

***United States – Definitive Safeguard Measures  
On Imports of Certain Steel Products***

**(WT/DS248-249, 251-254, 258-259)**

**United States Responses  
to the Panel's Questions for the Parties  
at the Second Meeting of the Panel**

January 6, 2003

TABLE OF REPORTS CITED IN THIS SUBMISSION

<b>Short Title</b>	<b>Full Title and Citation</b>
<i>Argentina – Footwear</i>	<i>Argentina – Safeguard Measures on Imports of Footwear</i> , Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000
<i>Felt Hats</i>	<i>Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of GATT</i> , GATT/CP/106, Working Party Report adopted 22 October 1951, GATT/CP.6/SR.19
<i>Korea – Dairy</i>	<i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000
<i>US – Lamb Meat</i>	<p><i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i>, Appellate Body Report, WT/DS177/AB/R, adopted 16 May 2001.</p> <p><i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i>, Panel Report, WT/DS177/R, adopted 16 May 2001, as modified by the Appellate Body, WT/DS177/AB/R.</p>
<i>US – Line Pipe</i>	<p><i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i>, Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002.</p> <p><i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i>, Panel Body Report, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body, WT/DS202/AB/R.</p>
<i>US – Privatization</i>	<i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , Appellate Body Report, WT/DS212/AB/R (9 December 2002).
<i>US – Wheat Gluten</i>	<p><i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i>, Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001.</p> <p><i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i>, Panel Report, WT/DS166/AB/R, adopted 19 January 2001, as modified by the Appellate Body.</p>

TABLE OF CITATIONS TO SUBMISSIONS BY THE PARTIES

<b>Short title</b>	<b>Date and nature of submission</b>
[Party] first written submission	Written submissions by [complaining party], submitted on August 30, 2002
U.S. first written submission	Written submission by the United States, submitted on October 4, 2002
[Party] first oral statement (topic)	Oral statement by [party] at the first substantive meeting of the Panel with the Parties, October 29-31, 2002. Topics indicated where necessary to distinguish among multiple oral statements by one party
[Party], Responses to the Panel's Questions for the Parties	Responses by [party] to questions from the Panel to the parties at the first substantive meeting of the Panel, submitted on November 12, 2002
[Party] second written submission	Written submission by [party], submitted on November 26, 2002
[Party] second oral statement (topic)	Oral statement at the second substantive meeting of the Panel with the Parties, December 10-12, 2002. Topics indicated where necessary to distinguish among multiple oral statements by one party

## I. PROCEDURAL VS. SUBSTANTIVE OBLIGATIONS

### A. QUESTIONS FOR THE COMPLAINANTS

**1. *What is the complainants' response to the assertion by the United States in its Second Written Submission (para. 33 et seq.) that while a failure to explain a determination adequately may support a claimed inconsistency with Article 3.1 of the Agreement which would amount to a procedural violation, it would be insufficient to establish a substantive violation associated with the determination in question?***

1. Complainants' initial response to the U.S. analysis was to argue that Article 2.1 of the Safeguards Agreement<sup>1</sup> contains an implicit requirement (they admit that there is no explicit requirement) to explain how a determination complies with its terms. They assert that this unwritten obligation derives from the standard for panel review of conformity with *Article 4.2(a)*, as articulated by the Appellate Body.<sup>2</sup> The text of Article 2.1 of the Safeguards Agreement in no way suggests such an 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, 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.

2. 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.

3. The EC does not attempt to argue otherwise. Instead, it asserts that "[t]he requirements of Article 2.1 . . . 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."<sup>3</sup> In the EC's view, the Article 4.2 "substantive" obligation to explain, which the EC seeks to import into Article 2.1, arises from the Appellate Body's statement in *US – Lamb Meat* that:

**We 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 of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated**

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<sup>1</sup> Unless otherwise noted, a reference in this submission to an Article designated with an Arabic numeral is to the Safeguards Agreement, while a reference to an Article designated with a Roman numeral is to GATT 1994.

<sup>2</sup> EC second oral statement (analytical framework).

<sup>3</sup> EC second oral statement (analytical framework), para. 22 (emphasis original).

*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.<sup>4</sup>

4. The EC’s argument has two primary flaws. First, the bolded text (which the EC omitted from its quotation) 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.

5. 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.<sup>5</sup>

6. The EC also attempts to find support for its interpretation in the objective, expressed in the Preamble of the Safeguards Agreement, “to re-establish multilateral control over safeguards.” It argues that meeting this goal is impossible “[i]f there is no obligation to provide a reasoned and adequate explanation for each finding.”<sup>6</sup> The EC misses the point. The terms of the Safeguards Agreement themselves 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.

7. In sum, the United States 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). But such a failure to *explain* does not automatically entail a conclusion that the resulting measure is itself inconsistent with other provisions of the Safeguards Agreement, including the substantive obligations under

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<sup>4</sup> *US – Lamb Meat*, AB Report, para. 141.

<sup>5</sup> *Argentina – Footwear*, AB Report, para. 88, n. 76 (“An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”).

<sup>6</sup> EC second oral statement (analytical framework), paras. 24-25.

Article 2.1. Indeed, a more robust explanation could well demonstrate the consistency of the measure with WTO rules.<sup>7</sup>

8. On a related topic, in its second oral statement, the EC cited the *US – Privatization* report for the proposition that “it is possible for methodologies – or methods as [the Appellate Body] prefers to call them – to be held to be *per se* or ‘as such’ inconsistent with WTO obligations.”<sup>8</sup> In fact, the Appellate Body found that that question was not before it in *US – Privatization*, because the United States did not appeal the panel’s decision that a particular methodology was “as such” inconsistent with the SCM Agreement.<sup>9</sup> It is difficult to see how the Appellate Body could have reached definitive findings on an issue that was not before it.

9. In addition, *US – Privatization* demonstrates the fallacy of the EC’s 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.”<sup>10</sup> 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*.”<sup>11</sup> 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.

10. In this dispute, the United States has shown that the methodologies employed by the ITC are not, as such, within the terms of reference of the Panel. Moreover, should the Panel decide to evaluate methodologies “as such,” we have shown that each of the “contested methodologies” identified by Complainants – the ITC’s analyses of like product, increased imports, and causation<sup>12</sup> – as a general matter facilitated, and at the very least *allowed*, findings consistent with Article XIX and the Safeguards Agreement. The determinations and the supporting views of the Commissioners demonstrate that they did so with regard to each of the ten imported steel products.

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<sup>7</sup> 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.” *US – Wheat Gluten*, AB Report, para. 103, note 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.

<sup>8</sup> EC second oral statement (analytical framework), para. 4.

<sup>9</sup> *US – Privatization*, AB Report, para. 86, note 178.

<sup>10</sup> EC second written submission, para. 30.

<sup>11</sup> *US – Privatization*, AB Report, para. 147 (emphasis added).

<sup>12</sup> EC second oral statement (analytical framework), para. 15.

## II. UNFORESEEN DEVELOPMENTS

### A. QUESTIONS FOR NORWAY AND SWITZERLAND

**2. *In their respective responses to Question 143 of the Panel's questions to the parties for the first substantive meeting, are Norway and Switzerland suggesting that each event referred to by the United States as constituting an unforeseen development must separately and independently result in increased imports?***

11. Each of the events cited by the ITC contributed to increased quantities of imported steel finding its way into the U.S. market, either by displacing steel from other markets or by making the U.S. market unusually attractive. In any event, nothing in Article XIX, or any Appellate Body report analyzing Article XIX, prevents a competent authority from identifying a group of events whose confluence was unforeseen and resulted in increased imports.

### B. QUESTIONS FOR THE COMPLAINANTS

**3. *China asserts in its Second Written Submission that the logical connection test applies between the unforeseen developments and the relevant tariff concessions (para. 23)? Do the other complainants agree? What does the logical connection test apply to?***

12. If China is in fact asserting that the unforeseen developments must be logically connected to the relevant tariff concession, China’s assertion is based on a misreading of the text of Article XIX and the Appellate Body’s analysis in *Argentina – Footwear*. In that report, the Appellate Body noted that “there is a logical connection between the circumstances described in the first clause – ‘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 Article XIX:1(a) for the imposition of a safeguard measure.”<sup>13</sup> Thus, the “logical connection” is not between “tariff concessions” and “unforeseen developments,” but between unforeseen developments and increased imports.

13. With regard to the role of “tariff concessions” in the analysis related to Article XIX:1(a), the Appellate Body found in *Argentina – Footwear* that:

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.<sup>14</sup>

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<sup>13</sup> *US – Lamb Meat*, para. 92.

<sup>14</sup> *Argentina – Footwear*, AB Report, para. 91.

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.

**4. With reference to the EC's Second Written Submission (para. 166), in what circumstances would a gradual and steady increase in imports not be considered to be "normal" and to meet the requirements of Article 2.1 of the Agreement? What sort of explanation would be expected from the competent authority in such cases?**

14. It is impossible to generalize about import increases and decide, absent a specific fact pattern or industry information, that a particular increase would or would not be “been recent enough, sudden enough, sharp enough, and significant enough” to cause or threaten serious injury.<sup>15</sup> In any case, the competent authorities’ task would be the same, namely, to “publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.”

**5. What is the complainants' response to the assertion by the United States that the panel in Chile-Price Bands accepted a multi-part document as the report of the competent authorities for the purposes of Article 3.1?**

15. Complainants have attempted to distinguish *Chile – Price Bands* on factual grounds, yet it remains incontrovertible that the panel considered a multi-part document. No party has yet provided authority for the assertion that a competent authority *must* publish all its findings in one document released at one time.

## C. QUESTIONS FOR THE UNITED STATES

**6. How does the United States respond to the assertion made by the EC in its Second Written Submission (para. 24) that there is no determination that the increased imports result from unforeseen developments and tariff concession given that the US determination was made on 22 October 2001?**

16. As an initial point, the EC continues to use the wrong terminology. In *US – Lamb Meat*, 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.<sup>16</sup> Thus, there is no requirement to make a “determination” of a relationship between increased imports and unforeseen developments or tariff concessions.

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<sup>15</sup> *Argentina – Footwear*, AB Report, para. 131.

<sup>16</sup> *See, e.g., US – Lamb Meat*, AB Report, para. 72; *Argentina – Footwear*, AB Report, para. 91.



17. The ITC made the requisite findings related to unforeseen developments and tariff concessions in its second supplemental report. The Appellate Body in *US – Lamb Meat* found that:

as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied" consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed. We find instructive guidance for where and when the "demonstration" should occur in the "logical connection" that we observed previously between the two clauses of Article XIX:1(a). The first clause, as we noted, contains, in part, the "circumstance" of "unforeseen developments". The second clause, as we said, relates to the three "conditions" for the application of safeguard measures, which are also reiterated in Article 2.1 of the *Agreement on Safeguards*. Clearly, the fulfilment of these conditions must be the central element of the report of the competent authorities, which must be published under Article 3.1 of the *Agreement on Safeguards*. In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.<sup>17</sup>

The Appellate Body found that the “demonstration” of unforeseen developments has to be made *before* the safeguard measure is *applied* and must be included in the published report of the competent authorities. The Appellate Body has not identified any other requirements. The “logical connection” is served (and satisfied) by placing the demonstration in the report. The ITC’s demonstration of unforeseen developments meets both of these requirements. Certainly Complainants have given no authority for their assertion that Article 3.1 contains restrictions on a competent authority’s ability to publish its report at once or over a period of time. Furthermore, Complainants have made no case that the ITC’s decision to publish its report serially severed the “logical connection” between its unforeseen development findings and its increased import determinations. As the United States has noted in its first written submission, the ITC Report itself shows that the unforeseen developments demonstrated in the second supplemental report informed its injury determinations.<sup>18</sup>

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<sup>17</sup> *US – Lamb Meat*, AB Report, para. 72 (footnote omitted).

