantially.[5622] For example, in 1999, the average unit values of the industry's net commercial sales fell by *** percent although its unit cost of goods sold fell by only *** percent.[5623] Similarly, in 2000, the average unit values of the industry's net commercial sales increased by *** percent despite the fact that its unit cost of goods sold increased by *** percent.[5624] Finally, in interim 2001, the unit value of the industry's net commercial sales fell by *** percent, despite the fact that its unit cost of goods sold increased by *** percent.[5625] In sum, during the latter half of the period, the record indicates that consistent and significant price underselling by imports managed to suppress and depress domestic prices. This resulted in the inability of the industry to effectuate changes in the price of its stainless rod sales that would cover increases (or keep pace with declines) in the price of its raw materials. Accordingly, the price-suppression and depression caused by imports resulted in the continuing depression and suppression of the industry's operating income levels.[5626]

Finally, the record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry. In particular, the operating income margins of the industry declined in 1997, 1999, and 2000, all of which were years in which import quantities increased from their level in the prior year.[5627] The only full-year in which the industry's operating income margin actually increased from the prior year's level was 1998, when import quantities decreased by 21.5 percent.[5628]

…

In light of the foregoing, we conclude that increased imports of stainless rod are an important cause, and a cause no less important than any other cause, of serious injury to the domestic industry producing stainless rod. Accordingly, we find that

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possible price comparison, at margins ranging from 6.5 percent to 23 percent. Id. These consistent underselling figures are supported by an examination of the average unit value for domestic and imported merchandise, which also show imports being priced at consistently lower levels than domestic merchandise during the period. CR and PR at Table STAINLESS-C-5.

[5622] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71 & Tables STAINLESS-7, STAINLESS-19, STAINLESS-31, & STAINLESS-C-5.

[5623] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

[5624] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

[5625] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

[5626] (original footnote) CR and PR at Table STAINLESS-31.

[5627] (original footnote) CR and PR at Tables STAINLESS-7, STAINLESS-31, STAINLESS-68, & STAINLESS-C-5.

[5628] (original footnote) CR and PR at Tables STAINLESS-7, STAINLESS-31, STAINLESS-68, & STAINLESS-C-5.

> imports of stainless rod are a substantial cause of serious injury to the domestic industry producing stainless rod."[5629]

Claims and arguments of the parties

10.575 The arguments of the parties are set out in Section VII.H.2 (i) *supra*.

Analysis by the Panel

10.576 At the outset, the Panel notes that the USITC undertook a coincidence analysis for stainless steel rod and concluded that coincidence existed. However, the Panel notes that it is unable to assess the complainants claims regarding the existence or otherwise of coincidence because of the redaction of relevant confidential information.

10.577 The Panel also notes that the United States, in rebutting the European Communities claim in this regard stated that: "In addition, as the USITC clearly explained in its analysis (even with the redaction of confidential data), imports undersold domestic merchandise in every period of the period of investigation, including 1999, which resulted in the suppression and depression of domestic prices during the last two-and-a-half years of the period of investigation, thus preventing the industry from keeping its prices at a level that would allow it to recoup its nickel costs during this period, including 1999."

10.578 We have examined the USITC's condition of competition analysis. We understand that the essential premise of the USITC's finding of a causal relationship between increased imports and serious injury is that imports undersold domestic products. In particular, the USITC stated that "imports consistently and significantly undersold the domestic merchandise throughout the period of investigation.[5630] In addition to causing purchasers to shift a significant volume of their purchases from domestic to imported product, we find that this underselling also depressed and suppressed domestic prices during the period of investigation."

10.579 The Panel notes that the assertion that underselling depressed and suppressed domestic prices is accompanied by the following analysis:

> "In this regard, although trends in the price of stainless rod are expected to follow trends in the price of nickel, prices of domestic stainless rod failed to keep pace with movements in the cost of nickel during the second half of the period of investigation, particularly during the latter half 1999 and 2000, when the price of nickel (and the nickel surcharge) increased substantially.[5631] For example, in 1999, the average unit values of the industry's net commercial sales fell by *** percent although its unit cost of goods sold fell by only *** percent.[5632] Similarly, in 2000, the average unit values of the industry's net commercial sales increased by *** percent despite the fact that

[5629] USITC Report, Vol. I, pp. 217-222.

[5630] (original footnote) CR and PR at Tables STAINLESS-88, STAINLESS-100, & Figure STAINLESS-11. The price comparison data indicate that imports undersold the domestic merchandise in every possible price comparison, at margins ranging from 6.5 percent to 23 percent. Id. These consistent underselling figures are supported by an examination of the average unit value for domestic and imported merchandise, which also show imports being priced at consistently lower levels than domestic merchandise during the period. CR and PR at Table STAINLESS-C-5.

[5631] (original footnote) CR at STAINLESS-95-96, PR at STAINLESS-70-71 & Tables STAINLESS-7, STAINLESS-19, STAINLESS-31, & STAINLESS-C-5.

[5632] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.

> its unit cost of goods sold increased by *** percent.[5633] Finally, in interim 2001, the unit value of the industry's net commercial sales fell by *** percent, despite the fact that its unit cost of goods sold increased by *** percent.[5634] In sum, during the latter half of the period, the record indicates that consistent and significant price underselling by imports managed to suppress and depress domestic prices. This resulted in the inability of the industry to effectuate changes in the price of its stainless rod sales that would cover increases (or keep pace with declines) in the price of its raw materials. Accordingly, the price-suppression and depression caused by imports resulted in the continuing depression and suppression of the industry's operating income levels.[5635]"

10.580 We note that a footnote to the above excerpt from the USITC Report stated that "The price comparison data indicate that imports undersold the domestic merchandise in every possible price comparison, at margins ranging from 6.5 percent to 23 percent." This statement seems to be supported by Table STAINLESS-100.

10.581 In the Panel's view, although relevant data was redacted from the USITC Report, the USITC nevertheless provided alternative information in Table STAINLESS-100 that sought to substitute the redacted data. In light of the foregoing, the Panel concludes that the facts that are available to us tend to support the USITC's conclusion that there was import underselling during the period of investigation. We note that none of the complainants have challenged the USITC's data indicating that "in every possible price comparison, at margins ranging from 6.5 percent to 23 percent". We recall that it is contrary to our standard of review to reassess the quality of the data contained in the USITC's Report. In our view, given the facts referred to above, the USITC provided a compelling explanation indicating that, subject to the fulfilment of the non-attribution requirement, a causal link existed between increased imports and serious injury.

Conclusions

10.582 In conclusion, the Panel is unable to assess the USITC's coincidence analysis given that essential information has been redacted. As stated above, the Panel agrees that, in some circumstances, Members have the obligation to confidentialize certain information, pursuant to Article 3.2 of the Agreement on Safeguards, although they can base their determination on such confidentialized information but this obligation should not reduce Members' rights to take safeguard actions. Also as mentioned above, in cases where information has been confidentialized, the Panel will examine whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data.[5636] In light of our approach, we reviewed the USITC's conditions of competition analysis and consider that it provided a compelling explanation, subject to fulfillment of the non-attribution requirement, that indicated the existence of a causal link between increased imports of stainless steel rod and serious injury to the relevant domestic producers.

(ii) Non-attribution

USITC findings

10.583 The USITC's findings read as follows:

[5633] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.
[5634] (original footnote) CR and PR at Table STAINLESS-C-5, STAINLESS-19, & STAINLESS-31.
[5635] (original footnote) CR and PR at Table STAINLESS-31.
[5636] See our discussions in para. 10.275.

"The industry's aggregate capacity level increased during the period of investigation, growing by *** percent from 1996 to 2000.[5637] Domestic capacity was *** percent higher in interim 2001 than in interim 2000.[5638] The industry's capacity utilization rate declined from *** percent in 1996 to *** percent in 1999, and then to *** percent in 2000. Capacity utilization also declined between interim periods, dropping from *** percent to *** percent.[5639] Moreover, the stainless rod industry captively consumes more than *** of its stainless rod production in the downstream production of wire and other stainless products.[5640]

…

In sum, we find that the increased quantities of imports of stainless rod during the period of investigation were an important cause of the declines in the industry's trade and financial condition during the period. In making this finding, we note that we have considered respondents' argument that adverse changes in the industry's condition during the latter half of the period were caused primarily by a downturn in the demand for stainless steel rod in late 2000 and in interim 2001, as well as an increase in energy costs during the same period.[5641] Although the record does show a downturn in demand for stainless bar [sic] and an increase in energy costs in late 2000 and interim 2001, there were substantial declines in the industry's production, sales, and profitability levels during the years prior to 2000 and interim 2001. In particular, the industry's market share, production volumes, employment levels and profitability levels all declined considerably during the period from 1996 to 1999 in the face of increased import volumes, despite the fact that there were only small changes overall in the amount of stainless rod consumed in the US market and despite the fact that there is little evidence that energy costs were increasing substantially in these periods. Considering this, it is clear that imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines and energy cost increases, especially given the substantial increase in import quantities and market share during the last year-and-a half of the period.

In addition, we also have considered respondents' argument that the industry's condition during the period was affected significantly by the poor operations of the domestic producer AL Tech/Empire.[5642] However, ***.[5643] Moreover, even if this producer were excluded from our analysis, the remaining domestic producers of stainless rod still experienced substantial declines in their operating income margins, production levels, shipments, capacity utilization, and employment levels during the period of investigation.[5644]

[5637] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5638] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5639] (original footnote) CR and PR at Tables STAINLESS-C-5 & STAINLESS-19.
[5640] (original footnote) CR and PR at Table STAINLESS-19.
[5641] (original footnote) Eurofer Prehearing Brief on Injury at 2.
[5642] (original footnote) Eurofer Prehearing Brief on Injury at 2.
[5643] (original footnote) Empire Specialty Steel, Inc. Questionnaire Response at August 6, 2001 Attachment; Republic Technologies International Questionnaire Response at p. 54.
[5644] (original footnote) We also note that, although the statute directs us to assess whether a significant number of producers have been able to operate at reasonable levels of profits, it ultimately requires us to assess whether increased imports have been a substantial cause of serious injury to the industry "as a whole". 19 U.S.C. §2252(c)(6).

> Finally, although antidumping and countervailing duty orders were imposed against imports of stainless rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan in 1993, 1994, and 1998[5645], the imposition of these orders appears not to have limited the ability of foreign producers in most of these countries to increase their stainless rod exports to the United States in 1999 and 2000.[5646]
>
> In light of the foregoing, we conclude that increased imports of stainless rod are an important cause, and a cause no less important than any other cause, of serious injury to the domestic industry producing stainless rod. Accordingly, we find that imports of stainless rod are a substantial cause of serious injury to the domestic industry producing stainless rod."[5647]

Factors considered by the USITC

Increases in capacity

Claims and arguments of the parties

10.584 The arguments of the parties are set out in Section VII.H.3(b)(x) *supra*.

Analysis by the Panel

10.585 The Panel notes that while the USITC discussed increases in capacity and declines in capacity utilization in its Report, it did not go so far as to acknowledge that increases in capacity played a role in causing the injury that was suffered by the domestic industry. The United States submits that even with the noted capacity increases, "the industry's actual production levels and shipments actually declined during the period from 1996 through 2000, primarily because imports increased their volumes and market share through price underselling during the period of investigation". In light of the Panel's conclusions above in relation to the USITC's conditions of competition analysis, the Panel considers that the facts that are available to the Panel tend to support the USITC's conclusion that import underselling, rather than capacity increases, caused injury to the industry. Therefore, in the Panel's view, capacity increase was not one of the "other factors" which the USITC should have separated, distinguished and assessed in order to reach a finding that increased imports were causing serious injury to the relevant domestic producers.

(iii) Overall conclusion on USITC's determination of a causal link

10.586 The facts that are available to the Panel tend to support the conclusions reached by the USITC. Accordingly, the Panel finds that the USITC's causation analysis for stainless steel rod was not inconsistent with the requirements of the Agreement on Safeguards.

