United States – Definitive Safeguard Measure on
Imports of Circular Welded Carbon-Quality Line Pipe from Korea

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES
AT THE SECOND MEETING OF THE PANEL WITH THE PARTIES
14 June 2001

Burden of proof and standard of review

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

2. The standard of review should also not be in doubt. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") covers all obligations under the WTO Agreement, and requires an objective assessment of the matter before the Panel. In *Lamb Meat*, the Appellate Body enunciated a legal test for *applying* that standard to the obligations under Article 4 of the WTO Agreement on Safeguards ("Safeguards Agreement" or "SGA"). By its terms, this test applies only to SGA Article 4 and not to other provisions of the Safeguards Agreement, such as Article 5. Any application of DSU Article 11 to claims under Article 5 must proceed in accordance with the terms of that Article.

Increased imports

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

4. Korea attempts to justify its reliance on a comparison of the last six months of 1998 with the first six months of 1999 by claiming that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury determination."[1] Korea's characterization of the USITC's analysis is simply untrue. The fact that the USITC collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998 – is clear from a review of the discussion of the serious injury factors in the USITC Report and of virtually every table with numerical data in the entire report. The USITC acted consistently with the "objectivity" requirement of Article 4.2 of the Safeguards Agreement by evaluating the data in this case in the same neutral and unbiased manner that it conducts all of its safeguards investigations.

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[1] Written Rebuttal of the Republic of Korea, para. 62.

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

Serious Injury

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

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

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

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

10. None of Korea's arguments concerning alleged financial improvements at the end of the period investigated detract from the hard evidence showing a significant overall impairment in the U.S. line pipe industry in 1998 and interim 1999. The USITC recognized that capital investment projects in this industry have long lead times. Decisions by two firms to begin producing line pipe were likely to have been made years before the 1998 and interim 1999 downturn in the industry. Nor do the statements by USITC Commissioners in their views on remedy detract from the serious injury finding. The Commissioners simply noted, when writing these views in December 1999, that oil and gas prices had increased since early 1999. Announcements by three producers of intended price increases are of little probative value. As two of the three producers explicitly stated in their price increase announcements, these were due to increases in raw material costs.

Causation

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

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

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

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

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

USITC explained the injurious effects of all other causal factors.

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

There is no requirement to explain how application of a safeguard measure satisfies the requirements of Article 5.1

17. Korea claims that the United States violated the Safeguards Agreement by failing to explain in 2000 how it complied with the Article 5.1 requirement to apply the line pipe safeguard only to the extent necessary to remedy serious injury and facilitate adjustment. However, the Appellate Body already considered exactly this argument and rejected it in *Korea – Dairy*.[2]

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

19. Korea's argument is also inconsistent with the framework established by the Safeguards Agreement. Under Article 2.1, a Member may apply a safeguard measure only after the determination of serious injury. Under Articles 3.1 and 4.2(a), the competent authorities make that determination only after conducting an investigation. They are also charged with issuing a report containing "findings and conclusions on all pertinent issues of fact and law" and "a detailed analysis of the case under investigation. Article 5 establishes the condition of the domestic industry, as revealed in that investigation, as the benchmark for a Member's application of the safeguard measure. Since the investigation, determination, and report are a necessary

[2]*Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, 14 December 1999, WT/DS98/AB/R, para. 98.

precursor to a Member's decision under Article 5 on the extent to which it applies a safeguard measure, they cannot themselves explain how the measure complies with Article 5.

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

Korea's claim that the line pipe safeguard itself does not comply with Article 5.1

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

22. Its analysis was deeply flawed. The record indicated that up to 19 customs territories would enjoy access at MFN rates, rather than just the seven identified by Korea. The ratio of the supplemental tariff to the MFN rate is irrelevant, and is high simply because the MFN rate is so low. Finally, data on actual line pipe imports does not demonstrate the "result of the measure." The panel has no information on market conditions after imposition of the line pipe safeguard, and the observed import patterns could result from a number of factors unrelated to the safeguard. Therefore, Korea has presented no basis for the Panel to conclude that the United States applied the line pipe safeguard beyond the extent necessary.

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