<sup>18</sup> U.S. first written submission, para. 954.

**7. Does the US agree with arguments made by various complainants that the only data provided by the ITC to link the Asian and Russian crises with increased imports in the United States were consumption decreases in those regions/countries?**

18. No. The ITC 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 ITC Report, the ITC cited tables which showed imports by country by product for the entire period of investigation.<sup>19</sup> All of these data support the ITC analysis.

19. Complainants take issue with the conclusions drawn by the ITC from that data, but have certainly brought forward no data to indicate that their alternative explanations – *e.g.*, perhaps production declined, perhaps imports to the U.S. 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 ITC’s demonstration of unforeseen developments was inconsistent with the Safeguards Agreement.<sup>20</sup>

**D. QUESTION FOR ALL PARTIES**

**8. Do parties consider that a time lag may exist between the occurrence of the unforeseen developments and the occurrence of the increased imports? If so, what time lag was reasonable in the specific circumstances of this case?**

20. Article XIX presumes a time lag. The Article itself provides no specific time-frame in which unforeseen developments must result in increased imports, nor a requirement or basis for identifying a “reasonable” length of time. In this case, the time lag was short. The currency crises began in Southeast Asia in mid-1997 and spilled over into other markets, including Russia and other former USSR republics, later in the year.<sup>21</sup> The resulting increase in imports was evident in 1998.

**III. SUCH PRODUCT**

**B. QUESTION FOR THE UNITED STATES**

**11. Can the United States clearly explain the inconsistency Brazil claims exists between the drawing of dividing lines between, on the one hand, carbon flat products, and on the other**

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<sup>19</sup> ITC 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).

<sup>20</sup> *US - Lamb Meat*, AB report, para. 106.

<sup>21</sup> ITC second supplemental response, pp. 2-3; *see also* Minimill Coalition (Long Products) Prehearing Brief, Sept. 11, 2001, Exh. 19, Exhibit US-74.

***hand carbon long products and stainless steel products (section II.B of Brazil's Second Written Submission)?***

21. 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. The U.S. response to question 12 addresses specific factual distinctions.

***12. With respect to Brazil's assertion in its Second Written Submission that carbon billets bear the same relationship to carbon long products as do carbon slabs to carbon sheet products (para. 12), can the United States explain the basis upon which such a distinction was made? Are the US producers of carbon billets and other carbon long products integrated in the same fashion as the producers of CCFRS?***

22. 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 percent 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-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.<sup>22</sup> 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.

23. 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 percent 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

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<sup>22</sup> 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).

manufacturing processes. Many U.S. 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.

### C. QUESTION FOR ALL PARTIES

**13. *If the like product criteria were to be applied as a basis for comparing domestic products with the imported product, to what extent is it relevant that the domestic industry is vertically integrated whereas producers of the imported product are not? Would the answer be any different if producers of the imported product were similarly integrated?***

24. As further discussed in response to question 18, the ITC’s analysis of whether there are domestic products that are like the subject imports considers whether subject imports and domestic products generally share similar physical properties, uses, production processes and marketing channels. One of the factors considered is whether domestic and imported products share similar production processes. It would depend on the facts of the case whether consideration of where a product is made, which may include an examination of the commonality of producers’ facilities, would be relevant in the analysis.

## IV. INCREASED IMPORTS

### A. QUESTION FOR THE COMPLAINANTS

**14. *What do complainants consider should be the relative importance of trends and recent imports in an analysis of increased imports?***

25. 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. In *Argentina – Footwear*, 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.”<sup>23</sup> In *US – Lamb Meat*, the Appellate Body cited the language from *Argentina – Footwear* 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.”<sup>24</sup> 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

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<sup>23</sup> *Argentina – Footwear*, AB Report, para. 130.

<sup>24</sup> *US – Lamb Meat*, AB Report, para. 138.

determination of increased imports.”<sup>25</sup> 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.

26. The panel in *US – Line Pipe* went on to reject Korea’s claim that the ITC’s finding of increased imports was inconsistent with Article 2.1.<sup>26</sup> The ITC applied precisely the same analysis in its steel determinations as in its line pipe determination, namely, considering both trends and recent imports in its analysis.<sup>27</sup>

## B. QUESTION FOR THE UNITED STATES

**16. *Assuming that account is not taken of the 2001 data points, does the United States accept the validity of the graphs of increased imports contained in the EC’s First Written Submission and Brazil’s First Written Submission? How should the interim 2001 data be represented?***

27. The United States has no objections to Brazil’s figure 8, as all figures appear correct. The United States considers Brazil Figures 9-15 to be irrelevant, since those figures are for products for which there was no separate injury determination and also include full-year 2001 data that was not on the record during the injury investigation. The United States strongly opposes the consideration of any injury-related data that was not before the ITC during the course of the investigation. The United States objects to EC Figures 5-23 on similar grounds, namely, that the figures contain data for which no separate injury determination was made or include non-record 2001 data.

28. At the second panel meeting, the EC presented a chart showing yet another version of “2001” data. This chart is neither relevant nor helpful. Interim data was available to the ITC in the course of the investigation, and interim data was used by the ITC. No complainant has been able to show that a competent authority is required to do more than the ITC did in gathering or using the most recent and complete data set available at the time the determinations were made.

29. Interim data for 2001 should be compared to interim data for 2000, while interim data should be segregated from full-year data. At the second panel meeting, the EC argued 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. However, this graphic representation would suggest that the “annualized” 2001 data were comparable to full year 1996, 1997, 1998, 1999, and 2000 data. That is simply not the case.

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<sup>25</sup> *US – Line Pipe*, Panel Report, para. 7.208.

<sup>26</sup> *US – Line Pipe*, Panel Report, para. 7.214.

<sup>27</sup> Contrary to Korea’s assertion at the second panel meeting, the panel in *US – Line Pipe* specifically endorsed the ITC’s finding that subject imports had increased *absolutely* despite a recent decline in import volume. *US – Line Pipe*, Panel Report, para. 7.210.

## V. LIKE PRODUCT

### B. QUESTIONS FOR THE UNITED STATES

**18. *How does the United States respond to the assertion by the EC in its Second Written Submission (para. 239) that the ITC 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"?***

30. The ITC 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 EC 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. So while there is no challenge to the ITC's factual findings, the EC seeks to misrepresent the ITC's approach. As stated in prior US submissions and presentations, the ITC 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.

31. For example, in its CCFRS analysis, the ITC found that the evidence showed that imported certain carbon flat-rolled steel consists mainly of the same range of carbon steel as the domestic certain carbon flat-rolled steel.<sup>28</sup> The ITC found that imported and domestic certain carbon flat-rolled steel 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 certain carbon flat-rolled steel. The domestic like product, certain carbon flat-rolled steel, is like and coextensive with the imported certain carbon flat-rolled steel used in the ITC's injury analysis. The ITC performed this comparison between imported and domestic products in making its like product determination, in section IV.A.1. of its report.

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<sup>28</sup> Complainants do not take issue with the ITC's findings regarding this comparison nor that the evidence showed that domestic and imported CCFRS consisted mainly of the same range of carbon steel. *See, e.g.*, EC first written submission, paras. 223-233.

**19. How does the United States respond to arguments made by the complainants on the basis of their interpretation of Appellate Body jurisprudence that the production process may be used to further separate products but that it can never serve as a criterion to bundle products that are otherwise not like?**

32. Complainants’ position is based on the erroneous assertion that the ITC “bundled together” predefined products rather than that the ITC identified clear dividing lines, using its long- standing analysis. As the United States has discussed in its submissions and presentations, the ITC 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 ITC 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 ITC 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.

33. 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 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. This was clearly what the Appellate Body had in mind when it stated:

As we have indicated, under the Agreement on Safeguards, the determination of the "domestic industry" is based on the "producers ... of the like or directly competitive products". The focus must, therefore, 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.<sup>55</sup>

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<sup>55</sup> 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.<sup>29</sup>

Thus, 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 ITC 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.

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<sup>29</sup> US – Lamb Meat, AB Report, para. 94, n.55.

**20. Does the United States agree with Norway's contention in its Second Written Submission (para. 73) that a number of tin mill producers also produce a variety of other types of certain carbon flat steel, including slab?**

34. A number of tin mill producers also produce types of certain carbon flat-rolled steel. However, the United States does not agree with Norway’s assertions in either paragraphs 73 through 75 of its second written submission or in its first written submission, including paragraphs 236 and 237, that data for production of other types of steel were included in the data for tin mill products. The United States’ response to this question also generally responds to question 25.

35. As the United States stated in addressing these allegations in its paragraphs 150 through 154 of its response to the Panel’s first set of questions, Norway’s contentions are erroneous. The essence of Norway’s allegation is that because the ITC did not release confidential responses of individual producers of tin mill products, it must be assumed that the ITC did not limit its analysis to producers of tin mill products.

36. 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.

37. Norway’s allegation centers on one table (Table FLAT-1) in the ITC Report which lists individual domestic producers responding to the ITC questionnaire and provides individual production data by type of carbon and alloy flat steel that each produces. Individual firm data provided in response to ITC questionnaires and the firms responding to the ITC 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. We note that the United States is not the only country that withholds the names of questionnaire respondents.

38. 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.<sup>30</sup> Contrary to Norway’s allegations, the fact that the ITC 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

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<sup>30</sup> See ITC 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.



mill products were included in ITC’s domestic industry analysis, nor may any presumption, strong or otherwise, be drawn.<sup>31</sup>

39. This Complainant fails to show how release of the individual firm data would show anything more than whether the ITC can correctly tally the individual company information. In the ITC’s questionnaire, domestic producers were clearly instructed to provide separate data for tin mill. For example, the following instructions were provided for Question III.7 of the Domestic Producers’ Questionnaire (“Operations on carbon and alloy steel flat products: Tin mill products”):

Report the commercial sales revenue and related cost information and your firm’s capital expenditures and research and development expenditures requested below on the carbon and alloy tin mill products operations of your U.S. establishment(s). Include only sales (whether domestic or export) and costs related to your U.S. manufacturing operations. Provide data for your five most recently completed fiscal years in chronological order from left to right, and for the specified interim periods.

Each domestic producer was required to certify the truthfulness of its questionnaire responses.

40. The Panel need not rely solely on the ITC’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.<sup>32</sup> None of them challenged the ITC’s aggregation of individual company data on tin mill material. The ITC is confident that the tin mill data provided in the ITC Report does not include data for other types of steel.

### C. QUESTIONS FOR ALL PARTIES

**21. Do the parties agree with the argument made by the EC in its Second Written Submission (para. 266) that the United States cannot now rely upon the concept of "directly competitive product" since the Panel's review is confined to the determinations actually made? Did the ITC de facto carry out a directly competitive analysis?**

41. Contrary to certain allegations, particularly those raised by the EC, 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 ITC 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.

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<sup>31</sup> Norway first written submission, para. 237.

<sup>32</sup> Under U.S. law, confidential business information is released to representatives for parties, usually outside counsel and economic consultants, under administrative protective order.

Moreover, the ITC applied a like product analysis in this investigation consistent with U.S. obligations under the Safeguard Agreement.

42. Norway is apparently referring to question 65 of the Panel’s first set of questions, which asked the United States: “what happens if the ITC’s definition of ‘like products’ is, from a WTO law perspective, too broad, but within the broader notion of ‘directly competitive.’” The U.S. response to this hypothetical question, in relevant part, stated: “Despite the U.S. [like product] analysis, if the Panel finds the U.S. findings are consistent with a directly competitive product analysis, it cannot find that the ITC’s findings are inconsistent with the Safeguards Agreement.” This response reflects our view that, if the Panel finds that the ITC analysis – which we consider as defining a “like product” under both the Safeguards Agreement and U.S. law – actually falls within the realm of “directly competitive product” for Safeguards Agreement purposes, its characterization as a “like product” analysis would not affect its consistency with WTO rules.