F. CLAIMS RELATING TO PARALLELISM

1. Claims and arguments of the parties

10.587 The complainants claim that the United States failed to meet the requirement of parallelism with regard to all safeguards at issue. The United States responds that the USITC's analysis in the

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[5645] (original footnote) CR and PR at Table OVERVIEW-1.
[5646] (original footnote) INV-Y-180 at G26 – Stainless Steel Rod.
[5647] USITC Report, Vol. I, pp. 221-222.

Second Supplementary Report, read in conjunction with the initial USITC Report, satisfies the requirement of parallelism.

10.588 The arguments of the parties as regards the legal standard to be applied are set out in Section VII.K.1-3 *supra*.

2. Relevant WTO provisions

10.589 The concept of parallelism has been derived from the parallel language in the first and second paragraphs of Article 2 of the Agreement on Safeguards. Article 2 provides as follows:

> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source.
>
> [1] 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 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.

3. Analysis by the Panel

10.590 The requirement of parallelism was first relied upon by the panel, and endorsed by the Appellate Body, in *Argentina – Footwear (EC)*.[5648] On the basis of the same phrase – "product … being imported" – appearing in both paragraphs of Article 2 of the Agreement on Safeguards, the Appellate Body found, in *US – Wheat Gluten*, that the phrase has the same meaning in both Article 2.1 and Article 2.2. The Appellate Body held, that the phrase would have two different meanings in both paragraphs if imports from all sources were included in the determination that increased imports are causing serious injury, and imports not from all these sources were covered by the measure. [5649]

10.591 The conclusion to be drawn from this is that the imports included in the determination and those covered by the measure should correspond.[5650] If they do not correspond, i.e. if there is a "gap" between imports covered by the determination and imports falling within the scope of the measure,

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[5648] Panel Report, *Argentina – Footwear (EC)*, para. 8.87; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 111-113.

[5649] Appellate Body Report, *US – Wheat Gluten*, para. 96. *See also* Appellate Body Report, *US – Line Pipe*, para. 180.

[5650] Appellate Body Report, *US – Wheat Gluten*, para. 96. *See also* Appellate Body Report, *US – Line Pipe*, para. 181.

the competent authorities must establish explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.[5651]

10.592 When the determination and the eventual measure do not correspond, the Panel believes that Members can establish explicitly that imports from sources covered satisfy the conditions for safeguard action, also when the decision to exclude certain sources from the safeguard measure is made *subsequent* to a determination, in the sense of Article 2.1. In such cases, the importing Member is entitled to make and publish these findings subsequent to the publication of the report setting out the determination in the sense of Article 2.1.[5652]

10.593 On that basis, in the present case, both the findings made in the initial USITC Report and those contained in the Second Supplementary Report issued in February 2002, are able to satisfy the requirement of establishing explicitly that imports covered by the measure satisfy the conditions of Articles 2.1 and 4.2. This, of course, assumes that such findings are necessary because there is a gap between sources covered by the ultimate measure and sources covered by the October 2001 determination. Conversely, however, that requirement must be fulfilled before the application of the safeguard measure. An explanation provided after the start of the application of the safeguard measure on 20 March 2002[5653] is not capable of meeting the requirement to establish explicitly that imports from sources covered by the measure meet the requirements for its application.

10.594 The Panel notes that there is some debate between the parties as to what amounts to a finding that does indeed establish explicitly that imports from sources covered by the measure satisfy the conditions for a safeguard measure. The United States maintains that Articles 3 and 4 of the Agreement on Safeguards do not require an "explicit" finding and that the Appellate Body has never related such a requirement to the text of the Agreement on Safeguards. According to the United States, the Appellate Body's use of the term "explicit" is best understood as referring to the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury, and does not require an "explicit" recitation of the results of each step of the analytical process leading to that conclusion.[5654] In contrast, New Zealand rejects the idea of reducing the requirement for a "reasoned and adequate explanation" to a simple requirement for a conclusion by way of mere assertion that even if FTA imports had not been included, the result would have been the same.[5655] The European Communities stresses that the "parallelism" requirement is clearly discernible from the text and the Appellate Body has clarified that it entails that there must be an explicit finding and a reasoned explanation that imports covered by a measure alone satisfy the requirements of Articles 2 and 4.[5656]

10.595 The Panel recalls that the requirement of parallelism, as developed by panels and the Appellate Body, is that the competent authorities must establish explicitly that imports covered by the safeguard measure satisfy the conditions for its application. This implies that the competent

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[5651] Appellate Body Report, *US – Wheat Gluten*, para. 98. *See also* Appellate Body Report, *US – Line Pipe*, para. 181.

[5652] The Panel notes that some of the complainants have argued that the Unites States has also violated the principle of parallelism in that it has granted so-called "product exclusions" (see paras.7.1680 to 7.1698) Given that, for the reasons discussed below, the Panel has found a violation of the principle of parallelism, there is no need for the Panel to specifically address this further argument.

[5653] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

[5654] United States' first written submission, paras. 752-753.

[5655] New Zealand's second written submission, para. 3.151.

[5656] European Communities' second written submission, paras. 454-457. Japan even argues in its Interim Review comments that the parallelism obligation existed in the wording of Article XIX. The Panel has, however, decided that it need not examine this claim pursuant to Article XIX of the GATT 1994.

authorities must provide a reasoned and adequate explanation of how the facts support their determination.[5657] As the Appellate Body has also clarified, "to be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[5658]

10.596 The Panel believes that the requirement of parallelism also exists in the interest of the other Members. The other Members who are facing the safeguard measure should be able to assess its legality on the basis of the determination and explanations provided by the competent authorities. This function would not be fulfilled if the other Members were left with statements such as those to the effect that the exclusion of subsets of all imports would not change the conclusions and, elsewhere in the report, that certain imports are very small.

10.597 Finally, the Panel notes the dispute between the parties as to whether competent authorities must consider imports from sources excluded by the measure as an "other factor" in the sense of Article 4.2(b) of the Agreement on Safeguards, when they perform the exercise of establishing explicitly that imports from sources covered by the measure satisfy the requirements set out in Article 2.1 and elaborated in Article 4.2.

10.598 As clarified by the Appellate Body, if the scope of the measure does not match the scope of the determination, competent authorities must "establish *explicitly* that increased imports from non-[FTA] sources alone"[5659] caused serious injury or threat of serious injury.[5660] Increased imports from sources ultimately excluded from the application of the measure must hence be *excluded* from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury". This makes it necessary – whether imports excluded from the measure are an "other factor" or not – to account for the fact that excluded imports may have some injurious impact on the domestic industry. As said, this impact must not be used as a basis supporting the establishment of the Article 2.1 criteria.

4. Measure-by-measure analysis

(a) CCFRS

(i) The USITC's findings

10.599 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel

[5657] Appellate Body Report, *US – Line Pipe*, para. 181.
[5658] Appellate Body Report, *US – Line Pipe*, para. 194.
[5659] In the view of the Panel, "alone", in this context means: "to the exclusion of increased imports from other sources (i.e. sources excluded from the measure)"; it does not mean: "to the exclusion of other factors, i.e. non-increased imports factors in the sense of Article 4.2(b), second sentence". The Appellate Body has clarified that increased imports precisely need not, by themselves, cause serious injury (Appellate Body Report, *US – Wheat Gluten*, paras. 70 and 79; Appellate Body Report, *US – Lamb*, para. 170). There is no reason why this latter aspect should be any different in the context of parallelism, where the same test of Articles 2 and 4 is applied, only to a narrower base of imports. *See also* Appellate Body Report, *US – Wheat Gluten*, para 98: "establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure".
[5660] Appellate Body Report, *US – Line Pipe*, para. 194;

and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5661] Specifically as regards CCFRS, the USITC made the following findings:

> "We report that increased imports of certain carbon flat-rolled steel from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing certain carbon flat-rolled steel.
>
> Non-NAFTA imports of certain carbon flat-rolled steel have increased. Imports of certain carbon flat-rolled steel from non-NAFTA sources increased from 14.5 million short tons in 1996 to 21.2 million short tons in 1998, an increase of 46.8 percent. Non-NAFTA imports were lower in 1999 and in 2000 but remained well above 1996 levels.[5662]
>
> In addition, the increase in non-NAFTA imports as a share of domestic production was substantial. Non-NAFTA imports were equivalent to 7.8 percent of domestic production in 1996 and peaked at 11.1 percent of domestic production in 1998. Such imports were equivalent to 8.4 percent of domestic production in 2000, still above the 1996 level.[5663]
>
> The average unit values of non-NAFTA imports followed the same pattern as the average unit values of imports from all sources. The average unit value of non-NAFTA imports peaked at $372 per short ton in 1997, then fell notably in both 1998 and in 1999. The average unit value of non-NAFTA imports rose somewhat in 2000, although average unit values of non-NAFTA imports were lower in interim 2001 than in interim 2000.[5664]
>
> Finally, excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined. Our finding that imports were generally priced below domestically-produced certain carbon flat-rolled steel, and that imports led to the decline in domestic prices, also applies to non-NAFTA imports.[5665]
>
> Consequently, the same considerations that led us to conclude that increased imports of certain carbon flat-rolled steel are a substantial cause of serious injury to the domestic industry[5666] are also applicable to increased imports of certain carbon flat-rolled steel from all sources other than Canada and Mexico."[5667]

(ii) Claims and arguments of the parties

10.600 The arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(a) *supra*.

[5661] USITC Second Supplementary Report, p. 4 (footnote omitted).

[5662] (original footnote) Non-NAFTA imports were lower in interim 2001 than in interim 2000. *See* INV-Y-209 at Table ALT7.

[5663] (original footnote) Non-NAFTA imports were equivalent to a smaller share of domestic production in interim 2001 than in interim 2000. *See* INV-Y-209 at Table ALT7.

[5664] (original footnote) *See* INV-Y-209 at Table ALT7.

[5665] (original footnote) *See* USITC Pub. 3479, Vol. II at Table FLAT-77.

[5666] (original footnote) *See* USITC Pub. 3479, Vol. I at 59-65.

[5667] USITC Second Supplementary Report, pp. 4-5

(iii) Analysis by the Panel

10.601 The Panel notes that the safeguard action on CCFRS excludes imports from Canada, Mexico, Israel and Jordan and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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.

10.602 The Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question of whether increased imports of CCFRS from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5668] In these findings, the USITC established and explained that non-NAFTA imports had increased. The USITC also examined average unit values and pricing trends of imports from non-NAFTA sources and concluded that the statements of underselling and of imports leading to the decline in domestic prices made in relation to all imports (investigated in the USITC Report) were equally applicable to non-NAFTA imports.

10.603 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, with regard to the question of whether imports from non-NAFTA sources caused serious injury, the USITC found that the statements made on all imports as regards average unit values – the fact of underselling and the result of a decline in domestic prices – could also be made with respect to non-NAFTA imports. This is not a reasoned and adequate explanation because one cannot conclude that the fact that all imports and non-NAFTA imports have the same characteristic mean that they have identical effects. This misses out on the important aspect that non-NAFTA imports are, at least in quantity, *less* than all imports. This smaller amount of imports, i.e. imports to the exclusion of Canadian and Mexican imports, may well result in a different impact on the domestic industry than imports including Canadian and Mexican imports. An assessment of this difference was all the more necessary in the present case, given that the USITC had previously established that imports from Canada and equally imports from Mexico represented a substantial share of total imports, and that Mexican imports contributed importantly to serious injury caused by imports.[5669] Therefore, the United States' explanation does not address the possibility that, unlike all imports, non-NAFTA imports are *not* a cause of serious injury in the sense of having a genuine and substantial relationship of cause and effect.

10.604 More specifically, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied. In the Second Supplementary Report, the USITC did not address factors other than increased imports which contributed to the causation of serious injury to the domestic CCFRS industry. The United States maintains that there was no need to do so since the "other factors", i.e. the non-import factors remained the same, so that the non-attribution performed in the main USITC Report remains valid.[5670]

10.605 In the view of the Panel, the fact that those other factors were the same, does not mean that new findings on causation did not have to be made. The obligation of non-attribution comprises the obligation to separate and distinguish the respective effects of increased imports and other factors to

[5668] USITC Second Supplementary Report, pp. 4-5.
[5669] USITC Report, Vol. I, pp. 65-66.
[5670] United States' first written submission, paras. 797-804.

discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

10.606 Hence, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.607 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also Israel and Jordan.[5671] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.608 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be necessary for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made, it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5672] The Panel recognizes that if, as established elsewhere in the report of the competent authorities, imports from an excluded source were "small and sporadic" and those of another excluded source "virtually non-existent"[5673], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

(iv) Conclusion

10.609 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on CCFRS, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

[5671] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5672] USITC Second Supplementary Report, p. 4.
[5673] USITC Report, Vol. I, p. 366 and footnote 69.

(b) Tin mill products

(i) Claims and arguments of the parties

10.610 The complainants assert that the determination made by the USITC in October includes all imports. Neither the initial USITC Report nor the Second Supplementary Report establishes explicitly that imports from sources covered by the measure satisfy the conditions of Articles 2.1 and 4.2 of the Agreement on Safeguards. The Second Supplementary Report does not even mention tin mill products specifically. The claims and arguments of the complainants as regards the USITC's findings on tin mill products are set out in more detail in Sections VII.K.2, 3(b) and 4(b) *supra*.

10.611 The United States contends that, when performing the analysis of all imports, Commissioner Miller made the necessary findings on non-NAFTA imports of tin mill products and Commissioner Bragg on non-NAFTA imports of CCFRS, comprising tin mill products. The claims and arguments of the United States as regards the USITC's findings on tin mill products are set out in more detail in Sections VII.K.2, 3(b) and 4(b) *supra*.

(ii) Analysis by the Panel

Split findings

10.612 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on tin mill products.[5674] Second, the October 2001 determination by the USITC covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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. In this regard, the United States relies, before the Panel, on findings made by Commissioners Miller[5675] and Bragg[5676] in the USITC Report.

10.613 The Panel recalls that Commissioner Bragg made her findings on a product category much broader than, and comprising, tin mill products, as Commissioner Devaney did.[5677] The Panel also recalls that the United States has imposed a safeguard measure on tin mill products and this measure has been challenged by the complainants. Three Commissioners have made an affirmative determination *with regard to tin mill products*, as is apparent from the very first paragraph of the actual USITC determination.[5678] They *supported* this determination with findings that are based on different product categories. However, it remains that for the purpose of WTO law the USITC has actually made a determination on tin mill as a separate product. The Panel notes that this is confirmed by the Proclamation of the President of 5 March 2001, in which the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the [US]ITC".[5679]

[5674] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

[5675] USITC Report, Vol. I, pp. 307-308 and footnotes 28 and 29 on p. 310.

[5676] USITC Report, Vol. I, pp. 15-17.

[5677] USITC Report, Vol. I, p. 71, footnote 368. The Panel notes that the United States does not rely on findings made by Commissioner Devaney in defence against the claim of violation of parallelism, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports. See USITC Report, Vol. I, p. 317.

[5678] USITC Report, Vol. I, p. 25.

[5679] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.

10.614 According to the Panel, this means that if there is a gap between the sources covered by a measure *on tin mill products* and a determination *on tin mill products*, the competent authority must, pursuant to the requirement of parallelism, establish explicitly that *tin mill products* from sources covered by the measure satisfy the conditions of Articles 2.1 and 4.

10.615 The Panel does not believe that findings on a product category other than tin mill products are able to support a measure relating to tin mill products as a separate product category, unless there is a reasoned and adequate explanation relating the two product categories. If it was necessary to establish explicitly certain conditions with regard to tin mill products, then these conditions cannot be established with findings on a different (broader) product category. Such findings would not be specific to the product to which the USITC determination and the United States' safeguard measure related. Hence, the views of Commissioners Bragg and Devaney, who reached no findings on tin mill but reached findings on the broader category of CCFRS, do not meet the requirements of parallelism. Therefore, the Panel will review the findings reached by Commissioner Miller who defined tin mill products as a separate product.

Commissioner Miller's and the USITC's findings

10.616 In the initial USITC Report, in two footnotes, Commissioner Miller, the only Commissioner making an affirmative determination with regard to tin mill products as a separately defined product, made the following statements:

> "I note that in my analysis of whether increased imports as a whole are a substantial causes of serious injury, I would have reached the same result had I excluded imports from Mexico. The quantity of imports from Mexico was so minuscule – 57 tons in 1996, 21 tons in 1997, 286 tons in 1998, 156 tons in 1999, 39 tons in 2000, and no imports in 2001 – that it accounted for zero percent of US market share in each year of the period examined. At their highest, in 1998, imports from Mexico represented 0.1 percent of imports, and zero percent in all other years. Therefore, the results with respect to increases in imports, their share of apparent US consumption, and their ratio to US production are virtually the same whether imports from Mexico are included in total imports or not. CR/PR at Table FLAT-10, Table FLAT-C-8.[5680]
>
> I further note that I would have found imports of tin mill products to be a substantial cause of serious injury had I excluded imports from Canada. Imports from all other sources increased by a significant amount – 22.4 percent – over the period, despite an overall decline in consumption. In addition, the US market share held by these imports increased by 2.9 percentage points over the period, while imports from Canada as a share of the US market increased by only 1.3 percentage points. CR/PR at Table-FLAT-C-8. The pricing data collected by the Commission show no underselling by imports from Canada. CR/PR at Table-FLAT-75. Also, while the AUVs of imports from Canada declined overall during the period, the rate of decline – 3.5 percentage points – was significantly lower than that of all other imports – 13.1 percentage points, and toward the end of the period, in 1999, 2000, and interim 2001, the AUVs of imports from Canada were higher than those of the other imports. CR/PR at Table-FLAT-C-8."[5681]

10.617 In her recommendation on remedy, Commissioner Miller stated:

[5680] USITC Report, Vol. I, p. 310, footnote 28.
[5681] USITC Report, Vol. I, p. 310, footnote 29.

> "I also recommend that the President not include imports from Israel and from beneficiary countries under the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act in any remedy action.[5] The only imports of tin mill products from these countries during the period of investigation were small and sporadic."[5682]
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> [5] The U.S.-Jordan Free Trade Area Implementation Act became effective on December 17, 2001, two days before submission of this report on our findings and recommendations in investigation No. TA-201-73, Steel, to the President. There have been no imports of tin mill products from Jordan during the period of investigation, and they are therefore not a substantial cause of serious injury or threat of serious injury. Therefore, to the extent that section 221(a) of the Jordan FTA applies to this investigation, I recommend that such imports not be subject to the additional tariff described above."

10.618 On that basis, the USITC reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5683]

Panel's Assessment

10.619 The Panel is unable to identify in these statements any finding that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards. In particular, none of the footnotes relied upon by the United States addresses the consequences of excluding imports from Canada, Mexico, Israel and Jordan. They only address the exclusion of imports from one Member, respectively.

10.620 Further, these findings do not account for the fact that imports other than those from an excluded source are less than those from all sources and that the effects on the domestic producers are, therefore, not the same. Commissioner Miller did not address factors other than increased imports which contributed to serious injury to the domestic tin mill industry.

10.621 In the view of the Panel, the fact that those other factors were the same, does not mean that new findings on causation did not have to be made. The non-attribution obligation comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors. For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-Canadian sources and serious injury.

10.622 Second, it may well be that imports from Mexico, Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-Canadian

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[5682] USITC Second Supplementary Report, p. 529
[5683] USITC Second Supplementary Report, p. 4 (footnote omitted).

imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5684] The Panel recognizes that if imports from an excluded source were "small and sporadic", "(virtually) non-existent"[5685] or "miniscule"[5686], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.623 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on tin mill products, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(c) Hot-rolled bar

(i) The USITC's findings

10.624 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5687] Specifically as regards hot-rolled bar, the USITC made the following findings:

> "We report that increased imports of carbon and alloy hot-rolled bar and light shapes ('hot-rolled bar') from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing hot-rolled bar.
>
> Non-NAFTA imports of hot-rolled bar have increased. The quantity of these imports rose from 584,126 short tons in 1996 to 644,577 short tons in 1997 and to 1.1 million short tons in 1998. Non-NAFTA imports then declined to 925,711 short tons in 1999 and increased to 1.2 million short tons in 2000. Non-NAFTA imports increased by 107.9 percent from 1996 to 2000, and had major increases from 1997 to 1998 (when they increased by 70.4 percent) and from 1999 to 2000 (when they increased by 31.2 percent). These were the same years that imports from all sources increased most rapidly. Non-NAFTA imports, however, increased at a greater rate than imports from all sources.[5688]

[5684] USITC Second Supplementary Report, p. 4.
[5685] USITC Report, Vol. I, p. 529 and footnote 5; United States' first written submission, para. 754.
[5686] USITC Report, Vol. I, footnote 28 on p. 310.
[5687] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5688] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. The quantity of non-NAFTA imports was lower in interim 2001, when it was 403,165 short tons, than in interim 2000, when it was 630,673 short tons.

The ratio of non-NAFTA imports of hot-rolled bar to domestic production also increased significantly during the period examined, growing from 6.8 percent in 1996 to 13.2 percent in 2000. The ratio increased most notably from 1997 to 1998 and from 1999 to 2000.[5689]

In our analysis of causation with respect to imports from all sources, we observed that increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling, leading to poor operating results and plant closures.[5690] This is also applicable to non-NAFTA imports.

With respect to market share measured by quantity, hot-rolled bar imports from sources other than Canada and Mexico declined from 5.8 percent in 1996 to 5.7 percent in 1997, increased to 9.4 percent in 1998, declined to 8.4 percent in 1999, and then increased to 10.8 percent in 2000. Like imports from all sources, non-NAFTA imports posted their greatest increases in market share between 1997 and 1998 and between 1999 and 2000. Moreover, the bulk of the increased market share that all imports captured from the domestic industry during the period examined was attributable to non-NAFTA imports.[5691]

Average unit values of non-NAFTA imports declined during every full-year of the period examined, as did average unit values of imports from all sources. However, the average unit values of non-NAFTA imports declined by a greater proportion from 1996 to 2000 than did imports from all sources. The average unit values of non-NAFTA imports fell from $679 in 1996 to $478 in 2000, a decline of 29.6 percent. By contrast, the average unit value of imports from all sources fell 13.5 percent over the same period.[5692]

In our analysis of import competition, we placed particular emphasis on underselling by imports from all sources during 1998 and the first half of 2000.[5693] During these periods, non-NAFTA imports undersold domestically produced hot-rolled bar by substantial margins.[5694] Indeed, non-NAFTA imports were priced lower than imports from all sources during these periods.[5695]

Consequently, the same considerations that led us to conclude that increased imports of hot-rolled bar are a substantial cause of serious injury are also applicable to increased imports of hot-rolled bar from all sources other than Canada and Mexico."[5696]

[5689] (original footnote) USITC Pub. 3479, vol. II at Table LONG-5. The ratio was lower in interim 2001, at 10.4 percent, than it was in interim 2000, when it was 12.7 percent.

[5690] (original footnote) USITC Pub. 3479, vol. I at 96.

[5691] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. The market share of non-NAFTA imports was lower in interim 2001, when it was 8.2 percent, than in interim 2000, when it was 10.4 percent.

[5692] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-3. Average unit values of imports from sources other than Canada and Mexico were higher in interim 2001 than in interim 2000.

[5693] (original footnote) *See* USITC Pub. 3479, vol. I at 96-97.

[5694] (original footnote) USITC Pub. 3479, vol. II at Table LONG-90

[5695] (original footnote) *Compare* USITC Pub. 3479, vol. II at Table LONG-90, with Confidential Report (CR), Table LONG-ALT-90.

[5696] USITC Second Supplementary Report, pp. 5-6.

(ii) Claims and arguments of the parties

10.625 The arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(c) *supra*.

(iii) Analysis by the Panel

10.626 The Panel notes that the safeguard measure on hot-rolled bar excludes imports from Canada, Mexico, Israel and Jordan[5697] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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.