**22. *What significance should be attached to the reference to "directly competitive" with respect to the ITC's consideration of FFTJ (to which attention is drawn by the EC in its Second Written Submission, para. 284)?***

43. None. The ITC 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. On page 147 of the ITC Report in a section titled “Finding”, the ITC stated:

we find that there are four domestic industries producing articles like the corresponding imported articles subject to investigation within the tubular products category: (1) welded pipe, other than oil country tubular goods (OCTG); (2) seamless pipe (other than OCTG); (3) OCTG, welded and seamless; and (4) fittings, flanges, and tool joints.<sup>33</sup>

Moreover, there is a footnote to this sentence in which the ITC explicitly states that it did not make findings on the basis of a directly competitive product analysis:

Since we have found that there are domestic articles “like” the imported articles, we did not need to reach the question of whether there are “directly competitive” domestic articles.<sup>34</sup>

The ITC’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]”<sup>35</sup> merely

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<sup>33</sup> ITC Report, p. 147.

<sup>34</sup> ITC Report, p. 147, n.893.

<sup>35</sup> ITC Report, p. 157.

recites the U.S. statutory language.<sup>36</sup> We believe that, in spite of the inadvertent inclusion of “directly competitive,” that it is clear that the ITC’s findings were on the basis of a like product analysis.

## **VI. SERIOUS INJURY**

### **B. QUESTION FOR THE UNITED STATES**

#### **24. *How did the ITC aggregate injury factor figures for the various items that comprised CCFRS?***

44. In conducting its investigation, the ITC 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.<sup>37</sup>

45. In making its determinations, the ITC 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.<sup>38</sup>

#### **25. *What is the United States' response to Norway's contention in its Second Written Submission (para. 73) that, although a number of tin mill producers also produce a variety of other types of certain carbon flat steel, 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"?***

46. Norway is mistaken. Its argument appears to assume that, if a U.S. producer produced several different types of steel, it would report its data to the ITC on the basis of all the products it produced. In fact, the ITC’s questionnaire instructions required each domestic producer to report all data, including financial data, separately for each of the 33 categories of steel.<sup>39</sup> 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 ITC staff examined all domestic producer

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<sup>36</sup> See Trade Act of 1974, § 202(c)(4), 19 U.S.C. § 2252(c)(4).

<sup>37</sup> ITC Report, p. FLAT-15 n. 11, p. FLAT-30 n.13, and FLAT-44 n. 14.

<sup>38</sup> ITC Report, p. 51 n. 193, and p. 56 n. 232.

<sup>39</sup> See Exhibit US-22 (questionnaire instructions); see also U.S. first written submission, para. 319.

questionnaire responses to ascertain whether they contained data discrepancies on reported information on factors including shipments, sales, and capacity.<sup>40</sup>

## VII. CAUSATION

### A. QUESTION FOR BRAZIL

**26. *With respect to Brazil's response to Question 85 of the Panel's questions to the parties for the first substantive meeting, could Brazil explain how the econometric models that were presented to the ITC established that domestic price decreases and increases not import price decreases were the dominant factor explaining domestic price levels?***

47. As discussed below in response to question 38, the United States disagrees with Brazil’s contention that the econometric models presented to the ITC during the steel investigation, particularly that submitted by foreign producers, “established” that import price competition had only a minimal or insignificant impact on domestic price declines during the period of investigation. The ITC and its economic staff reviewed the economic model submitted by foreign producers during the steel investigation and concluded that the model had significant methodological limitations, thus rendering its results inconclusive.

48. The United States directs the Panel’s attention to question 38 below for a more detailed discussion of this issue.

### B. QUESTIONS FOR THE COMPLAINANTS

**27. *Could Brazil explain on what basis it can be concluded that a market functions as a "spot market." On what basis is Brazil asserting that the market for CCFRS functions as a spot market? Could Brazil provide evidence in this respect?***

49. To the extent that Brazil claims that the U.S. market for carbon flat-rolled steel is a “spot market,” Brazil misreads the record data. While there is a substantial volume of spot market sales in the carbon flat-rolled steel market, the market is characterized by a more substantial volume of contractual sales. As the ITC noted in its Report, the majority of U.S. purchasers of carbon flat-rolled steel reported making all or the majority of their purchases of carbon flat-rolled steel on a contract, rather than spot basis.<sup>41</sup>

50. 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 percent) reported making all or nearly all of their purchases on a contract basis.<sup>42</sup> Moreover, of the 73 purchasers who reported making

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<sup>40</sup> ITC Report, p. OVERVIEW-7.

<sup>41</sup> ITC Report, Vol. II, p. FLAT-61.

<sup>42</sup> ITC Report, Vol. II, p. FLAT-61.

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.<sup>43</sup> 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.

**28. *Japan, Brazil and other complainants refer in their Second Written Submissions to inventory levels as a basis for arguing that import levels did not have lingering effects in the market. Are inventory levels the only relevant indicator in this respect?***

51. No. As the United States has previously indicated,<sup>44</sup> inventory levels are not the only way in which imports can have a “lingering” effect in a market. For example, as the United States has stated in its prior submissions, companies affected by a substantial surge of imports in one year will not immediately go into bankruptcy in that year. Instead, most companies will take every action possible to avoid entering bankruptcy because of the substantial negative impact that entering bankruptcy will have on these companies. Accordingly, companies may not enter bankruptcy for several years after a serious and continued surge in imports.

52. Similarly, a company may not make immediate cuts in its workforce as a result of a surge in import volumes and severe import price competition. Instead, a company may reasonably take some time to assess whether the increased competition from imports has reduced shipment or pricing levels to such an extent that a reduction in the company’s work force is necessary to reduce the costs of the company. For example, in the case of the carbon flat-rolled steel industry, the domestic producers did not immediately reduce the sizes of their work forces in 1998, when carbon flat-rolled imports first surged into the U.S. market, despite the fact that this surge caused substantial market share losses, reduced prices, and reduced profits for the industry.<sup>45</sup> Instead, the domestic carbon flat-rolled steel producers first substantially reduced the number of workers they employed in 1999, when it became clear that imports would remain at elevated levels in the market and would continue to have substantial adverse effects on domestic prices.<sup>46</sup>

53. In other words, there are a number of ways in which an increase in imports in one year might have a delayed impact on the performance factors in a subsequent year. The United States emphasizes, however, that the ITC’s causation analyses for the products covered by the steel remedies were not, in any case, primarily dependent upon findings that increased imports had delayed impacts on the conditions of the industries. Instead, for each product, the ITC clearly

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<sup>43</sup> ITC Report, Vol. II, p. FLAT-61.

<sup>44</sup> U.S. first written submission, paras. 446-447; U.S. second written submission, paras. 117-128.

<sup>45</sup> ITC Memorandum INV-Y-209, Table FLAT-ALT7 (Exhibit US-33).

<sup>46</sup> The industry reduced its work force by 4.2 percent (a total of approximately 4.5 thousand workers) in 1999. ITC Memorandum INV-Y-209, Table FLAT-ALT7 (Exhibit US-33). The industry kept its work force at essentially this level in 2000. Id.

and correctly found correlations between imports trends and changes in the industry’s condition, indicating that increased imports continued to have injurious effects during each year of the period of investigation.

**29. What role should price play vis-à-vis other factors in determining the effect of imports on the domestic industry? In what situations would prices be critical or important?**

54. The United States discusses the importance of price in the ITC’s causation analyses in its answer to question 37. As indicated in its response to that question, the ITC considers the price effects of imports to be one of a number of significant factors that indicate whether increased imports are causing serious injury to the domestic industry.

55. The United States directs the attention of the Panel to its more detailed answer to Panel question 38 for a discussion of this issue.

**31. Do complainants agree with the assertion made by China in its Second Written Submission (para. 177) that the Appellate Body requirement that the nature and extent of other factors be identified means that both the quality and quantity of the injurious effects of other factors must be assessed? Do complainants agree with China’s interpretation?**

56. The United States 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 Safeguards Agreement 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.

57. 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 Safeguards Agreement.<sup>47</sup> The findings and conclusions in those reports, however, are not treaty text, nor do they create obligations under the 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*.

58. 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.”<sup>48</sup> This definition simply

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<sup>47</sup> China, second written submission, paras. 173-179.

<sup>48</sup> China, second written submission, para. 175 (citing *The New Shorter Oxford English Dictionary*).

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.

59. Given this, 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.

**32. *Is China suggesting in its Second Written Submission (para. 181 et seq.) that the obligation to separate and distinguish factors other than increased imports involves and analysis of the interplay of the various factors? If so, what does China consider such an analysis entails?***

60. In our view, 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 ITC’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.

**33. *If it cannot be concluded that quantification is required by the Agreement in relation to the non-attribution exercise, what do the complainants consider the competent authority must do in "separating" and "distinguishing" factors so as to allow it to "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."***

61. As it stated at the second Panel meeting, the United States believes that its detailed and comprehensive explanation of the nature and extent of injury attributable to both imports and non-import factors fully satisfies the requirements articulated by the Appellate Body to provide a “reasoned and adequate explanation, that injury caused by factors other than imports is not attributed to increased imports.”

62. At the second Panel meeting, Brazil’s representatives asserted that a competent authority could provide the “reasoned and adequate” explanation of the injury caused by other factors under Article 4.2(b) by performing an analysis similar to that conducted by Korea with respect to minimills in its second written submission (at paras. 169-176). Article 4.2(b) plainly does not *require* such an analysis, and Article 3.1 does not require such an explanation. As we noted in response to question 31, the only analysis that is necessary is one that does not attribute to increased imports any injury caused by factors other than increased imports. Thus, Article 3.1 requires findings and reasoned conclusions in this regard only to the extent necessary to establish that injury caused by other factors was not attributed to increased imports.

63. However, as the United States noted at the second Panel meeting, the ITC itself performed a similar analysis when assessing the nature and extent of injury caused by minimills in its determination for carbon flat-rolled steel. The ITC’s discussion of the injurious effects of minimill competition consists of a detailed narrative analysis of the pricing effects of imports and minimills and of the differences in minimill and integrated producers’ financial and trade operations during the period.<sup>49</sup> Moreover, the ITC’s conclusions were supported by detailed statistical charts prepared by the ITC that separated and distinguished the pricing practices, financial performance, and trade performance for minimills and integrated producers.

64. As the United States noted at the second Panel meeting,<sup>50</sup> those detailed charts showed that:

- Imports consistently undersold both integrated *and* minimill producers during the period of investigation, particularly on sales of hot-rolled steel.<sup>51</sup> Hot-rolled steel accounted for the bulk of minimill shipments during the period.<sup>52</sup>
- This underselling of minimill and integrated producers by imports caused prices to decline and remain suppressed during the period from 1998 through interim 2001, after imports increased their presence in the market in 1998.<sup>53</sup>
- Like integrated producers, minimills’ operating income levels for carbon flat-rolled steel declined dramatically in 1998 when a surge of imports entered the market.<sup>54</sup>
- Minimills “did typically enjoy cost advantages over integrated producers,” because of their lower raw materials costs and the different product mixes between integrated and minimill producers. However, the record data also showed that minimills’ “cost advantages existed throughout the [period of investigation]” and that “integrated producers as well as minimills enjoyed declining costs throughout the” period.<sup>55</sup>
- As the ITC correctly concluded, “minimills may have been in a somewhat better position to withstand low-priced import competition than other domestic

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<sup>49</sup> ITC Report, p. 65.

<sup>50</sup> U.S. second oral statement, paras. 72-78.

<sup>51</sup> ITC Report, p. 65.

<sup>52</sup> Minimill Trade Data (Exhibit US-60).

<sup>53</sup> ITC Report, pp. 60-62, 65.

<sup>54</sup> See, ITC Memorandum INV-Y-215, (integrated and minimill financial data) (Exhibit US-38).