10.627 The Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of hot-rolled bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5698] In these findings, the USITC established and explained that non-NAFTA imports had increased. The USITC also examined market shares, average unit values and underselling of imports from non-NAFTA sources and found that non-NAFTA imports captured the bulk of the market share lost by domestic producers, that their average unit values declined more sharply and that they were priced lower than was the case for all imports.[5699]

10.628 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied. In the Second Supplementary Report, the USITC did not address factors other than increased imports which contributed to the causation of serious injury to the domestic hot-rolled bar industry. The United States maintains that there was no need to do so since the "other factors", i.e. the non-import factors either did not cause the serious injury or were unrelated to the specific source of imports, so that the non-attribution performed in the main USITC Report remains valid.[5700]

10.629 In the view of the Panel, the fact that those other factors were the same, does not mean that new findings on causation did not have to be made. The obligation of non-attribution comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial relationship of cause and effect between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

[5697] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5698] USITC Second Supplementary Report, pp. 4-6.
[5699] Second Supplementary Report, p. 6.
[5700] United States' first written submission, para. 834.

10.630 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.631 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5701] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.632 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5702] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5703] or, as the USITC found, "at very low levels" and non-existent[5704], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.633 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on hot-rolled bar after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(d) Cold-finished bar

(i) The USITC's findings

10.634 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel

[5701] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5702] USITC Second Supplementary Report, p. 4.
[5703] United States' first written submission, para. 754.
[5704] USITC Report, Vol. I, p. 376 and footnote 117.

and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5705] Specifically, as regards cold-finished bar, the USITC made the following findings:

> "We report that increased imports of carbon and alloy cold-finished bar ("cold-finished bar") from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing cold-finished bar.
>
> Non-NAFTA imports of cold-finished bar have increased. The quantity of these imports rose from 137,834 short tons in 1996 to 167,256 short tons in 1997 and then to 201,473 short tons in 1998. Non-NAFTA imports then declined to 154,971 short tons in 1999 and increased to 233,940 short tons in 2000. Non-NAFTA imports had a major increase from 1999 to 2000, when they rose by 51.0 percent. This was the same year that imports from all sources increased most sharply. Non-NAFTA imports, however, increased at a greater rate than imports from all sources both from 1999 to 2000 and over the entire period examined.[5706]
>
> The ratio of non-NAFTA imports of cold-finished bar to domestic production also increased significantly during the period examined, growing from 11.8 percent in 1996 to 17.6 percent in 2000. The ratio increased most notably from 1999 to 2000, when it rose by 6.4 percentage points.[5707]
>
> In our analysis of causation with respect to imports from all sources, we stated that aggressive pricing by imports during the latter portion of the period examined caused the industry to lose market share and revenues.[5708] This observation is applicable as well to non-NAFTA imports.
>
> With respect to market share measured by quantity, cold-finished bar imports from non-NAFTA sources increased from 9.8 percent in 1996 to 10.5 percent in 1997 and then to 12.1 percent in 1998. The market share of these imports then declined to 9.6 percent in 1999 and increased to 14.3 percent in 2000. Like imports from all sources, non-NAFTA imports posted a significant increase in market share between 1999 and 2000. Indeed, non-NAFTA imports were responsible for the entire increase in import market share both during this period and the period between 1996 and 2000.[5709]
>
> Average unit values of cold-finished bar imports from sources other than Canada and Mexico declined during every full-year of the period examined, falling from $919 in 1996 to $758 in 2000. The 17.6 percent decline in average unit values for non-

[5705] Second Supplementary Report, p. 4 (footnote omitted).

[5706] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The quantity of non-NAFTA imports was lower in interim 2001, when it was 99,082 short tons, than in interim 2000, when it was 122,028 short tons.

[5707] (original footnote) USITC Pub. 3479, vol. II at Table LONG-6. The ratio was higher in interim 2001, at 17.5 percent, than it was in interim 2000, when it was 17.0 percent.

[5708] (original footnote) *See* USITC Pub. 3479, vol. I at 105.

[5709] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The market share of non-NAFTA imports was higher in interim 2001, when it was 14.2 percent, than in interim 2000, when it was 13.5 percent.

> NAFTA imports from 1996 to 2000 was greater than the decline in average unit values for imports from all sources over the same period.[5710]
>
> In our analysis of import competition, we discussed pricing trends and underselling of one-inch round C12L14 during 1999 and 2000.[5711] For imported C12L14 from non-NAFTA sources, there were significant price declines during 1999. Prices declined further during 2000, particularly during the final quarter of the year. Between the second quarter of 1999 and the fourth quarter of 2000, non-NAFTA imports of C12L14 undersold the domestically-produced product by margins ranging from ***.[5712] Both the pricing trends and the underselling data for non-NAFTA imports are similar to those for imports from all sources on which we relied in our injury determination.[5713]
>
> Consequently, the same considerations that led us to conclude that increased imports of cold-finished bar are a substantial cause of serious injury are also applicable to increased imports of cold-finished bar from all sources other than Canada and Mexico."[5714]

(ii) Claims and arguments of the parties

10.635 The arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(d) *supra*.

(iii) Analysis by the Panel

10.636 The Panel notes that the safeguard measure on cold-finished bar excludes imports from Canada, Mexico, Israel and Jordan[5715] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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.

10.637 The Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question of whether increased imports of cold-finished bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5716] In these findings, the USITC established and explained that non-NAFTA imports had increased. The USITC also examined the market share, average unit values and pricing data concerning imports from non-NAFTA sources. It concluded that non-NAFTA imports were responsible for the entire increase in import market share from 1999 to 2000 and from 1996 to 2000, that the average unit values of such imports declined during every full year of the period

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[5710] (original footnote) USITC Pub. 3479, vol. III at Table LONG-C-4. The average unit values of non-NAFTA imports were higher in interim 2001 than in interim 2000.
[5711] (original footnote) *See* USITC Pub. 3479, vol. I at 106-07.
[5712] (original footnote) CR, Table LONG-92.
[5713] (original footnote) *Compare* USITC Pub. 3479 at 105-07.
[5714] USITC Second Supplementary Report, pp. 6-7.
[5715] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5716] USITC Second Supplementary Report, pp. 4, 6-7.

examined, and that non-NAFTA imports of the C12L14 product undersold the domestically producer product between the second quarter of 1999 and the fourth quarter of 2000.[5717]

10.638 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards, including the requirement of non-attribution, has not been satisfied. In the Second Supplementary Report, the USITC did not address other factors than increased imports which contributed to the causation of serious injury to the domestic cold-finished bar industry. The United States maintains that there was no need to do so, since of the two "other factors", i.e. the non-import factors identified, one did not cause the serious injury observed and the other one was discussed in the analysis pertaining to all imports. Hence, in the view of the United States, the non-attribution performed in the main USITC Report remains valid.[5718]

10.639 In the Panel's view, the fact that those other factors were the same, does not mean that no new findings on causation had to be made. The obligation of non-attribution comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial causal relationship between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

10.640 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. The competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.641 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5719] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.642 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports

[5717] See para. 10.634.
[5718] United States' first written submission, paras. 838-846.
[5719] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding (establishing explicitly) to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5720] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5721] or non-existent[5722], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.643 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on cold-finished bar, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(e) Rebar

(i) The USITC's findings

10.644 Before the Panel, the United States relies on footnote 704 of the USITC Report. This footnote states:

> "We find that our injury analysis would not be affected in any way by the exclusion of rebar imports from Canada and Mexico.
>
> Exclusion of imports from Canada and Mexico only makes the increase in imports during the period examined more dramatic. Imports of rebar from all sources other than Canada and Mexico increased from 302,217 tons in 1996 to 403,881 tons in 1997, to 1.1 million tons in 1998, and then to 1.7 million tons in 1999. Imports then decreased to 1.6 million tons in 2000. Imports from sources other than Mexico and Canada were lower in interim 2001, at 778,779 tons, than in interim 2000, when they were 960,625 tons. Imports from sources other than Mexico and Canada increased by 434.8 percent from 1996 to 2000, and had major increases both from 1997 to 1998 (183.5 percent) and from 1998 to 1999 (50.2 percent). *See* CR and PR, Table LONG-7.
>
> Excluding Canada and Mexico also serves to accentuate the increase in market share of imports from other sources. The market share of rebar imports from sources other than Canada and Mexico increased from 5.5 percent in 1996 to 21.4 percent in 1999, its peak level of the period examined, and then declined to 19.9 percent in 2000. The market share of imports from sources other than Mexico and Canada was lower in interim 2001 than interim 2000. *See* CR and PR, Table LONG-72.
>
> Average unit values of imports from sources other than Canada and Mexico followed the same pattern as average unit values of imports from all sources. The average unit value of imports from sources other than Canada and Mexico from $300 in 1996 to

[5720] USITC Second Supplementary Report, p. 4.
[5721] United States' first written submission, para. 754.
[5722] USITC Report, Vol. I, p. 376 and footnote 117.

> $275 in 1998, then plummeted to $207 in 1999, and increased slightly to $215 in 2000. These average unit values were $210 in interim 2000 and $224 in interim 2001. *See* CR and PR, Table LONG-7.
>
> Finally, excluding imports from Canada and Mexico from the database does not appreciably change import pricing trends during the period examined. There were no pricing observations for imports from Canada, and imports from Mexico were sold at higher prices than imports from all other sources during every quarter for which pricing data were collected except the fourth quarter of 1996 and the first quarter of 1997. Consequently, for periods after 1998, exclusion of Mexican imports increases the magnitude of underselling margins somewhat. *See* CR and PR, Table LONG-93.
>
> Consequently, the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated."[5723]

10.645 The USITC also reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners".[5724]

(ii) Claims and arguments of the parties

10.646 The complainants assert that neither the USITC Report nor the USITC Supplementary Report contain any particular findings establishing "explicitly" that increased imports from non-NAFTA sources satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. The claims and arguments of the complainants as regards the USITC's findings on rebar are set out in more detail in Sections VII.K.2, 3(b) and 4(e) *supra*.

10.647 The United States relies on footnote 704 of the USITC's analysis of all imports, which provides a detailed analysis of non-NAFTA rebar imports. In that footnote, the USITC expressly found that "the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated".[5725] The claims and arguments of the United States as regards the USITC's findings on rebar are set out in more detail in Sections VII.K.2, 3(b) and 4(e) *supra*.

(iii) Analysis by the Panel

10.648 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on rebar.[5726] The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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.

[5723] USITC Report, Vol. I, p. 116, footnote 704.
[5724] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5725] USITC Report, p. 116, footnote 704.
[5726] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.649 The Panel notes two legal flaws in the USITC's findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure.

10.650 First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of increased imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and serious injury, the injury caused by excluded imports must be accounted for. The USITC did not sufficiently do so by noting the similarity of average unit value patterns between all imports and non-NAFTA imports and that non-NAFTA import undersold domestic goods even more strongly than all imports (on average) did.[5727] This approach does not account for the possibility that serious injury caused by non-NAFTA imports is but a part of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect. In other words, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury.

10.651 Second, the Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5728] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.652 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5729] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5730] or non-existent[5731], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.653 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on rebar, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

[5727] USITC Report, Vol. I, p. 116, footnote 704.
[5728] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5729] Second Supplementary Report, p. 4.
[5730] United States' first written submission, para. 754.
[5731] USITC Report, Vol. I, p. 376 and footnote 117.

(f) Welded pipe

(i) The USITC's findings

10.654 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5732] Specifically as regards welded pipe, the USITC made the following findings:

> "We report that increased imports of welded tubular products other than OCTG from non-NAFTA countries are a substantial cause of the threat of serious injury to the domestic industry producing welded tubular products other than OCTG.
>
> Non-NAFTA imports of welded tubular products other than OCTG have increased. Imports from sources other than the NAFTA countries increased from 786,151 short tons in 1996 to 1,420,685 short tons in 2000, and from 724,859 short tons in interim 2000 to 870,944 short tons in interim 2001. Non-NAFTA imports had major increases of 20-30 percent in every year of the period examined except 1999.[5733] Similarly, the ratio of non-NAFTA imports of such welded tubular products to US production increased in each year except 1999 during the period examined; the ratio rose from 16.9 percent in 1996 to 29.7 percent in 2000, and was 34.5 percent in interim 2001 compared to 28.6 percent in interim 2000.[5734]
>
> Similarly, with respect to market share, measured by quantity, non-NAFTA imports increased from 13.1 percent in 1996 to 19.8 percent in 2000, and were 22.7 percent of the market in the first half of 2001, compared to 18.9 percent in the first half of 2001 [sic].[5735]
>
> Moreover, prices for standard pipe and mechanical pipe from non-NAFTA sources undersold comparable domestic products in all but one quarter (32 of 33 quarters) for which data were available. For both products, the prices of pipe from non-NAFTA countries fell over the period examined, including during the most recent quarter or quarters for which data are available.[5736]
>
> Finally, excluding Canada and Mexico from the database does not appreciably alter projections for foreign production, capacity, and exports to the United States. Indeed, capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002.[5737]
>
> Consequently, the same considerations that led us to conclude that increased imports of welded tubular products (other than OCTG) are a substantial cause of the threat of

[5732] Second Supplementary Report, p. 4 (footnote omitted).
[5733] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-4.
[5734] (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-6.
[5735] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-4.
[5736] (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-58-59.
[5737] (original footnote) USITC Pub. 3479, vol. II, at Tables TUBULAR-30-32.

> serious injury are also applicable to increased imports of welded tubular products (other than OCTG) from all sources other than Canada and Mexico."[5738]

(ii) Claims and arguments of the parties

10.655 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(f) *supra*.

(iii) Analysis by the Panel

10.656 The Panel notes that the safeguard measure on welded pipe excludes imports from Canada, Mexico, Israel and Jordan[5739] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of welded pipe from non-NAFTA countries are a substantial cause of the threat of serious injury to the domestic industry.[5740]

10.657 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of (increased) imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and the threat of serious injury to the domestic industry, the threat of serious injury caused by excluded imports must be accounted for. The USITC did not adequately do so by stating that standard and mechanical pipe from non-NAFTA countries undersold domestic goods.[5741] This does not account for the fact that the threat of serious injury caused by non-NAFTA imports is but a part of the threat of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect. In other words, a genuine and substantial relationship of cause and effect between all increased imports and threat of serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and threat of serious injury.

10.658 Second, the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5742] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

[5738] USITC Second Supplementary Report, pp. 10-11.
[5739] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5740] USITC Second Supplementary Report, pp. 4, 10-11.
[5741] USITC Second Supplementary Report, p. 10.
[5742] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.659 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5743] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5744] or below one per cent and non-existent[5745], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.660 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on welded pipe, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(g) FFTJ

(i) The USITC's findings

10.661 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5746] Specifically as regards FFTJ, the USITC made the following findings:

> "We report that increased imports of carbon and alloy fittings from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing carbon and alloy fittings.
>
> Non-NAFTA imports of carbon and alloy fittings have increased. Imports from sources other than the NAFTA countries increased from 76,079 short tons in 1996 to 100,592 short tons in 2000; non-NAFTA imports increased in each year of the period examined except 1997.[5747] Similarly, the ratio of non-NAFTA imports to US production increased in each year of the period examined except 1997; the ratio rose from 37.1 percent in 1996 to 51.8 percent in 2000, and was 69.0 percent in interim 2001 compared to 43.9 percent in interim 2000.[5748]

[5743] USITC Second Supplementary Report, p. 4.
[5744] United States' first written submission, para. 754.
[5745] USITC Report, Vol. I, p. 385 and footnote 155.
[5746] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5747] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-6.
[5748] (original footnote) USITC Pub. 3479, vol. II, at Table TUBULAR-8.

> With respect to market share, measured by quantity, non-NAFTA imports increased from 25.7 percent in 1996 to 31.0 percent in 2000, and were 36.3 percent of the market in the first half of 2001, compared to 28.8 percent in the first half of 2001 [sic].[5749]
>
> Average unit values of non-NAFTA imports were similar to the average unit values of imports from all sources and generally were above domestic average unit values.[5750] ***.[5751] ***.
>
> Consequently, the same considerations that led us to conclude that increased imports of carbon and alloy fittings are a substantial cause of serious injury are also applicable to increased imports of carbon and alloy fittings from all sources other than Canada and Mexico.
>
> The conclusion would not be different if only Mexico was excluded, or if only Canada was excluded."[5752]

(ii) Claims and arguments of the parties

10.662 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(g) *supra*.

(iii) Analysis by the Panel

10.663 The Panel notes that the safeguard measure on FFTJ excludes imports from Canada, Mexico, Israel and Jordan[5753] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of FFTJ from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5754]

10.664 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of (increased) imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and serious injury, the injury caused by excluded imports must be accounted for. The USITC did not adequately do so by stating that average unit values of non-NAFTA imports were similar to those of all

[5749] (original footnote) USITC Pub. 3479, vol. III, at Table TUBULAR C-6. Non-NAFTA imports increased from 45,537 short tons in interim 2000 to 63,226 short tons in interim 2000 [sic]. *Id*.
[5750] (original footnote) USITC Pub. 3479, Vol. I, at 176.
[5751] (original footnote) USITC Pub. 3479, Vol. II, at Table TUBULAR-61.
[5752] Second Supplementary Report, p. 8.
[5753] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5754] USITC Second Supplementary Report, pp. 4, 8.

imports.[5755] This does not account for the fact that serious injury caused by non-NAFTA imports is but a part of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect.

10.665 Moreover, when discussing non-NAFTA imports in the Second Supplementary Report, the USITC did not address other factors than increased imports which contributed to the causation of serious injury to the domestic FFTJ industry. The United States maintains that there was no need to do so since of the five "other factors" identified in the analysis of all imports, four were found not to cause the serious injury and one, purchaser consolidation, focused exclusively on domestic industry data.[5756]

10.666 In the view of the Panel, the fact that those other factors were the same, does not mean that no new findings on causation had to be made. The non-attribution obligation comprises the obligation of separating and distinguishing the respective effects of increased imports and other factors to discern whether there is a genuine and substantial causal relationship between increased imports and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports or the effects of only some increased imports with the effects of other factors.

10.667 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. As already stated, the competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.668 Second, the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5757] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.669 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, be they about all imports, be they about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard

[5755] USITC Second Supplementary Report, p. 8.
[5756] United States' first written submission, para. 882.
[5757] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

measure.[5758] The Panel recognizes that if imports from an excluded source were "small and sporadic"[5759] or below one per cent and "virtually non-existent"[5760], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.670 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on FFTJ, after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(h) Stainless steel bar

(i) The USITC's findings

10.671 In the Second Supplementary Report, the USITC reported "that its results would have been the same had imports from Canada and Mexico been excluded from the analysis." The USITC also indicated, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5761] Specifically as regards stainless steel bar, the USITC made the following findings:

> "We report that increased imports of stainless bar and light shapes ("stainless bar") from non-NAFTA countries are a substantial cause of serious injury to the domestic industry producing stainless bar.
>
> Non-NAFTA imports of stainless bar have increased. In terms of quantity, imports of stainless bar and light shapes from non-NAFTA countries increased by 61.1 percent during the five full-years of the period of investigation, growing from 81,426 short tons in 1996 to 131,184 short tons in 2000.[5762] Although the quantity of non-NAFTA imports fluctuated somewhat during the period (remaining essentially stable in 1998 and declining somewhat in 1999 from its level in 1997 and 1998), a rapid and dramatic increase in the quantity of non-NAFTA imports occurred during the last full-year of the period of investigation, when non-NAFTA imports of stainless bar grew by 38,843 short tons.[5763]
>
> The ratio of non-NAFTA imports of stainless steel bar to domestic production also increased significantly during the period, growing from 43.1 percent in 1996 to 73.3

[5758] USITC Second Supplementary Report, p. 4.
[5759] United States' first written submission, para. 754.
[5760] USITC Report, Vol. I, p. 390 and footnote 180.
[5761] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5762] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4.
[5763] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4. The quantity of these imports declined between interim 2000 and interim 2001, dropping from 73,738 short tons to 57,584 short tons. USITC Pub. 3479, Vol. III at Tables STAINLESS-6 & STAINLESS-C-4.

percent in 2000, with the largest single percentage increase in the ratio (17.1 percentage points) occurring in 2000.[5764]

In sum, non-NAFTA imports of stainless bar increased significantly, both in quantity terms and as a ratio to domestic production, between 1996 and 2000, with the largest single increase in imports occurring during the last full-year of the period. Although there was a decline in non-NAFTA imports in terms of quantity and as a ratio to domestic production between interim 2000 and interim 2001, we report that non-NAFTA imports of stainless bar have increased.

As we concluded with respect to imports of stainless bar from all sources, we report that increases in non-NAFTA import volumes between 1996 and 2000 had a serious adverse impact on the production levels, shipments, commercial sales and market share of the domestic industry. During the period from 1996 to 2000, the quantity of non-NAFTA imports increased by 61.1 percent and the market share of those imports increased by 11 percentage points as well.[5765] Although these import increases occurred during a period of growing demand, the industry's production volumes, shipment levels and sales revenues all declined significantly as a result of increases in non-NAFTA import volume during the period between 1996 and 2000[5766], with the industry's production levels falling by 5.3 percent[5767], its net commercial sales falling by *** percent[5768], and the value of its net commercial sales falling by *** percent during the period.[5769] Moreover, the industry's share of the market also fell considerably, dropping from 64.6 percent in 1996 to 59.8 percent in 1999 and then to 53.5 percent in 2000, with imports from non-NAFTA sources accounting for all of the industry's market share loss during that period.[5770] Accordingly, we report that the increasing imports from non-NAFTA sources had a serious adverse impact on the production, shipment, sales and market share levels of the industry during the period of investigation.

Excluding imports from Canada and Mexico from our analysis also would not affect our conclusion that imports affected domestic prices of stainless bar negatively during the period of investigation. There were no reported prices for the price comparison products with respect to imports from Mexico and the exclusion of the reported price comparisons for Canadian imports results in an increase in the percentage of price comparisons in which underselling by imports occurred during the period.[5771] In particular, after excluding the data for Canada, the record indicates that imports from other sources undersold the domestic merchandise throughout the period of investigation in 40 of 43 possible quarterly comparisons at underselling margins of up

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[5764] (original footnote) USITC Pub. 3479, Vol. III at Table STAINLESS-6. The ratio of non-NAFTA imports to domestic production declined from 77.7 percent in interim 2000 to 70.4 percent in interim 2001. USITC Pub. 3479, Vol. III at Table STAINLESS-6.

[5765] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-67 & STAINLESS-C-4.

[5766] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-18, STAINLESS-30, & STAINLESS-C-4.

[5767] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-18 & STAINLESS-C-4.

[5768] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-30 & STAINLESS-C-4.

[5769] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-30 & STAINLESS-C-4.

[5770] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-67 & STAINLESS-C-4.

[5771] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-86, STAINLESS-87, STAINLESS-98, STAINLESS-99, & Figures STAINLESS-7 & STAINLESS-8.

> to 51 percent.[5772] Given these underselling trends and taking into account the analysis set forth in our pricing analysis for imports of stainless bar from all sources, we report that this underselling by non-NAFTA imports depressed and suppressed domestic prices during the period of investigation and led to declines in the sales revenues and operating profits of the industry.
>
> Consequently, the same considerations that led us to conclude that increased imports of stainless bar from all sources are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of stainless bar from all sources other than Canada and Mexico."[5773] [5774]

(ii) Claims and arguments of the parties

10.672 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(h) *supra*.