<sup>55</sup> ITC Report, p. 65. Although the ITC, in response to arguments made during the investigations, reviewed minimills as another factor, we urge the Panel to recall that minimills are domestic producers of carbon flat-rolled steel who are part of the domestic carbon flat-rolled steel industry. To the extent that they perform better than other members of the industry, that performance masks the greater injury being suffered by the remaining members of the industry.



producers” due to this cost advantage, but this did not mean that minimills were not affected by low-priced import competition.<sup>56</sup>

65. Finally, as the United States noted in its first written submission<sup>57</sup> and at the second panel meeting, there was a larger volume of import shipments into the carbon flat-rolled steel market than there was of minimill shipments during each year of the period of investigation. Given this, and the factual evidence cited above, it is clear that the ITC correctly concluded that it was imports – not minimills – that had the most significant impact on domestic price declines during the period from 1998 through 2000.

**34. *What is the legal basis for the EC's argument in its Second Written Submission (para. 327) that it is incorrect to determine that there is a causal link before carrying out the non-attribution analysis? Does this refer to the "causal link" mentioned in the 1st sentence of Article 4.2(b)?***

66. The United States responds to this question in its response to question 41.

**35. *For those complainants which assert that Article 4.2(b) requires "quantification", what is actually entailed by such a requirement?***

67. The United States will let Complainants explain why they believe the Safeguards Agreement requires “quantification” of the level of injury caused by imports. During the course of this proceeding, Complainants have failed to establish that there is any econometric model that can quantify all of the factors that must be considered under the Agreement. Moreover, as the United States discusses below in response to question 38, the United States has shown throughout this proceeding that the economic model submitted by foreign producers during the steel investigation had substantial methodological flaws that rendered it inconclusive from the viewpoint of the ITC and its economic staff.

68. Finally, the United States points out that the ITC’s causation analysis consists of a quantitative analysis that closely examines a wide variety of quantitative data relating to the effects of imports on the financial and trade operations of the industry. To the extent that Complainants assert that the United States does not perform such an analysis, they are simply mistaken.

**36. *Do the restraints/limitations that the United States considers exist in relation to regression and correlation analyses for the purposes of Article 4.2(b) equally apply to the analysis the United States conducted under Article 5.1?***

69. Please refer to our response to question 57.

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<sup>56</sup> ITC Report, p. 65.

<sup>57</sup> U.S. first written submission, paras. 506-514.

### C. QUESTIONS FOR THE UNITED STATES

**37. *What role did the ITC consider price played vis-à-vis other factors in analyzing the effect of imports on the domestic market?***

70. Generally, price is one of a number of significant factors considered by the ITC when assessing whether increased imports have caused serious injury to a domestic industry. The Agreement specifies that the competent authority should evaluate “all relevant factors” having a bearing on the situation of an industry in its causation analysis, including “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,”<sup>58</sup> among other things. Like the Agreement, the U.S. statute requires the ITC to consider all relevant economic factors in its analysis, absolute and relative increases in import volumes, increases in import market share and declines in industry market share, and declines in the level of the industry’s sales, production, productivity, capacity utilization, profits and losses, and employment, among other things.<sup>59</sup>

71. The Agreement does not place an obligation on a competent authority to place greater or lesser weight on any other specific factors, or any other “relevant factor,” when performing its causation analysis in a safeguards proceeding. Instead, consistent with the Agreement, the ITC will assess the impact of increased imports on all of the performance criteria of the industry as a means of assessing how imports have affected the overall condition of the industry. In many cases, for example, increased volumes of imports can have their greatest impact on the volume-related performance criteria of an industry, including such criteria as the industry’s production levels, capacity utilization levels, shipment levels, or market share. In these types of situations, it is possible that imports might have only a minimal impact on pricing in the market yet still be causing serious injury to the industry.

72. In other cases, however, increased import volumes can have a more substantial impact on the pricing levels of the industry, causing substantial declines in the industry’s revenues and profitability levels, and having a negative impact on the industry’s ability to support its current investment and employment levels. For example, an industry might choose to compete with lower-priced increased imports on a price basis in a particular market in order to lessen their market share losses. In this situation, the industry might suffer more substantial revenue losses as a result of price declines than as a result of market share losses or lost sales volumes. In situations such as these, a competent authority can clearly and appropriately focus on price as a critical aspect of the injurious effects of imports.

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<sup>58</sup> Safeguards Agreement, Article 4.2(a).

<sup>59</sup> Trade Act of 1974, §202(c)(1), (c)(2) & (c)(6); 19 U.S.C. § 2252(c)(1), (c)(2), & (c)(6) (Exhibit US-2).

73. Nonetheless, the primary focus for a competent authority under the Agreement is how increased imports affect all of an industry’s performance factors, including price, and whether increased imports have caused a “significant overall impairment in the position” of the industry. The ITC performs such an analysis in every safeguards investigation.

74. The United States has addressed the specific causation analysis of the ITC – including its discussion of the price effects of imports – for each of the products subject to a remedy in its first written submission.<sup>60</sup> The Panel should also direct its attention to the U.S. response to question 38 below, as well as the U.S.’s prior discussions of the impact of imports on domestic pricing in previous submissions.

**38. *How does the United States respond to Brazil's assertion in its Second Written Submission (para. 97) that with regard to CFERS, import price decreases and increases were either statistically insignificant or a minor factor explaining domestic price levels in relation to other factors?***

75. The United States 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 carbon flat-rolled steel.

76. As an initial matter, the record clearly established that imports of carbon flat-rolled steel 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.

77. The United States addresses these issues in more detail below.

**The Record Clearly Established That Imports of Carbon Flat-rolled Steel Had a Serious and Adverse Impact on Domestic Pricing During the Period of Investigation**

78. The record of the steel investigation provided clear evidence that imports of carbon flat-rolled steel had a serious and adverse impact on domestic pricing during the period of

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<sup>60</sup> U.S. first written submission, section E.

investigation. As the United States noted in its first submission,<sup>61</sup> the record of the steel investigation showed that:

- Purchasers of carbon flat-rolled steel consider price an important factor in purchasing decisions. Indeed, purchasers reported that the lowest priced supplier frequently wins the sale.<sup>62</sup>
- The elasticity of substitution between imports and domestic merchandise was moderate to high.<sup>63</sup> In other words, imports and domestic merchandise are close enough substitutes for one another that even a small decline in the price of imports will cause purchasers to shift their purchases from domestic merchandise to imports.<sup>64</sup>
- Imports routinely undersold both integrated and minimill producers during the period of investigation.<sup>65</sup>
- 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. Import prices generally continued to decline throughout the remainder of the period. 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. Moreover, prices declined even further in interim 2001.<sup>66</sup>
- Domestic price declines followed decreases in import prices during the period.<sup>67</sup> The moderate to high level of substitutability between imports and 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.<sup>68</sup>

79. In addition, as the United States has discussed at length in its submissions,<sup>69</sup> the ITC also considered whether other factors (such as minimill competition or demand declines) were more important causes of these price declines in the market.<sup>70</sup> As the United States has stated in its

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<sup>61</sup> U.S. first written submission, paras. 460 & 472..

<sup>62</sup> ITC Report, pp. 58 & 62.

<sup>63</sup> ITC Report, pp. 58 & 62.

<sup>64</sup> ITC Report, 60-62 & 65, & Tables FLAT-66-71, Tables FLAT 73-74.

<sup>65</sup> ITC Report, 60-62 & 65, & Tables FLAT-66-71, Tables FLAT 73-74.

<sup>66</sup> ITC Report, pp. 61-62.

<sup>67</sup> I ITC Report, 60-62 & 65, & Tables FLAT-66-71, Tables FLAT 73-74.

<sup>68</sup> ITC Report, pp. 60-62.

<sup>69</sup> U.S. first written submission, paras. 484-517.

<sup>70</sup> ITC Report, pp. 63-65.

written submissions and in its oral statements, the ITC examined the record evidence in detail and concluded that the price declines in the carbon flat-rolled steel market between 1998 and 2000 were caused primarily, if not exclusively, by import price competition.

80. In sum, the record evidence showed that import pricing was an important determinant of domestic price declines during the period of investigation.

### **The Economic Model Submitted by the Foreign Producers Did Not “Establish” that Imports Had a Minimal Impact on Domestic Pricing**

#### The Model Was Methodologically Flawed

81. Although Brazil contends that the economic models submitted during the steel investigation, including that submitted by the foreign producers, “established that import decreases and increases were either a statistically insignificant or a minor factor explaining domestic price levels in relation to . . . other factors” like capacity increases or minimill competition,<sup>71</sup> Brazil’s characterizations of the validity of the foreign producers’ model are unfounded.

82. First, as the United States has pointed out previously,<sup>72</sup> the model submitted by the foreign producers contained significant methodological flaws, rendering it unreliable as a means of establishing the contribution of imports (or any other factor) to declines in domestic prices. As noted by the ITC’s economic staff in its written analysis of the model, the model 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.”<sup>73</sup> Indeed, because the foreign producers’ economic consultant failed to supply the theoretical foundations to support the model used to perform the regression analysis, the ITC’s staff stated that the lack of a formal conceptual model made it impossible to assess the validity of the study’s core argument, i.e., that domestic capacity increases, primarily by minimills, drove down market prices.<sup>74</sup>

83. In addition, the ITC’s economic staff noted that the respondents’ economic “model” failed to provide an adequate justification for using certain variables for measure of domestic competition.<sup>75</sup> For example, a time dummy variable was used in the model to indicate the presence of a new domestic producer in the market, but the time period represented by the variable chosen appeared to coincide with the 1998 surge in imports, thus causing a downward bias for the coefficient of the import price variable. In other words, the construction of the model biased the model toward a result that would minimize the impact of imports on domestic

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<sup>71</sup> Brazil second written submission, para. 97.

<sup>72</sup> U.S. first written submission, paras. 518-522.

<sup>73</sup> ITC Memorandum EC-Y-042, p. 2 (Exhibit US-35)

<sup>74</sup> ITC Memorandum EC-Y-042, p. 3 (Exhibit US-35).

<sup>75</sup> ITC Memorandum EC-Y-042, p. 3 (Exhibit US-35)

pricing.<sup>76</sup> Because of these limitations, the ITC’s staff noted, the study’s “main argument[,] that domestic competition was the biggest source of domestic price decline[, was] only weakly supported by the empirical results.”<sup>77</sup>

84. In their final word on the matter, the ITC 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.”<sup>78</sup> In other words, the ITC staff considered that the author of this study had not provided support for his basic premise, which was that imports had a minimal impact on domestic pricing in the carbon flat-rolled steel market.<sup>79</sup>

85. In sum, the model was, as the ITC concluded, methodologically flawed. Because of these methodological flaws, the ITC properly concluded that the model was inconclusive with respect to whether imports had had a minimal or insignificant impact on domestic pricing during the period of investigation. Brazil’s contentions to the contrary are unfounded.<sup>80</sup>

The Foreign Producers’ Model Does Not Control for the Inherent Limitations of Linear Regression Models Cited by the United States in Its Responses to the Panel’s Questions

86. As final note on the model submitted by foreign producers, the United States would note that *it is critical to point out that Brazil is mistaken when it asserts that the model submitted by foreign producers during the steel investigations addresses the issues associated with linear regression models that were outlined in the United States’ written responses to the Panel’s first set of questions*

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<sup>76</sup> ITC Memorandum EC-Y-042, p.4 (Exhibit US-35).

<sup>77</sup> ITC Memorandum EC-Y-042, p. 3 (Exhibit US-35)

<sup>78</sup> ITC Memorandum EC-Y-042, p. 3 (Exhibit US-35)

<sup>79</sup> The model had other flaws as well. For example, the foreign producers’ model used different lag periods for possible price effects for hot-rolled and cold-rolled steel, with a one-month lag for hot-rolled steel and a three-month lag for cold-rolled steel. Mr. Prusa, the author of the model, provided little justification for using the different lag periods for the two products and provided no indication whether the results of the model were robust for other lag specifications.