(iii) Analysis by the Panel

10.673 The Panel notes that the safeguard measure on stainless steel bar excludes imports from Canada, Mexico, Israel and Jordan[5775] and that the determination made by the USITC in October 2001 covered imports from all sources. The question is, therefore, whether the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan meet 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. In this regard, the Panel notes that the USITC has, in its Second Supplementary Report, made certain findings on the exclusion of imports from Israel and Jordan and with regard to the question whether increased imports of stainless steel bar from non-NAFTA countries are a substantial cause of serious injury to the domestic industry.[5776]

10.674 The Panel notes two legal flaws in these findings and, therefore, believes that they do not establish explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure satisfy the requirements for the imposition of a safeguard measure. First, the requirement of causation in Articles 2.1 and 4.2(b) of the Agreement on Safeguards has not been satisfied. In the view of the Panel, the USITC failed to consider adequately the fact that it was dealing with a smaller amount of (increased) imports. In order to establish the existence of a genuine and substantial relationship of cause and effect between increased imports (covered by the measure) and serious injury, the injury caused by excluded imports must be accounted for. In assessing the injurious impact of non-NAFTA imports on the domestic industry, the USITC found that frequent underselling by non-NAFTA imports at high margins depressed and suppressed domestic prices during the period

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[5772] (original footnote) USITC Pub. 3479, Vol. III at Tables STAINLESS-87, STAINLESS-99, & Figure STAINLESS-9.

[5773] (original footnote) In this regard, we note that we would make this finding whether imports of stainless bar and light shapes from Mexico are included in the analysis outlined above or not. Imports of stainless bar and light shapes from Mexico accounted for a minuscule and declining share of the market and imports during the period of investigation and there was no reported price comparison data for imports from Mexico. Consequently, the analysis set forth above would apply whether or not the President chose to include imports from Mexico in any remedy imposed against imports of stainless bar and light shapes.

[5774] USITC Second Supplementary Report, pp. 8-10.

[5775] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

[5776] USITC Second Supplementary Report, pp. 4, 8-10.

of investigation and led to declines in the sales revenues and operating profits of the industry.[5777] This approach is inadequate because it does not account for the fact that serious injury caused by non-NAFTA imports is but a part of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect.

10.675 Moreover, when discussing non-NAFTA imports in the Second Supplementary Report, the USITC did not address other factors than increased imports which contributed to the causation of serious injury to the domestic stainless steel bar industry. The United States maintains that there was no need to do so since of the three "other factors" identified and investigated in the analysis of all imports (changes in demand during late 2000 and 2001, increases in energy costs, and the poor operating results of two producers during the period) were found not to cause the serious injury observed.[5778]

10.676 As the Panel understands, the USITC rather concluded, about the first two of the three "other factors" that they were not a more important cause of serious injury than imports.[5779] In other words, there were other factors and they also did cause some injury. In the view of the Panel, this made it necessary to make adjusted new findings on whether there is a genuine and substantial causal relationship between increased imports (from covered sources) and serious injury. It may be unnecessary to repeat the exercise of separating and distinguishing the effects of other factors. However, the effects of increased imports *from all sources* and the effects of increased imports *only from a subset of sources* will not necessarily be the same. Therefore, it potentially makes a difference whether one compares the effects of all increased imports, or the effects of only some increased imports with the effects of other factors.

10.677 For that reason, a genuine and substantial relationship of cause and effect between all increased imports and serious injury, if established, is not a sufficient basis for assuming the existence of such a genuine and substantial link between increased imports from non-NAFTA sources and serious injury. The United States' proposition could be maintained only if those two groups of imports had the same effects. At least for quantitative reasons and the fact that increased NAFTA imports undoubtedly had *some* effect, this proposition cannot be upheld in this case. As already stated, the competent authority is under an obligation to account for the fact that excluded (FTA) imports contributed to the serious injury suffered by the domestic industry in establishing whether imports from sources covered by the measure satisfy the requirement of causing serious injury.

10.678 Second, the sources excluded from the measure are not only Canada and Mexico, but also Israel and Jordan.[5780] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.679 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports

[5777] USITC Second Supplementary Report, p. 9. See para. 10.671.
[5778] United States' first written submission, para. 893.
[5779] USITC Report, Vol. I, p. 212.
[5780] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5781] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5782] or "small or non-existent" and "non-existent"[5783], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.680 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on stainless steel bar after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(i) Stainless steel wire

(i) Claims and arguments of the parties

10.681 The complainants assert that the determination made by the USITC in October includes all imports. Neither the initial USITC Report nor the Second Supplementary Report establishes explicitly that imports from sources covered by the measure satisfy the conditions of Articles 2.1 and 4.2 of the Agreement on Safeguards. The Second Supplementary Report does not even mention stainless steel wire specifically. The claims and arguments of the complainants as regards the USITC's findings on stainless steel wire are set out in more detail in Sections VII.K.2, 3(b) and 4(i) *supra*.

10.682 The United States contends that, when performing the analysis of all imports, Commissioners Bragg and Koplan made the necessary findings on non-NAFTA imports of stainless steel wire. The claims and arguments of the United States as regards the USITC's findings on stainless steel wire are set out in more detail in Sections VII.K.2, 3(b) and 4(i) *supra*.

(ii) Analysis by the Panel

Split findings

10.683 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on stainless steel wire.[5784] Second, the October 2001 determination by the USITC covered imports from all sources. Hence, the requirement of parallelism requires that the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports of stainless steel wire from sources other than Canada, Mexico, Israel and Jordan satisfy the requirements 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. In this regard, before the Panel, the United States relies on findings made by Commissioners Koplan and Bragg in the USITC Report.

[5781] USITC Second Supplementary Report, p. 4.
[5782] United States' first written submission, para. 754.
[5783] USITC Report, Vol. I, p. 399 and footnote 225.
[5784] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

10.684 The Panel recalls that Commissioner Bragg made her findings on a product category broader than, and comprising, stainless steel wire (stainless steel wire and stainless steel wire rope), as Commissioner Devaney did.[5785] The Panel also recalls that stainless steel wire is not only the product category for a separate remedy imposed by the United States, but also the product for which the three Commissioners were reported to have made the affirmative determination[5786] which later served as the basis for the safeguard measure.[5787] Those three Commissioners *supported* this determination with findings that are based on different product categories. However, for the purposes of WTO law, the USITC has actually made a determination on stainless steel wire as a separate product. The Panel notes that this is confirmed by the Proclamation of the President of 5 March 2001, in which the President "decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to [tin mill products and stainless steel wire] to be the determination of the [US]ITC".[5788]

10.685 Therefore, and for the reasons elaborated in the context of tin mill products[5789], the Panel does not believe that findings on a product category other than stainless steel wire are able to support a measure relating to stainless steel wire, unless there is a reasoned and adequate explanation relating the two product categories. If it was necessary to establish explicitly certain conditions with regard to stainless steel wire, then these conditions cannot be established with findings on a different (broader) product category. Such findings would not be specific to the product to which the USITC determination and the United States' safeguard measure related. Hence, the views of Commissioners Bragg[5790] and Devaney[5791], who reached no findings on stainless steel wire but did reach findings on a broader category including stainless steel wire, do not meet the requirements of parallelism. Therefore, in the remainder of this section, the Panel will review the findings reached by Commissioner Koplan which relate to stainless steel wire as a separate product.

Commissioner Koplan's and the USITC's findings

10.686 Commissioner Koplan made the following findings:

> "Additionally, I conclude that increased imports from all sources other than Canada and Mexico are a substantial cause of the threat of serious injury to the domestic industry. Imports of stainless steel wire from Canada and Mexico accounted for a small and decreasing share of domestic apparent consumption over the period of investigation. Imports from Canada and Mexico accounted for 3.8 percent of apparent consumption in 1996, 3.6 percent in 1997, 1.5 percent in 1998, 0.4 percent in 1999, and 0.3 percent in 2000. Imports from Canada and Mexico accounted for 0.3 percent of apparent consumption in interim 2000 and in interim 2001. Imports from all sources other than Canada and Mexico accounted for an increasing share of apparent consumption over the period of investigation, increasing from 20.1 percent in 1996 to 22.8 percent in 2000. Between the interim periods, imports from all other sources other than Canada and Mexico increased from 20.7 percent in interim 2000 to 27.8 percent in interim 2001. CR and PR at Table STAINLESS-C-7. Consequently,

[5785] USITC Report, Vol. I, p. 277 (Commissioner Bragg) and p. 335 (Commissioner Devaney).
[5786] USITC Report, Vol. I, p. 27.
[5787] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5788] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10553.
[5789] *Supra* paras. 10.613-10.614.
[5790] USITC Second Supplementary Report, pp. 22-23.
[5791] The Panel notes that the United States does not rely on findings made by Commissioner Devaney in defence, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports. See USITC Report, Vol. I, p. 347.

> the conclusions I have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated."[5792]

10.687 The USITC also reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5793]

Panel's assessment

10.688 The Panel does not believe that these statements establish explicitly, with a reasoned and adequate explanation, that increased imports from sources other than Canada, Mexico, Israel and Jordan, alone, satisfy the requirements of Article 2.1 as elaborated in Article 4.2 of the Agreement on Safeguards. The findings relied upon by the United States do not take account of the portion of the threat of serious injury caused by NAFTA imports. They do not establish a genuine and substantial relationship of cause and effect between non-NAFTA imports and the threat of serious injury in the light of the threat attributable to other factors. They examine an increase in imports merely in a rudimentary fashion and otherwise focus on market share developments before stating that the conclusions made concerning the effects of increased imports are equally applicable even when NAFTA imports are excluded.

10.689 Second, the Panel recalls that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan.[5794] Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.

10.690 It may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5795] The Panel recognizes that if imports from an excluded source were "small and sporadic"[5796] or "small or non-existent" and "virtually non-existent"[5797], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.691 These findings, finally, relate only to non-NAFTA imports, not to imports from sources other than Canada, Mexico, Israel and Jordan. They do not establish explicitly, with a reasoned and

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[5792] USITC Report, p. 260, footnote 36.
[5793] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5794] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.
[5795] Second Supplementary Report, p. 4.
[5796] United States' first written submission, para. 754.
[5797] USITC Report, Vol. I, p. 405 and footnote 268.

adequate explanation, that imports from sources other than Canada, Mexico, Israel and Jordan satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards.

10.692 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on stainless steel wire, after including imports from all sources in its determination and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

(j) Stainless steel rod

(i) The USITC's findings

10.693 Before the Panel, the United States relies on footnote 1437 of the USITC's analysis of all imports. This footnote states:

> "We also have considered whether the exclusion of imports of stainless rod from Mexico or Canada from our injury analysis would have affected our finding that imports were a substantial cause of serious injury to the stainless rod industry. Because imports of stainless rod from Mexico and Canada each accounted for an extremely small percentage of total imports during the period of investigation, INV-Y-180 at Table G-25, we find the exclusion of these volumes does not change our volumes or pricing analysis in a significant manner. Accordingly, our injury analysis would not be changed in any way by their exclusion."[5798]

10.694 The USITC also reported in the Second Supplementary Report, "in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[5799]

(ii) Claims and arguments of the parties

10.695 The claims and arguments of the parties as regards the USITC's findings are set out in Sections VII.K.2, 3(b) and 4(j) *supra*.

(iii) Analysis by the Panel

10.696 The Panel first notes that imports from Canada, Mexico, Israel and Jordan have been excluded from the safeguard measure on stainless steel rod.[5800] Second, the October 2001 determination by the USITC covered imports from all sources. Hence, the requirement of parallelism requires that the competent authorities of the United States have established explicitly, with a reasoned and adequate explanation, that imports of stainless steel rod from sources other than Canada, Mexico, Israel and Jordan satisfy the requirements 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.

10.697 The Panel agrees with the United States that in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports

[5798] USITC Second Supplementary Report, p. 223, footnote 1437.
[5799] USITC Second Supplementary Report, p. 4 (footnote omitted).
[5800] Proclamation No. 7529 of 5 March 2002, Federal Register, Vol. 67, No. 45, p. 10556.

from other sources satisfy the same requirements as all imports do.[5801] However, the Panel is unable to identify in the statements contained in footnote 1437 the required findings that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards. In particular, the rather implicit statement made that imports other than Canadian and Mexican imports have increased and that they have caused serious injury to the domestic industry, does not relate to imports covered by the measure which are imports from sources other than Canada, Mexico, Israel and Jordan.

10.698 Also, it may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure.[5802] The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent"[5803] or "small and non-existent" and "non-existent"[5804], it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.

10.699 The Panel concludes that the United States has acted inconsistently with the requirement of parallelism under Articles 2 and 4 of the Agreement on Safeguards by excluding imports from Canada, Mexico, Israel and Jordan from the application of the safeguard measure on stainless steel rod, after including imports from all sources in its determination, and without establishing explicitly, with a reasoned and adequate explanation, that non-excluded imports satisfy the requirements for the right to apply a safeguard measure.

G. ADDITIONAL FINDINGS

1. Judicial economy

10.700 The Panel has not addressed each and every claim raised by the complainants. Relying on judicial economy, the Panel refrains from ruling on several claims and sub-claims, including those relating to the proper definition of the imported product, the like product and the domestic industry; claims relating to serious injury; claims relating to the consistency of product exclusions with the principle of parallelism; claims relating to Articles 5, 7, 8 and 9 of the Agreement on Safeguards as well as claims relating to Articles I, X, XIII, XIX (except insofar as the latter deals with the unforeseen developments requirement) and XXIV of GATT 1994.

10.701 The principle of judicial economy is recognized in WTO law. In *US – Wool Shirt and Blouses*, the Appellate Body made clear that panels are not required to address all the claims made by

[5801] The Panel recalls in this regard that it has found the USITC's finding on increased imports of stainless steel rod to be legally inconsistent with WTO law since the facts did not show that stainless steel rod was being imported in increased quantities and therefore the USITC failed to provide a reasoned and adequate explanation of how the facts support the conclusion.

[5802] USITC Second Supplementary Report, p. 4.

[5803] United States' first written submission, para. 754.

[5804] USITC Report, Vol. I, p. 405 and footnote 268.

a complaining party. The Appellate Body relied on the explicit aim of the dispute settlement mechanism which is to secure a positive solution to a dispute (Article 3.7) or a satisfactory settlement of the matter (Article 3.4). Thus, the basic aim of dispute settlement in the WTO is to settle disputes and not to develop jurisprudence. The Appellate Body stated:

> "[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[5805]" [5806]

10.702 In its supporting reasoning, the Appellate Body also explored Article 11 of the DSU, the provision setting out the mandate of panels and found nothing in this provision that would require panels to examine all legal claims made by a complaining party. The Appellate Body relied on previous dispute settlement practice, *inter alia*, under the GATT 1947. Specifically, it stated: "if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated."[5807]

10.703 Yet, the Panel is aware of the limits to its discretionary right to exercise judicial economy. As the Appellate Body stated in *Australia – Salmon*, the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[5808]

10.704 The Panel believes that these principles are applicable in the present dispute. The complainants have raised a large number of legal claims, arguing that each of the safeguard measures at issue in this dispute violates various obligations contained in the Agreement on Safeguards and GATT 1994. The Panel has concluded that each safeguard measure is inconsistent with various provisions of the Agreement on Safeguards or the GATT 1994. The Panel need not to examine whether each of the same safeguard measures also violates other provisions of the Agreement on Safeguards or the GATT 1994 that were raised by the complainants.

10.705 In addressing several of the claims raised in this dispute (those relating to unforeseen developments, increased imports, causation and parallelism), the Panel believes that it has effectively resolved the dispute in finding inconsistencies that result in the absence of the right of the United States to take the safeguard measures at issue in this dispute. Since the safeguard measures at issue

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[5805] (original footnote) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

[5806] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340.

[5807] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340 (footnote omitted).

[5808] Appellate Body Report, *Australia – Salmon*, para. 223.

were deprived of a legal basis, the United States could not impose such safeguard measures against any WTO Members, Thus, the Panel does not need to examine the remaining claims, a number of which, have been raised only by some of the complainants and sometimes only for some of the measures at issue.

10.706 Since the Panel's conclusions mean that the United States had not complied with the requirements to exercise the right to apply safeguard measures, there is no need to address those claims relating to the alleged breaches of obligations regarding the *application* of such safeguard measures. For the same reasons, we believe that the Panel need not examine whether the tariff quota on slabs constitutes a distinct measure from that applied on the rest of CCFRS. Since the basis for that safeguard measure on slabs was a determination made on CCFRS which we concluded lacked legal basis, such determination could not provide any legal basis for a tariff quota on a sub-group of CCFRS, namely on slabs. Moreover, the Panel does not have to address the legal questions of whether the United States, in applying its safeguard measures, acted inconsistently with Articles 5.1 and 7 (relating to the necessary extent and duration), Article 5.2 of the Agreement on Safeguards and Article XIII of the GATT (quota allocation), Article 8 of the Agreement on Safeguards (maintenance of an equivalent level of concessions) or Article 9.1 of the Agreement on Safeguards (exemption of *de minimis* developing country exporters).

10.707 The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings relating to safeguard measures. In *US – Wheat Gluten*, the Appellate Body upheld the panel's exercise of judicial economy by not ruling on claims relating to Article XIX (unforeseen developments), Article I of GATT 1994 and Article 5 of the Agreement on Safeguards.[5809] In *US – Lamb*, the Appellate Body upheld the panel's exercise of judicial economy by not ruling on a claim relating to Article 5 of the Agreement on Safeguards.[5810] In fact, the panel had exercized judicial economy in relation to claims under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement on Safeguards and Articles II and XI of GATT 1994.[5811]

10.708 In the two mentioned cases, the Appellate Body accepted as basis for the panels' exercise of judicial economy the fact that the panels had reached the conclusion that inconsistencies with Articles 2.1 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 deprived the safeguard measures at issue of a legal basis.[5812] According to the Appellate Body, the panels were, therefore, entitled to exercise judicial economy and not to address further claims relating to alleged inconsistencies with further provisions of the same safeguard measures. The Appellate Body also observed that additional findings (on Article I of GATT 1994 or Article 5.1 of the Agreement on Safeguards) would not have enhanced the ability of the DSB to make sufficiently precise

[5809] Appellate Body Report, *US – Wheat Gluten*, paras. 183-184.

[5810] Appellate Body Report, *US – Lamb*, paras. 193-195. In *US – Lamb* (para. 192), the Appellate Body also referred to *Argentina – Footwear (EC)* and stated that the panel in that case had, like the panel in *US – Wheat Gluten*, "acted within its discretion in declining to address the issue of 'unforeseen developments' under Article XIX:1(a) of the GATT 1994." As a matter of fact, the panel considered Article XIX:1(a) to be of no independent relevance (see Panel Report, *Argentina – Footwear Safeguard (EC)*, para. 8.69). However, the Appellate Body itself, after reversing the panel's conclusion, saw no need to complete the analysis on the claim under Article XIX of the GATT 1994 (unforeseen developments) because violations of Articles 2 and 4 already deprived the measure of a legal basis. See Appellate Body Report, *Argentina – Footwear*, para. 98 and Appellate Body Report, *US – Wheat Gluten*, paras. 181-182.

[5811] Panel Report, *US – Lamb*, para. 7.280.

[5812] Appellate Body Report, *US – Wheat Gluten*, para. 183; Appellate Body Report, *US – Lamb*, para. 193.

recommendations and rulings in the dispute.[5813] The Panel believes that the circumstances in the present dispute are similar.

10.709 Two further claims on which the Panel exercises judicial economy are, on the one hand, under Articles 2.1 and 4.1(c) of the Agreement on Safeguards relating to the allegedly incorrect definition of the imported product, like product and the domestic industry and, on the other hand, under Articles 2.1 and 4.2(a) relating to serious injury. These claims are also concerned with the question of whether the United States has complied with the WTO requirements that must be satisfied for the right to apply a safeguard measure to exist. According to the Panel's conclusions, each of the safeguard measures lacked a legal basis under WTO law. There is, therefore, no need to address further claims which also relate to the question of whether the United States satisfied the conditions for the right to apply these measures.

10.710 All of the determinations on which the safeguard measures challenged in this dispute are based have been found to be inconsistent with several of the requirements of Article 2.1 and 4 of the Agreement on Safeguards. There is, therefore, also no need to address the claim made under Article X of GATT 1994 in relation to the decision-making process leading to the relevant determinations.

10.711 Finally, since the Panel has found that the exemption of imports from Canada, Mexico, Israel and Jordan in this case was inconsistent with the requirement of parallelism, there was no need to address the question whether this exemption in departure of Article I of GATT 1994 and Article 2.2 of the Agreement on Safeguards was justified by Article XXIV of GATT 1994. As the Appellate Body has stated, the question of whether Article XXIV of GATT 1994 can serve as an exception to Article 2.2 of the Agreement on Safeguards becomes relevant only when the requirement of parallelism has been complied with.[5814]

10.712 With reference to China and Norway's claims under Article 9.1 of the Agreement on Safeguards, the Panel recalls the provisions of Article 12.11 of the DSU pursuant to which where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for that developing country.

10.713 The Panel is aware of the crucial importance of the provisions on special and differential treatment in the WTO Agreement in general, and of Article 9.1 of the Agreement on Safeguards as one such provision.[5815] Article 9.1 of the Agreement on Safeguards, under certain circumstances, requires importing Members to exempt developing country Members from the application of safeguard measures. Those developing country Members, accordingly, are intended to enjoy the benefit of continued access to the market of the importing Member without facing the restrictions imposed by the safeguard measure. A Member imposing a safeguard measure is under an obligation to accord these advantages to every Member which is a developing country. We note that China's Protocol of Accession to the WTO makes reference to China's status in the WTO context.

[5813] Appellate Body Report, *US – Wheat Gluten*, para. 184; Appellate Body Report, *US – Lamb*, para. 194.

[5814] Appellate Body Report, *US – Line Pipe*, paras. 198-199.

[5815] It is not without reason that the Doha Ministerial Declaration contains a mandate to review all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational. See Ministerial Declaration, WT/MIN(01)/DEC/1, adopted on 14 November 2001, para. 44.

10.714 Nevertheless, the Panel believes that the principle of judicial economy also applies to a claim such as that made under Article 9.1 of the Agreement on Safeguards. The Panel, therefore, believes that it is not necessary to examine the additional specific claim raised under Article 9.1 and that China is not prejudiced in its asserted rights under Article 9.1, by the Panel's exercise of judicial economy. Since there was no legal basis to impose *any* of the safeguard measures at issue in this dispute against *any* other WTO Member, there was obviously also no legal basis to apply any of these measures to China. For this Panel, the recommendations and rulings of the DSB on claims relating to Article 9.1 would not have had any different practical effects on the WTO-compatibility of these safeguard measures.

10.715 Finally, in resorting to judicial economy, the Panel has been aware of the need for a "prompt settlement" of disputes, including the expeditious issuance of its report, as called for by Article 3.3 of the DSU.

2. The United States' request for the issuance of separate panel reports

10.716 The Panel recalls that in accordance with Article 6 of the DSU, the DSB originally established multiple panels to examine similar matters raised by the various complainants. Pursuant to two procedural agreements (one concluded on 27 June 2002 between, on the one hand, the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand and, on the other hand, the United States[5816] and the other concluded on 18 July 2002 between Brazil and the United States[5817]), the United States accepted, *inter alia*, the establishment of a single panel under Article 9.1 of the DSU. Pursuant to the two agreements and in accordance with Article 9.1 of the DSU, the DSB agreed that the various disputes would proceed on the basis of a single panel.[5818]

10.717 On 28 January 2003, the Panel received a request from the United States pursuant to Article 9.1 of the DSU that the Panel issue eight separate panel reports rather than one single report. The basis for the United States' request was to protect its DSU rights including the right to seek a solution with one or more of the individual complaints without adoption of a report or without an appeal, in case this right depended on the existence of separate reports.