<sup>80</sup> Moreover, the United States notes that, in making this argument in its prior submissions, Brazil has misunderstood the ITC economic staff’s memorandum. In that memorandum, the staff stated that the neither the foreign producers’ model nor the domestic industry’s model showed “strong statistical evidence” that imports of cold-rolled or galvanized (corrosion-resistant) merchandise were major determinants of domestic price declines. ITC Memorandum EC-Y-042, p. 2 (Exhibit US-35). However, the staff’s assessment that the models failed to provide “strong statistical evidence” of this proposition does *not* reflect a judgment by the staff that there *was* strong statistical evidence that imports were not a major determinant of domestic price declines. Instead, the conclusion that neither model provided “statistical evidence” of this proposition simply reflects the judgment of the ITC economic staff that neither model’s results were particularly compelling or conclusive on the issues. As the Staff explicitly noted in its concluding paragraph, neither Mr. Hausman, the domestic industry’s expert, nor Mr. Prusa, the foreign producers’ expert, were able to provide sufficient statistical support for their theses. More specifically, “Mr. Hausman did not provide evidence that the effect of import competition was significantly greater than the effect of the other factors,” as his model purported to do. Similarly, Mr. “Prusa did not provide evidence that the effect of import prices and volumes was significantly less than the other factors.” ITC Memorandum EC-Y-042, p. 4 (Exhibit US-35).

87. As the Panel is aware, in its response to question 88 of the Panel’s first set of written questions to the parties, the United States noted that linear regression models had inherent limitations that would complicate their use in a safeguards proceeding. First, the United States noted that linear regression models only become statistically useful when a relatively large number of observations (i.e., data points) are available for both the independent and dependent variables used in the linear regression model.<sup>81</sup> Second, the United States noted 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.<sup>82</sup>

88. Brazil contends that the respondents’ model resolved both of these issues. Brazil appears to misunderstand the second problem outlined by the United States in its response to Panel question 88. In its written rebuttal submission, Brazil has confused 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 in its second written submission, a linear regression model can be properly designed to resolve the endogeneity issue. For example, in the case of the carbon flat-rolled market, a properly designed linear regression model should control for the fact that the impact of capacity increases may be dependent upon the existence of minimill competition because most of the capacity increases were added by minimills.

89. However, endogeneity does not address the second limitation described by the United States in its response to question 88. As that response showed,<sup>83</sup> 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*.

90. 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

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<sup>81</sup> U.S., Responses to the Panel's Questions for the Parties, paras. 157 & 159-161.

<sup>82</sup> U.S., Responses to the Panel's Questions for the Parties, para. 158.

<sup>83</sup> *Ibid.*

effects that imports have in common with other injury factors.<sup>84</sup> 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.

### **The Model Submitted by the Domestic Industry During the Investigation Claimed That Imports Had An Important Impact on Domestic Pricing**

91. Finally, the United States notes that Brazil has mistakenly implied in its submissions throughout this proceeding that the models submitted by both the respondent and domestic parties during the steel investigation both indicated that imports of carbon flat-rolled merchandise had a minimal impact on domestic cold-rolled and corrosion-resistant prices during the period of investigation. Once again, Brazil’s assertions are wrong.

92. As Brazil should be aware, the econometric model provided by the domestic steel industry to the ITC 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 U.S. market.<sup>85</sup> 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 attempted to establish that imports of cold-rolled steel had important “own price” effects on domestic cold-rolled prices in the U.S. market, while the price of all carbon flat-rolled imports had important price effects on the price of galvanized (corrosion-resistant) products.<sup>86</sup> 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.<sup>87</sup>

93. In other words, it is simply not true, as Brazil asserts, that all of the models submitted to the ITC claimed that imports had a minimal impact on domestic carbon flat-rolled pricing. The domestic industry submitted an economic model to the ITC to provide support for their argument that imports were the dominant cause of price declines in the market during the period from 1998 to 2001.

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<sup>84</sup> See, e.g., Chapter 2, “The Classical Multiple Linear Regression Model,” and Chapter 3, “Least Squares” in William H. Green, *Econometric Analysis*, Fifth Edition (Prentice Hall 2003); and Peter Kennedy, *A Guide to Econometrics, Fourth Edition*, pp. 47-50 (MIT Press 1998).

<sup>85</sup> Transcript of Commission Hearing, September 19, 2001, p. 413 (testimony of Professor Jerry Hausman on the results of his econometric model) (Exhibit US-84).

<sup>86</sup> Tr., p. 415-416 (Exhibit US-84); see also Exhibits to Professor Hausman’s Testimony, pp. 6-8 (Exhibit US-84).

<sup>87</sup> Tr., pp. 418-419 & Hausman Exhibit, p. 4 (entitled “Conclusions: Carbon Steel Flat Products”) (Exhibit US-84).



94. Indeed, the simple fact of the matter is that two respected economists<sup>88</sup> developed economic models to assess the impact of import pricing on domestic pricing in the carbon flat-rolled market. However, these two respected economists came to entirely different conclusions concerning the impact of imports on domestic pricing in the carbon flat-rolled steel market. In other words, the use of an econometric model will not necessarily result in one conclusion that is clearly correct nor will the use of such a model always result in a finding that imports have had no impact on domestic prices, as Complainants suggest. On the contrary, a requirement that a competent authority use such models (a requirement in no way provided for in the Agreement) would simply result in arguments between economic consultants – like Mr. Prusa and Mr. Hausman – as to the validity of the assumptions, inputs, and model design used in the other economists’ models.

**39. Does the United States have any arguments to counter those made by the complainants regarding the lack of coincidence between increased imports and injury in relation to FFTJ?**

95. Yes. 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.<sup>89</sup> During the last three full years of the period, 1998 through 2000, imports increased in absolute terms by 28.4 percent and increased their market share by 11.1 percentage points to 45.6 percent.<sup>90</sup> During the same period, the industry experienced substantial and consistent declines in its U.S. shipments, commercial sales values, employment levels and profitability levels.

96. For example, in 1998 – the mid-point of the period of investigation – the volume of imports increased on an absolute level by 11.2 percent 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.<sup>91</sup> In that same year, the industry’s condition declined in the following respects:

- The industry’s production levels fell by 4.2 percent.
- The quantity of its net commercial sales fell by 4.4 percent.
- The value of its net commercial sales fell by 2.1 percent.

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<sup>88</sup> The domestic industry’s economist, Professor Jerry Hausman, is a professor at the Massachusetts Institute of Technology. The foreign producers’ economist, Thomas Prusa, is a professor at Rutgers University.

<sup>89</sup> The Panel should also refer to the somewhat more general discussion of this issue in paragraphs 650 through 655 of the U.S. first written submission.

<sup>90</sup> ITC Report, Table TUBULAR-C-6.

<sup>91</sup> ITC 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 percent in 1997 to 55.3 percent in 1998 while import market share increased from 32.9 percent in 1997 to 35.5 percent in 1998. *Ibid.*

- The hours worked by its employees declined by 3.1 percent.
- Its aggregate gross profits fell by 15.8 percent.
- Its aggregate operating income level fell by 41.2 percent.
- Its operating income margin fell by 3.1 percentage points.
- Its market share fell by 2.2 percent.<sup>92</sup>

97. 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 their 1998 levels and their share of the overall FFTJ market by 2.2 percentage points over their 1998 levels.<sup>93</sup> At the same time, the industry’s condition further declined in the following respects:

- The industry’s production levels fell by 11.9 percent.
- The volume of its U.S. shipments declined by 8.7 percent.
- The aggregate value of its U.S. shipments declined by 9.8 percent.
- Hours worked by its employees declined by 11.6 percent while wages paid to its employees declined by 11.0 percent.
- Its net commercial sales value fell by 13.2 percent.
- Its aggregate gross profits fell by 19.1 percent.
- Its aggregate operating income level fell by 55.5 percent.
- Its operating income margin fell by 2.3 percent.
- Its market share fell by 2.2 percent.<sup>94</sup>

98. Finally, in 2000 – the last full year of the period – import volumes increased on an absolute level by a further 15.3 percent 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

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<sup>92</sup> ITC Report, Table TUBULAR-C-8.

<sup>93</sup> ITC 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 percent in 1998 to 63.0 percent in 1999 while import market share increased from 35.5 percent in 1998 to 37.7 percent in 1999. *Ibid.*

<sup>94</sup> ITC Report, Table TUBULAR-C-6.

market by a further 4.0 percentage points over their 1999 levels.<sup>95</sup> In that year, the industry’s condition further declined in the following respects:

- The volume of its U.S. shipments declined by 2.4 percent.
- The aggregate value of its U.S. shipments declined by 3.8 percent.
- Its work force was reduced by 8.7 percent.
- Its net commercial sales value fell by 4.9 percent.
- Its aggregate gross profits fell by 17.7 percent.
- Its operating income margin fell by 2.4 percent.
- Its market share fell by 4.0 percent.

99. In other words, during each of the last three years of the period of investigation, imports progressively and consistently increased their market share and ratio to domestic production substantially and the industry’s production levels, shipment levels, commercial sales quantities and values, profits, and market share all declined. Clearly, as the ITC found, there was a correlation between import increases and industry declines during the last three full years of the period.

100. Despite these strong correlations, the EC nonetheless asserts that there was not a genuine and substantial link between import increases and the industry’s declines because, it asserts, the declines in the industry’s profitability levels were caused by increases in the industry’s cost of goods sold during the period, a factor that the EC asserts the ITC failed to address.<sup>96</sup>

101. As the United States noted in its first written submission,<sup>97</sup> the EC is wrong in asserting that the ITC failed to address this issue in its analysis. On the contrary, the ITC specifically considered this increase in costs in its analysis, noting that “lower production and shipments [during the period of investigation] meant fewer sales over which to spread fixed costs, contributing to increased unit costs.” The ITC also specifically found 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.”<sup>98</sup>

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<sup>95</sup> ITC 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 percent in 1999 to 69.7 percent in 2000 while import market share increased from 37.7 percent in 1999 to 41.7 percent in 2000. *Ibid.*

<sup>96</sup> EC second written submission, para. 412.

<sup>97</sup> U.S. first written submission, paras. 645-652.

<sup>98</sup> ITC Report, pp. 176-77.

102. In other words, the ITC found not only that increased imports had helped increase the unit costs of the industry by reducing the industry’s production volumes, underselling by imports prevented the industry from raising prices they had prevented the industry from raising their prices to cover the cost increases that occurred during the period. The EC’s contentions that these were considerations not taken into account by the ITC are groundless.

**40. What is the United States’ response to the assertion by New Zealand in its Second Written Submission (para. 2.3) that minimills account for one third of total United States steel production?**

103. The exact percentage of total domestic production accounted for by minimills varies from product to product. For example, as the United States indicated in its answer to question 76(a) of the first set of Panel questions in this proceeding, the vast majority of hot-rolled bar is produced using the minimill production process. By way of contrast, there is very limited production of stainless steel bar by minimills.

104. The issue of minimills has been consistently raised primarily in the context of the carbon flat-rolled steel market. The record evidence established that minimill producers accounted for approximately 15 percent of total domestic production of carbon flat-rolled steel in 2000.<sup>99</sup> The United States notes that Korea appears to agree with this calculation of minimills’ share of domestic production in its written rebuttal submission, which states that minimills never accounted for more than 16.9 percent of domestic shipments of carbon flat-rolled steel during the period of investigation.<sup>100</sup>

105. In this regard, the United States cautions the Panel not to rely on Korea’s comparisons of the volumes of minimill and import shipments. 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.*<sup>101</sup> As the United States explained during the second Panel meeting, 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 carbon flat-rolled steel products. For example, the record indicates that, of the 27.9 million tons of carbon flat-rolled steel shipped by minimills overall in 2000, 16.043 million tons (or more than 57 percent) 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.<sup>102</sup> In other words, if double-counting of internal transfers is eliminated, the actual tonnage of carbon flat-rolled steel shipped by the minimills is overstated in Korea’s charts

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<sup>99</sup> United States first written responses to Panel questions, question 76(a); Compare Minimill Trade Data (Exhibit US-60) with ITC Memorandum INV-Y-209, Table ALT7 (Exhibit US-33) (28.442 million tons of production for minimills for all carbon flat-rolled products in 2000 compared to 199.865 millions tons for all domestic production of CCFRS in 2000).