10.718 On 30 January 2003, the complainants opposed that request for a number of reasons, notably because the request had not been made in a timely fashion, that complying with the request would result in additional delays and that had the complainants known that multiple reports would be issued, they would have presented their arguments differently.

10.719 A series of communications between the parties followed.[5819] On 3 February 2003, the Panel wrote to the parties that a decision on the United States' request would be issued with the Interim Panel Report but that, in any case, should the United States' request be accepted by the Panel, all such separate Panel Reports would have the same Descriptive Part. The content of this letter is reproduced in paragraph 2.18 of the Descriptive Part. On Thursday, 6 February 2003, the Panel issued a single draft Descriptive Part. On 19 February 2003 the Panel received consolidated comments from the complainants as well as comments from the United States.[5820]

[5816] WT/DS248/13, WT/DS249/7, WT/DS251/8, WT/DS252/6, WT/DS253/6, WT/DS254/6, WT/DS258/10.

[5817] WT/DS259/9.

[5818] See para. 10.1.

[5819] See paras. 2.6-2.19.

[5820] The Panel notes also that complainants co-ordinated their comments on the Panel's Interim Findings (of 9 April) as well as their comments on the United States' comments (of 16 April).

10.720 The Panel will now examine the United States' request for the issuance of separate Panel Reports. We recall that our working procedures do not address this issue as such.[5821] As a starting-point, we refer to Article 9.2 of the DSU, which deals with the issue of requests for separate reports in cases involving multiple complainants. Article 9.2 provides in relevant part that:

> "The … panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned."

10.721 The Appellate Body in *US – Offset Act (Byrd Amendment)* acknowledged that, by its terms, Article 9.2 accords to the requesting party a broad right to request a separate report, which is not made dependent on any conditions.[5822] The Appellate Body also noted that the text of Article 9.2 of the DSU contains no requirement for the request for a separate panel report to be made *by a certain time*, but also observed that the text does not explicitly provide that such requests may be made *at any time*.[5823] The Appellate Body went on to observe that Article 9.2 must not be read in isolation from other provisions of the DSU and without taking into account the overall object and purpose of that Agreement, namely that expressed in Article 3.3 of that Agreement, the prompt settlement of disputes.[5824] On the basis of the foregoing, the Appellate Body concluded that the right contained in Article 9.2 is not unqualified. In particular, it cannot justify a request for a separate panel report *at any time during the panel proceedings*.[5825]

10.722 We note also that the United States did express a reason for its request for separate Panel Reports – that is, to protect its right to seek a solution to one or more of the individual complaints without adoption of a report (or without an appeal) and, thus, claimed that it might otherwise suffer prejudice.

10.723 As for the timing of the United States' request, in the Panel's view, the United States' request for separate Panel Reports was *not necessarily* made in an *untimely* fashion. The Panel finds that the United States' request did not come too late in order to adopt the approach that we have chosen in the issuance of this report. We use the word "necessarily" because we consider that despite the fact that the request was made when the Panel's process was quite advanced – that is, three days before the draft Descriptive Part was due to be issued[5826], this did not necessarily prevent the Panel from settling the dispute in a prompt fashion. Indeed, for the reasons mentioned in the Panel's letter dated 3 February 2003[5827] and with a view to expediting the process, while respecting all the parties' rights, the Panel decided to issue a single draft Descriptive Part. The question remains, however, as to whether separate Panel Reports should be issued, of which the common Descriptive Part will form a part, to address the concerns expressed by the United States in requesting the issuance of separate Panel Reports.

10.724 In this regard, the Panel notes that the Appellate Body in *US – Offset Act* interpreted the meaning of the first sentence in Article 9.2, which provides that it is for the panel to "organize its

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[5821] See para. 6.1.
[5822] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310.
[5823] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310.
[5824] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.
[5825] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.
[5826] The draft Descriptive Part was, however, not issued on 31 January 2003 but rather on 6 February 2003; the United States' request for separate reports was made on 28 January 2003.
[5827] See para. 2.18.

examination and present its findings in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired."[5828] In so doing, the Appellate Body, referred to its comments in *EC – Hormones* about panels' discretion in dealing with procedural issues, which it said were pertinent in the context of Article 9.2 of the DSU:

> "[T]he DSU and in particular its Appendix 3, leave panels a *margin of discretion* to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling."[5829] (emphasis added)

10.725 In exercising our "margin of discretion" under Article 9.2 of the DSU, and taking into account the particularities of this dispute, the Panel decides to issue its Reports in the form of one document constituting eight Panel Reports. For WTO purposes, this document is deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page and a common Descriptive Part. This reflects the fact that the eight steel safeguard disputes were reviewed through a single panel process. This single document also contains a common set of Findings in relation to each of the claims that the Panel has decided to address. In our exercise of judicial economy, we have mainly addressed the complainants' common claims and on that basis, we were able to issue a common set of Findings which, we believed, resolved the dispute. Finally, this document also contains Conclusions and Recommendations that are particularised for each of the complainants, with a separate number (symbol) for each individual complainant.

10.726 In coming to this solution, which is specific to the present dispute, the Panel is aware that it must, in exercising its discretion under Article 9.2 of the DSU, bear in mind that "the rights which [*all*] the parties would have enjoyed had separate panels examined the complaints are in no way impaired". In fact, the approach seeks to protect the rights of both sides to the dispute. In particular, we consider that the approach protects the rights of the complainants who, in the present dispute, with the apparent agreement of the United States, referred to and relied upon each other's arguments and demonstrations, cross-referenced each other's written submissions[5830] and written answers, and explicitly stated as much. From the initiation of the panel process, parties have recognized[5831] that the complainants would act together on some common claims and that the United States would respond once to such common claims while responding as well to claims specific to some of the complainants. The complainants coordinated their presentations to the Panel, divided among themselves the argumentation on common claims often explicitly stating that they were speaking on behalf of all complainants. The complainants submitted common comments on the Descriptive Part, common comments on the Interim Findings as well as a common response to the United States' comments on the Interim Findings. At all these stages, the United States often provided one response addressing collectively the arguments made by the complainants. We are aware that some complainants may not

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[5828] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 315.

[5829] Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152.

[5830] See for example, European Communities' first written submission, paras. 16-17; Switzerland's first written submission, para. 10; Norway's first written submission, para. 8; Brazil's first written submission, para. 3; New Zealand's first written submission, para. 1.5; China's first written submission, para. 8; Japan's first written submission, para. 5; Korea's first written submission, para. 7. Throughout their written and oral submissions the complainants refered to each other's allegations and arguments. See also the oral statements of the complainants (before the Panel) stating that each of the complainant was speaking on a specific matter on behalf of the other complainants.

[5831] See para. 5 of the Panel's working procedures quoted in para. 6.1 of the Descriptive Part

have developed much argumentation in relation to one or more of the measures at issue.[5832] Yet, all complainants challenged the WTO-compatibility of all measures and decided to argue their case together; this was encouraged by the Panel and seemed to have been accepted by the United States.

10.727 Therefore, in organizing its examination of the various claims at issue, at the outset, the Panel understood that since all complainants made (some) similar violation claims against the USITC's Report for all measures at issue and since such claims were to be examined through a single panel process, complainants would rely upon each other's arguments and demonstrations when making their case. On the basis of our findings on common claims, we were able to conclude that the United States' safeguard measures lack legal basis.

10.728 We are aware that panels are not entitled to make the case for the complainants.[5833] WTO jurisprudence recognizes that panels may, after an assessment of the evidence and argumentation made by complainants, reach a conclusion as to whether, overall, the complainants made their prima facie case.[5834] We believe that in the present case, each of the complainant has made a prima facie case that the safeguard measures at issue were inconsistent with the WTO provisions listed in our Recommendations, through its own and together with each other's demonstration. In addition, we consider that this approach also protects, the right of the United States, by allowing it to respond to all arguments and allegations made with regard to each measure in a more coherent and comprehensive manner and to seek a solution with one or more of the individual complaints without adoption of that complainant's report or without an appeal, should this right at all depend on the existence of separate reports. Accordingly, we are of the view that the approach we adopted respects the principles of judicial economy and the rights of all parties.

10.729 Finally, in considering the United States' request for separate panel reports, and throughout this Panel process, the Panel has been aware of its duty to make all efforts to ensure, as far as possible, a *prompt and effective* resolution of the dispute, while respecting the rights of all parties. We believe this is essential to the functioning of the WTO.[5835]

[5832] We note in this regard that, in fact, some of the complainants may not have much trade interest in relation to some of the measures at issue, which would have a direct impact on these complainants' rights pursuant to Article 22.4 of the DSU.

[5833] Appellate Body Report, *Japan – Agricultural Products II*, paras. 126-130.

[5834] Appellate Body Report, *Korea – Dairy*, para. 145. The Appellate Body confirmed this view in *Thailand – H-Beams*, para. 134. See also the Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.50.

[5835] The Panel notes that Members are now negotiating amendments to the DSU, Ministerial Declaration, WT/MIN(01)/DEC/1 adopted on 14 November 2001, para. 30. Members may want to address the issue of the legal consequences of the establishment of a single panel during these negotiations.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY THE EUROPEAN COMMUNITIES (WT/DS248)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of the European Communities, that the application of a safeguard measure by the United States on imports of:

CCFRS[5836]:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

[5836] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to the European Communities under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY JAPAN (WT/DS249)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Japan, that the application of a safeguard measure by the United States on imports of:

CCFRS[5837]:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

[5837] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Japan under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY KOREA[5838] (WT/DS251)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Korea, that the application of a safeguard measure by the United States on imports of:

CCFRS[5839]:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

[5838] In its request for the establishment of a Panel, Korea did raise a claim for Unforeseen Developments. However, in its first and second written submissions, Korea did not develop this claim or request any findings on the issue.

[5839] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

Hot-rolled bar:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Korea under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommend that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY CHINA (WT/DS252)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of China, that the application of a safeguard measure by the United States on imports of:

CCFRS[5840]:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

[5840] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to China under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY SWITZERLAND (WT/DS253)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Switzerland, that the application of a safeguard measure by the United States on imports of:

CCFRS[5841]:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

[5841] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Switzerland under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY NORWAY (WT/DS254)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Norway, that the application of a safeguard measure by the United States on imports of:

CCFRS[5842]:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

[5842] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Norway under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY NEW ZEALAND (WT/DS258)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of New Zealand, that the application of a safeguard measure by the United States on imports of:

CCFRS[5843]:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

[5843] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Hot-rolled bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the

conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of parallelism between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Article XIX:1 of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to New Zealand under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

XI. CONCLUSIONS AND RECOMMENDATIONS ON THE CLAIMS BY BRAZIL[5844] (WT/DS259)

11.1 In light of the findings made in Section X above, the Panel concludes that the safeguard measures imposed by the United States on the imports of certain steel products as of 20 March 2002 are inconsistent with the Agreement on Safeguards and GATT 1994.

11.2 Specifically, the Panel upholds the following claims of Brazil, that the application of a safeguard measure by the United States on imports of:

CCFRS[5845]:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Tin mill:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

[5844] In its request for the establishment of a Panel, Brazil did raise a claim for unforeseen developments. However, in its first and second written submissions, Brazil did not develop this claim or request any findings on the issue.

[5845] The USITC's determination on CCFRS served as a basis for safeguard measure(s) imposed on CCFRS including slabs. Therefore, our conclusions cover any safeguard measure imposed on CCFRS which includes the tariff quota on slabs.

Hot-rolled bar:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Cold-finished bar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Rebar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Welded pipe:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

FFTJ:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel bar:

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury to the relevant domestic producers;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel rod:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports";

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

Stainless steel wire:

– is inconsistent with Articles 2.1 and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports", since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards, as the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a "causal link" between any increased imports and serious injury since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance;

– is inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, as the United States failed to comply with the requirement of "parallelism" between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure.

11.3 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, the Panel concludes that to the extent that the United States has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described above, it has nullified or impaired the benefits accruing to Brazil under the Agreement on Safeguards and GATT 1994.

11.4 The Panel therefore recommends that the Dispute Settlement Body request the United States to bring all the above safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.