<sup>100</sup> Korea second written submission, para. 170.

<sup>101</sup> These comparisons are contained in paragraphs 169 through 176 of Korea’s second written submission.

<sup>102</sup> See Minimill Trade Data, p. 1 (Exhibit US-60).

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 then considered domestic production and shipments.

106. 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 carbon flat-rolled products made by minimills. When the Panel does so, it will recognize that there was a substantially smaller volume of shipments of carbon flat-rolled steel 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.

107. In sum, double-counting minimill data would not be a particular problem when comparing these numbers to other double-counted numbers (such as shipments or production of the entire domestic carbon flat-rolled industry). However, it would be misleading to compare shipment numbers that are not double-counted, such as those for imports.

#### D. QUESTIONS FOR ALL PARTIES

**41. *The EC argues in its Second Written Submission (para. 327) that it is incorrect to determine that there is a causal link before carrying out the non-attribution analysis. Do the parties agree with this approach? Is it impossible to establish that a causal link between increased imports and serious injury exists before the non-attribution exercise has been undertaken?***

108. As the United States noted in its oral statement at the second panel meeting,<sup>103</sup> the argument set forth in paragraph 327 of the EC’s second written submission is based on a significant misunderstanding of the ITC’s causation analysis in safeguards proceedings. The ITC 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.

109. Instead, the ITC *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, as the United States stated at the second panel meeting, the ITC performs both of these

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<sup>103</sup> U.S. second oral statement, paras. 55-62.

analytical steps before ultimately concluding that imports have caused serious injury to the domestic industry.<sup>104</sup>

110. The EC also appears to misunderstand the Appellate Body’s guidance concerning a proper causation analysis in a safeguards proceeding. First, the EC 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.”<sup>105</sup> Indeed, the ITC 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.

111. Second, the EC’s 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 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.

112. 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.”<sup>106</sup> 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.”<sup>107</sup> 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 Safeguards Agreement, in line with reports adopted by the Appellate Body.

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<sup>104</sup> 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.” *Argentina - Footwear*, AB Report, para. 144.

<sup>105</sup> *Argentina – Footwear*, AB Report, para. 144.

<sup>106</sup> *US - Lamb*, AB Report, para. 178.

<sup>107</sup> *US - Lamb*, AB Report, para. 178.

**42. *What are parties' views regarding the argument made by the EC in its Second Written Submission (para. 334) that "the purpose of the non-attribution requirement cannot be limited to assessing the extent of the injury for the purposes of the remedy. The purpose of the non-attribution requirement is to ensure that a competent authority properly establishes the existence of a causal link between increased imports and serious injury"?***

113. The United States believes that the second sentence of Article 4.2(b) requires that the competent authority not attribute to increased imports any injury caused by factors other than increased imports before ultimately concluding that there is a genuine and substantial causal link between increased imports and serious injury.

**43. *In which circumstances could import prices be found to have led down [domestic] prices when the import market share is relatively low compared with the domestic market share?***

114. To take one example, 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 carbon flat-rolled steel 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 carbon flat-rolled steel, cannot be termed "relatively low."

## **VIII. ARTICLE 5.1**

### **B. QUESTIONS FOR COMPLAINANTS**

**45. *With respect to complainants' responses to Question 104 of the Panel's questions to the parties for the first substantive meeting, are complainants suggesting that Article 3.1 applies to Article 5.1 only in cases where there is a deviation between the ITC's remedy recommendation and the President's remedy determination, or that it applies in all cases?***

115. At the second panel meeting, the EC appeared to answer this question (without disagreement from other Complainants) by stating 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. We agree 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 ITC, 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.

116. Of course, the Appellate Body has found that the Safeguards Agreement only requires a contemporaneous explanation of compliance with Article 5.1 in certain limited circumstances that are not applicable to the steel safeguard measures.<sup>108</sup> 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 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.

### C. QUESTIONS FOR THE UNITED STATES

**46. *Could the United States provide precise details regarding what it regards as the "accumulation of injurious effects caused by increased imports" (United States' Second Written submission, para. 183), which it says may be redressed under Article 5.1?***

117. 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.

118. In either case, the industry will immediately 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.

119. 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 down 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 likely fall, reducing their ability to fund new projects through equity financing.

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<sup>108</sup> *US – Line Pipe*, AB Report, para. 233.



120. In short, 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. This is what we refer to as the accumulation of injurious effects.

121. The ITC data demonstrate how the injurious effects of imports can accumulate. We will use two products – certain carbon flat-rolled steel and rebar – as examples. Similar conditions apply in the other eight industries.

### **Certain carbon flat-rolled steel**

122. The state of the domestic certain carbon flat-rolled steel industry declined throughout the investigation period, in marked contrast to the steady and significant increase in demand that also characterized that period.<sup>109</sup> 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.<sup>110</sup> These losses had significant adverse effects on the cash flow to the domestic industry. In 1996, the certain carbon flat-rolled steel industry saw \$2.1 billion in cash flow, rising in 1997 to \$2.7 billion, and dipping to \$2.1 billion in 1998. In 1999, cash flow had dropped to \$0.9 billion (just one-third of the 1997 level) and fell further in 2000 to \$0.7 billion. In the first six months of 2001, the domestic industry had a *negative* cash flow of \$0.8 billion, compared to the \$1.2 billion positive cash flow in the first six months of 2000.<sup>111</sup>

123. The change from operating income to operating losses and the loss of cash flow accompanied the decline in average unit values (“AUV”) for commercial shipments of certain carbon flat-rolled steel. In 1996, the AUV for certain carbon flat-rolled steel was \$470. By 2000, this amount had declined by 11 percent to \$418. In the first six months of 2001, the AUV of CCFRS had fallen to \$373, representing a twenty percent decline in price since 1996.<sup>112</sup> 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

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<sup>109</sup> ITC Report, pp. 56 & 60.

<sup>110</sup> For instance, in 1996 and 1997, the domestic industry had positive operating income margins of 4.3 and 6.1 percent of sales respectively. The percentage dropped to 4.0 in 1998, and into a 0.7 percent loss in 1999 and a 1.4 percent loss in 2000. In the first half of 2001, operating losses plummeted to 11.5 percent. ITC Report, p. 53. In dollar terms, the domestic industry posted an operating income of \$1.2 billion in 1996, which rose to \$1.8 billion in 1997, and then fell to \$1.1 billion in 1998. After this point, operating income turned to continually deepening losses – \$181 million loss in 1999 and a \$370 million loss in 2000. In the first six months of 2001, operating losses reached \$1.3 billion, compared to an operating income of \$538 million in the first six months of 2000. ITC Report, pp. FLAT-24 - FLAT-28, Tables FLAT-20 - FLAT-25.

<sup>111</sup> *Ibid.*

<sup>112</sup> ITC Report, p. 53.

percent.<sup>113</sup> 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 well. From 1996 to 1998, the domestic industry devoted \$2.3 billion, \$2.5 billion, and \$2.3 billion to capital expenditures respectively. By 1999, this amount had fallen to \$1.8 billion, dropping further to \$1.5 billion in 2000. A comparison of interim period data for 2000 and 2001 demonstrates a further decline, as \$478 million was spent in the first six months of 2000, compared to \$361 million in the same period for 2001.<sup>114</sup>

## Rebar

124. Imports peaked in 1999, and remained at high levels afterward. But 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 percent 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.<sup>115</sup>

125. 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. 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 \$274/ton in 1999 to \$269/ton in 2000 and \$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 \$266/ton. Steel, vol. 2, at LONG-35.) In other words, rebar unit values fell another \$9 per ton from 1999 to June 2001, as import levels moderated slightly from their peak in 1999.<sup>116</sup>

126. U.S. rebar producers reported modest operating income of \$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 \$59.9 million by 2000.<sup>117</sup> As a percentage of net commercial sales, the industry's operating profit of 5.0 percent in 1999 became an operating loss of negative 1.6 percent.

127. The decline in profitability resulted in cash flow, capital expenditures, and R&D expenses reaching their lowest levels in 2000. Capital expenditures fell from \$108 million in 1996 to

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<sup>113</sup> ITC Report, p. 54.

<sup>114</sup> ITC Report, pp. FLAT-24 - FLAT-28, Tables FLAT-20 - FLAT-25. We derived these figures by adding the reported capital expenditures.

<sup>115</sup> ITC Report, p. LONG-11

<sup>116</sup> ITC Report, p. LONG-23.

<sup>117</sup> ITC Report, p. LONG-35.

\$62.1 million in 1999, and fell again to \$49.4 million in 2000.<sup>118</sup> Because major capital expenditures in the steel industry require advance planning, 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.)

**47. Could the United States provide details of the legal basis upon which it asserts that Article 5.1 allows the application of safeguard measures to imports as a whole rather than just the increased imports?**

128. As we explained in response to question 153 of the Panel’s first set of questions to the parties, the term “increased imports” as used in the Safeguards Agreement is synonymous with “imports as a whole.” We derive this conclusion from the ordinary meaning of “increased imports” in its immediate context.<sup>119</sup> Other provisions of Article XIX and the Safeguards Agreement provide additional confirmation for this understanding of “increased imports.”

129. Article 5.1 authorizes a Member to “apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.” Nothing in this provision suggests that safeguard measures are limited to the increase in imports, as opposed to all of the imports that have increased.

130. Article 1 confirms this conclusion. It 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.

Thus, by definition, a safeguard measure may be applied to a *product* as such, and not merely to the increase in imports of that product.

131. 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.

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<sup>118</sup> ITC Report, p. LONG-35.

<sup>119</sup> US, Responses to the Panel’s Questions for the Parties, paras. 303-307.

132. 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.<sup>120</sup> 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.<sup>121</sup> Thus, the determination under Article 4.2 has the same scope as the determination described in Article 2.1 – increased imports as a whole. And, as we have explained previously, 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.<sup>122</sup>

133. These provisions of the Safeguards Agreement 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.

**48. *If the model presented by the United States was used by the ITC in making its remedy recommendation, why is it that there is a discrepancy between the ITC recommendation and the President's measure, which the United States now claims is also justified by the model?***

134. As an initial point, the Safeguards Agreement does not require the competent authorities (or any other instrumentality of a Member’s government) to recommend a remedy, or to provide an explanation with regard to any remedy that they do recommend. Unless adopted by the Member, such a recommendation and any related explanation would have no legal status under the Safeguards Agreement or Article XIX.

135. In addition, the ITC did not attempt to recommend application of a measure to the maximum possible extent. Instead, for each product, the ITC found that its recommended remedy “will not *exceed* the amount necessary to remedy the serious injury we find to exist.”<sup>123</sup> The panel in *US – Line Pipe* found with regard to an almost identical ITC finding that “there is nothing in this statement to suggest that the restrictive effect of the ITC recommendation was set at (or above) the maximum amount necessary under Article 5.1.”<sup>124</sup> Thus, the remedy proposed by the ITC and the remedy established by the President could *both* be less than the maximum extent permitted under Article 5.1. It is the view of the United States that this was the case for each product.

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<sup>120</sup> 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.” *US – Wheat Gluten*, AB Report, para. 95.

<sup>121</sup> 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.” *US – Wheat Gluten*, AB Report, para. 96.

<sup>122</sup> U.S., Responses to the Panel’s Questions for the Parties, paras. 305-306.

<sup>123</sup> ITC Report, p. 359 (emphasis added). The ITC makes similar findings on pages 370, 380, and 394.

<sup>124</sup> *US – Line Pipe*, Panel Report, para. 7.94.

136. It is important to recognize the differences in the use of the model by the ITC in its remedy discussion and in the modeling exercise in the U.S. first written submission.<sup>125</sup> Although the volume, price, revenue, and elasticity inputs to reflect market conditions in 2000 were the same, the ITC modeled a series of remedy options different from remedies subsequently chosen by the President. In contrast, the modeling exercise in the U.S. first written submission was based on the estimated price, volume, and revenue effects of the remedies actually applied by the President. It compared these with the estimated price, volume, and revenue effects of the increase in imports. The ITC did not model the price, volume, and revenue effect of the increase in imports.

137. It is also important to recognize that the ITC reached its remedy recommendation by considering a number of factors, of which the results of the model were only one. The ITC also considered information and arguments submitted by the parties, testimony at its remedy hearings, data on the administrative record, and non-modeling economic analysis. Based on this information, the ITC 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.

138. 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.”<sup>126</sup> These include the recommendation and report of the ITC, the extent to which workers and firms in the domestic industry are benefitting 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.

139. The modeling 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. We have provided this analysis in rebuttal to Complainants’ arguments that the ITC findings were inconsistent with Article 4.2(b), and that a finding in their favor on this point would, by itself, create a presumption that the measures are inconsistent with Article 5.1.<sup>127</sup>

140. This rebuttal reflects the limited nature of Complainants’ arguments. Other than conclusory assertions, they have not addressed the injurious effects of increased imports on all

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<sup>125</sup> We note again that the ITC used the modeling results as one element in its evaluation of the remedy options, and not in its analysis of injury and causation.

<sup>126</sup> Memorandum of March 5, 2002, 67 Fed. Reg. 10593, 10594 (Exhibit CC-13).

<sup>127</sup> Of course, the Appellate Body has found that any presumption created by an inconsistency with Article 4.2(b) would be rebuttable. *US – Line Pipe*, AB Report, para. 262.

indicators of injury, or demonstrated as a matter of fact (rather than by unwarranted presumption) that the remedial effects of the measures exceed those injurious effects. In any event, in addressing the effects of imports on only three of the indicators of injury, the modeling exercise does not fully capture the injurious effects of imports on *other* indicators of injury, which all parties recognize are within the scope of a WTO-consistent safeguard measure. Thus, the exercise is conservative.

141. Finally, we note that the ITC Commissioners made different recommendations based upon the evidence. In six of ten cases, the majority recommended application of measures at a lesser extent (but for a longer period) than those established by the President. However, in each of those cases, a two-Commissioner plurality recommended application of safeguard measures to a *greater* extent than those established by the President. These recommendations reflect the different conclusions that the Commissioners drew from the information before them. These variations reflect the different weight that individual evaluators may place on the information on the record. The President’s choice of safeguard measures is somewhere between the higher and lower recommendations of the individual Commissioners.

**49. *Could the United States provide the full documentation of the model and parameters used to in the COMPAS model (Exhibit US-57)? In addition, please provide the electronic worksheets used to calculate the results.***

142. Yes. Documentation for the COMPAS model appears in the ITC’s first supplemental response. Complainants submitted part of this document as Exhibit CC-10, but omitted the memorandum describing COMPAS. We have included this material in Exhibit US-93.

143. The model used in the U.S. first written response used the same parameters for 2000 as the ITC did during its remedy phase. With regard to the counterfactual inputs to ascertain how price, volume, and revenue would have changed, the modeling exercise in the U.S. first written submission used the safeguard measures actually imposed by the President, reflecting the exclusion Canada, Mexico, and developing countries that individually accounted for less than three percent of total imports of each product.<sup>128</sup> The modeling exercise also involved an estimate of the price, volume, and revenue effects of increased imports that the ITC did not perform at any time.

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<sup>128</sup> ITC Memorandum EC-Y-046 describes these parameters. Exhibit US-94 provides the relevant portions of the Memorandum. (Other portions of Memorandum EC-Y-046 appear in Exhibit US-64.)

144. Electronic versions of the spreadsheets are provided with this submission.<sup>129</sup> In reviewing the electronic versions of the spreadsheets, we discovered two typographical errors on the hard copies, which do not affect any of the conclusions we have drawn from these materials. Exhibit 95 contains corrected versions of the affected pages.

**50. Please respond to Korea's comments on the US methodology. In particular, please address Korea's allegation regarding the value of the substitution elasticity used in the model.**

145. As an initial point, as the United States has observed in previous submissions, any numerical analysis – be it the price- or volume-based exercise or economic modeling – can only indicate the order of magnitude of a safeguard measure, and cannot set a precise level.<sup>130</sup> Most of Korea’s comments are directed at the precision of the U.S. numerical exercises, and do not detract from our observation that the exercises demonstrate the consistency of the steel safeguard measures with Article 5.1.

146. In any event, the points raised by Korea – both general and specific criticisms – are invalid. We address each in turn.

**General criticisms**

147. **Additions to target profit to reflect industry’s existing injured condition:** We addressed this point in paragraphs 127 and 128 of our oral statement. The ordinary meaning of “remedy” means to “rectify” or “make good,”<sup>131</sup> a concept that clearly encompasses addressing the accumulated effects of increased imports. Complainants have not actually disagreed with our analysis of the ordinary meaning of “remedy” and its implications, including the observation that

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<sup>129</sup> The model is run using QuattroPro release 8, which was the ITC’s spreadsheet package at the time that the model was most recently revised. Since the model contains a number of complex macros, it has not been revised to run in subsequent releases of QuattroPro. Accordingly, the spreadsheets cannot be run in the current version of QuattroPro (release 10). Because of the complexity of the macros, the spreadsheets will not function in other spreadsheet software.

In preparing these materials, we found that the description of the modeling exercise for stainless steel wire rod in the first written submission contained an error. The submission indicates that the second scenario for this product reflected “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.” U.S. first written submission, para. 1186. In fact, the second scenario was based on a comparison of 1998 with 2000. The volume of stainless steel rod imports peaked in 1997 before dropping in 1998 and 1999, and then undergoing their greatest volume increase of the investigation period in 2000. ITC Report, p. STAINLESS-12. The ITC found that “[i]n 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.” ITC Report, p. 220. Accordingly, the modeling exercise used the 1998-2000 increase in imports, rather than the 1997-2000 increase used for most other products.

<sup>130</sup> U.S. first written submission, para. 1062.

<sup>131</sup> U.S. second written submission, paras. 180-184.

imports have cumulative injurious effects.<sup>132</sup> The additions to the target profit in the second step of our numerical exercise reflect the cumulative injurious effect of increased imports. Omitting such an addition would ignore those effects, something that the Safeguards Agreement does not require.

148. **Use of average unit values (“AUVs”):** We addressed this point in paragraph 129 of our oral statement. In addition, the U.S. first written submission noted that

[f]or the most part, we based the calculations on unit values, as these captured all of the products under investigation. For some products, the findings of the ITC or data in the ITC 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, we based our calculations on the item-specific pricing comparisons conducted by the ITC.<sup>133</sup>

The first written submission explains the reasons for choosing unit values or some other figure as the basis for the numerical exercise.<sup>134</sup> We see nothing in Korea’s Exhibit 14 that suggests any infirmity in the choice of AUVs or item-specific pricing data for particular products.

149. **Treatment of domestic and imported products as perfect substitutes:** 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. Complainants view this element of the calculation as presupposing perfect substitutability between imported and domestic products, when the ITC found a moderate to high degree of substitution.<sup>135</sup>

150. 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, we note that many purchasers felt that imported products were of higher quality than domestic products.<sup>136</sup> This

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<sup>132</sup> The EC did not address the substance of the hypothetical in paragraph 128 of our oral statement regarding the accumulated polluting effects of a factory, other than to suggest that it treated imports as equivalent to pollution, when our point was that the pollution was analogous to injurious effects. Thus, we conclude that the EC 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.

<sup>133</sup> U.S. first written submission, para. 1072, note 1375.

<sup>134</sup> U.S. first written submission, paras. 1091, 1105, 1114, 1132, 1133, 1143, 1156, and 1164.

<sup>135</sup> Exhibit K-14, pp. 3-4.

<sup>136</sup> As a general rule, the majority of purchasers viewed U.S. 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. ITC Report, pp. FLAT-58, LONG-81, TUBULAR-49, STAINLESS-69. The precise figures are: flat-rolled steel, 129 comparable, 64 non-NAFTA superior, 33 U.S. superior; long steel, 136 comparable, 44 non-NAFTA superior, 22 U.S. superior; tubular steel, 85 comparable, 28 non-NAFTA superior, 22 U.S. superior; stainless and tool steel, 87 comparable, 26 non-NAFTA superior, 10 U.S. superior. These evaluations



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.

151. **Capture of volume-related cost decreases:** 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.<sup>137</sup> The criticism is misplaced. As we noted 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.<sup>138</sup> 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, we considered it appropriate to omit the possible beneficial effects of reduced import volume that might accompany a safeguard measure.

152. **Calculation of target prices:** Korea states “it is not at all 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.”<sup>139</sup> 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.

### Specific criticisms

153. **Choice of the target profit margin for certain carbon flat-rolled steel:** Korea notes that the United States used 7.5 percent as the target operating margin for slab in interim 2001, when the operating margin for slab in 1996 was -3.9 percent. This was a clerical error. We have revised the calculation using -3.9 percent as the target margin for interim 2001.<sup>140</sup> The correction does not change the results for certain carbon flat-rolled steel as a whole.

154. **Choice of target margin for other welded pipe:** Korea notes that the target margin of 5.7 percent does not appear in the ITC Report. This figure is the average of profit margins for

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of product quality would suggest that, on average, non-NAFTA products would command a price premium over domestic products.

<sup>137</sup> Exhibit K-14, p. 3.

<sup>138</sup> U.S. first written submission, para. 1079. Such factors would include productivity, production, capacity utilization, employment, etc.

<sup>139</sup> Exhibit K-14, p. 3.

<sup>140</sup> Exhibit US-96 contains a corrected version of the affected pages from Exhibit US-56.

1999 and interim 2001. We omitted data for 2000 from the calculation because the ITC found that excess capacity had a “minor” effect on the industry’s performance in 2000.<sup>141</sup>

155. **Modeling 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 percent higher, while the remedy would result in estimated price increases of 8.7 to 11.1 percent. 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.

**51. How was the conclusion reached that the level of the measures should be reduced over time given that this was not provided for in the model? How was the extent of the reduction of the level of the measure determined?**

156. The United States decided to reduce the steel safeguard measures over time because Article 7.4 of the Safeguards Agreement (and U.S. law) require progressive liberalization of all safeguard measures of more than one year in duration.

157. The United States did not consider modeling 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.

158. In line with the Working Party’s findings in *Felt Hats*, the United States did not attempt to predict future developments. Rather, we 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 we could evaluate the condition of the domestic industry and the role of imports to decide whether these required action of some sort.

**52. How were adjustments made to take account of NAFTA imports?**

159. As noted in response to question 48, the safeguard measures applied by the President were based on consideration of a variety of factors, both quantitative and qualitative. The

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<sup>141</sup> U.S. 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. 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.

numerical exercises do not attempt to duplicate this process, but to provide a numerical confirmation that the measures consistent with Article 5.1, in rebuttal of Complainants’ limited arguments to the contrary.

160. The U.S. first written submission contained two numerical exercises to demonstrate the consistency of the safeguard measures with Article 5.1. The first consisted of a calculation for each product based on the price or volume of increased imports (the “price- or volume-based exercise”).<sup>142</sup> The second used modeling, also discussed above in response to question 48, comparing the estimated price, volume, and revenue effects of the increase in imports with the estimated price, volume, and revenue effects of the safeguard measures (the “modeling exercise”).<sup>143</sup>

161. No adjustment for NAFTA imports was necessary in the modeling exercise, which excluded NAFTA parties and developing country WTO Members accounting for less than three percent of total imports. Thus, in both of the two scenarios used in the modeling 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 reflected changes in *covered imports*.<sup>144</sup> The modeling of the effects of the safeguard measures treated imports from NAFTA countries and excluded developing countries as not subject to safeguard measures. The modeling of the increase in imports involved 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.<sup>145</sup> In addition, for most products, the price, volume, and revenue of domestic products and NAFTA imports changed by similar amounts.

162. We also concluded 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 the reasons discussed in the U.S. first written submission, the exercises for tin mill steel and stainless steel wire were based on the market share effects of imports.<sup>146</sup>

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<sup>142</sup> Paragraphs 1065 through 1080 of the U.S. first written description describe the price- or volume-based exercise.

<sup>143</sup> Paragraphs 1081 through 1084 describe the modeling exercise.

<sup>144</sup> The results of this modeling appear in the COMPAS Results tables in Exhibit US-57. The “other included” line reflects changes for these covered imports.

<sup>145</sup> 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 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.

<sup>146</sup> U.S. first written submission, paras. 1173, 1183, 1197, and 1200-1201. We note in addition that Chairman Koplán 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 . . . .” ITC Report, p. 259. Commissioner

163. For the two products subject to the volume-based exercise, we based 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 were the market share of non-NAFTA imports, the volume of non-NAFTA imports, and U.S. apparent domestic consumption prior to and during the increase in imports.<sup>147</sup> 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, 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.

164. For the eight products subject to price-based exercises, we also concluded that no adjustment was necessary. These conclusions are based on the ITC findings regarding each product.

165. **Certain carbon flat-rolled steel:** The ITC 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.<sup>148</sup> In addition, the ITC 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.”<sup>149</sup> Thus, for purposes of evaluating the Article 5.1 consistency of the President’s safeguard measure, we 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 our price-based exercise.

166. **Hot-rolled bar:** The ITC found that Canadian imports contributed importantly to serious injury based on “the sheer volume of the Canadian increase,” without mentioning any price effect. The ITC found that Mexico did not contribute importantly to serious injury, as its imports

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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. ITC Report, pp. 288-289.

<sup>147</sup> We note in this regard that restoration of the pre-increase market share is the source for the 23 percent reduction in imports that we calculated for tin mill steel, and which Norway criticized at the Panel meeting. Norway second oral statement (Article 5.1), para. 34. For 1999, 2000, and the first half of 2001 we calculated what the volume of non-NAFTA imports would have been if they had retained their 1998 market share of 10.5 percent. We then calculated the difference between that figure and actual imports, and calculated the average reduction over three years. This exercise, which appears in Exhibit US-56, indicated that import volume would have been 23.13 percent lower if imports had not increased their market share.

<sup>148</sup> ITC Report, pp. 66-67.

<sup>149</sup> Second supplemental response, p. 5. In fact, NAFTA imports sold for prices lower than comparable domestic items in only 19 percent of the ITC’s comparisons, while non-NAFTA imports sold for less than comparable domestic items in 58 percent of comparisons. ITC Report, p. FLAT-74, Table FLAT-77. This is a marked difference in the level of underselling.

actually decreased over the period of investigation.<sup>150</sup> 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.<sup>151</sup> Thus, for purposes of evaluating the Article 5.1 consistency of the President’s safeguard measure, we 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.

167. **Cold-finished bar:** The ITC 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 ITC found that Mexico’s share of imports was “very small and declining” and did not contribute to serious injury.<sup>152</sup> Thus, for purposes of evaluating the Article 5.1 consistency of the President’s safeguard measure, we concluded that there was no need to make an adjustment to our price-based exercise.

168. **Rebar:** All parties to the proceeding agreed that the ITC should make a negative injury finding with regard to Canadian and Mexican imports.<sup>153</sup> The ITC found that the volumes of Canadian rebar were “consistently very small,” and that the volume of Mexican rebar declined by 81 percent over the investigation period. The ITC 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.<sup>154</sup> Thus, for purposes of evaluating the Article 5.1 consistency of the President’s safeguard measure, we concluded that there was no need to make an adjustment to the price-based exercise.

169. **Other welded pipe:** The ITC found that imports from Canada and Mexico, while substantial, did not contribute importantly to the threat of serious injury. The ITC 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.<sup>155</sup> For similar reasons, the

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<sup>150</sup> ITC Report, pp. 100-102.

<sup>151</sup> Second Supplemental Response, p. 6.

<sup>152</sup> ITC Report, p. 108.

<sup>153</sup> ITC Report, pp. 115-116, notes 698 and 701.

<sup>154</sup> ITC, pp. 115-116 and note 704.

<sup>155</sup> ITC Report, pp. 168-170. The ITC 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.

price-based exercise relied on data for the later part of the investigation period.<sup>156</sup> 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, we concluded that there was no need to make an adjustment to the price-based exercise.

170. **FFTJ:** The ITC found that imports from both Canada and Mexico were substantial and contributed importantly to serious injury. The ITC found that imports from Canada had a large and increasing volume. The unit values for Canadian FFTJ were twice as high as those for other imports or the domestic product, but the ITC 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.<sup>157</sup> In light of these findings, for purposes of evaluating the Article 5.1 consistency of the President’s safeguard measure, we concluded that there was no need to make an adjustment to our price-based exercise to account for Canadian imports.

171. The ITC found that the volume of imports from Mexico increased at a lower rate than non-NAFTA imports from 1998 to 2000, and Mexico’s share of total imports decreased. It also found that FFTJ from Mexico undersold comparable domestic products “by substantial and increasing margins.”<sup>158</sup> The price-based exercise indicated that a measure of up to 30 percent would be commensurate with the injury related to increased imports, while the safeguard measure was a tariff of 13 percent in the first year. Imports of FFTJ from Mexico never accounted for more than 9 percent of apparent domestic consumption, and had fallen to 5.8 percent of domestic consumption in 2000.<sup>159</sup> Accordingly, for purposes of evaluating the Article 5.1 consistency of the President’s safeguard measure, we consider 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.

172. **Stainless steel bar:** The ITC 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.<sup>160</sup> And 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.<sup>161</sup> In fact, non-NAFTA imports sold for less than comparable domestic products in 40 of 43 comparisons.<sup>162</sup> Imports from Mexico decreased over the course of the

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<sup>156</sup> U.S. first written submission, paras. 1133-1137.

<sup>157</sup> ITC Report, p. 179.

<sup>158</sup> ITC Report, p. 180.

<sup>159</sup> ITC Report, p. TUBULAR-C-6.

<sup>160</sup> ITC Report, p. 213.

<sup>161</sup> ITC Report, p. 214; Second Supplemental Response, p. 9.

<sup>162</sup> ITC Report, p. STAINLESS-86, Table STAINLESS-99.

investigation period, and accounted for “an extremely small percentage of total imports.” There were no pricing comparisons for Mexican imports.<sup>163</sup> The ITC also found that imports from non-NAFTA sources accounted for *all* of the domestic industry’s market share loss during the 1996-2000 period.<sup>164</sup> 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 our price-based exercise.

173. **Stainless steel rod:** The ITC 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.”<sup>165</sup> In light of these findings, we concluded that there was no need to make an adjustment to our price-based exercise.

#### **D. QUESTIONS FOR ALL PARTIES**

**53. *What are the parties' views regarding the use of AUV as the basis for the ITC's numerical analysis, particularly in relation to CCFRS?***

174. As we explained in our oral statement, 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 ITC.<sup>166</sup> (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.

175. However, in some situations that we noted in the first written submission, a difference in product mix for imported and domestic products might limit the usefulness of unit values. In those cases, where possible, we relied on alternative sources of data, such as item-specific pricing data.

**54. *Is it sufficient to base the benchmark income margin on figures for one year alone?***

176. Yes. 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

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<sup>163</sup> ITC Report, p. 214 and note 1361.

<sup>164</sup> Second Supplemental Report, p. 9.

<sup>165</sup> ITC Report, pp. 222-223.

<sup>166</sup> The discussion of the numeric exercise in the U.S. first written submission indicates our reasons for considering AUVs to be preferable with regard to particular products.

exercise. The first written submission describes the basis for choosing the comparison year for each product.<sup>167</sup>

177. Moreover, for many products, the ITC found that imports had injurious effects for much of the investigation period. For example, for certain carbon flat-rolled steel, the ITC 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.

178. 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 certain carbon flat-rolled steel, 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 certain carbon flat-rolled steel, 1997 profit margins provide a conservative estimate of the profits the domestic industry should have made in the 1998-2000 period.

**55. *Is there a link between the number of years used in the model for calculating the benchmark and the number of years in the future for which a valid conclusion can be drawn from the model (as regards the necessary level of remedy)?***

179. No. Regardless of the number of years on which the price-based exercise is based, using it to predict the future is an inherently speculative exercise, as the Working Party in *Felt Hats* recognized. Therefore, use of a large number of years in the data pool does not increase its reliability as an indicator of the industry’s future performance.

**56. *What do parties consider is meant by the reference to "facilitate adjustment" in Article 5.1? Does it allow adjustment only to the increased imports? If so, what would provision for such adjustment in a remedy entail?***

- ***What do parties consider is meant by the reference to "facilitate adjustment" in Article 5.1?***

180. As we noted in our first written submission, “facilitate adjustment” means to promote the adaptation to changed circumstances.<sup>168</sup> In light of the other provisions of the Safeguards

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<sup>167</sup> U.S. first written submission, paras. 1089, 1096, 1106, 1115, 1124, 1136, 1144, 1156, and 1166.

<sup>168</sup> U.S. 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.”).



Agreement, we consider 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.

- ***Does it allow adjustment only to the increased imports?***

181. It is unclear to us whether this question is directed to whether Article 5.1 allows an adjustment only to the increase in imports (as opposed to increased imports as a whole) or to whether Article 5.1 allows an adjustment only to increased imports (as opposed to other factors) that are causing injury to the domestic industry at the same time. We will answer both possible readings of the question.

182. With regard to the first potential reading of the question, we noted in response to question 47, “increased imports” as used in the Safeguards Agreement refers to imports as a whole. Therefore, 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.

183. With regard to the second possible reading, it is unclear whether the question assumes that the consideration of adjustment will take place independently of the related question of whether a measure will prevent or remedy serious injury. 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.” As we showed in past submissions, this is an additive authorization – the measure may both prevent or remedy serious injury *and* facilitate adjustment. Thus, if a measure that fully remedies serious injury does not fully facilitate adjustment to increased import competition,<sup>169</sup> a Member may apply a measure to a greater extent.<sup>170</sup>

184. As we explained with regard to the first segment of this question, “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. This is not an issue that the Panel need address in this dispute, since the United States applied the safeguard measure to

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<sup>169</sup> As noted in response to question 47, we read “increased imports” as referring to imports as a whole.

<sup>170</sup> We discuss this issue in greater detail in paragraphs 185-189 of the U.S. second written submission.

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.

185. In its second written submission, New Zealand argues that “to prevent or remedy serious injury” and “to facilitate adjustment” are independent limitations on application of a safeguard measure. Thus, in its view, “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.”<sup>171</sup> This interpretation 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.

186. 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, we 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.

187. However, New Zealand suggests that the objectives of remedying serious injury and facilitating adjustment were in conflict for flat-rolled steel. It alleges that the ITC “recognized” that “proposals for higher tariffs [than recommended by the ITC] did not ‘clearly anticipate the reduction in capacity and closures, that, as discussed above, are necessary for the industry’s improvement.’”<sup>172</sup>

188. New Zealand misunderstands the ITC’s statement. First, as we have noted, the ITC 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 certain carbon flat-rolled steel.<sup>173</sup> In any event, for each of the ten steel products, the President adopted a measure at a level *lower* than the measure proposed by the domestic industry. Therefore, the ITC’s observation about *some* of proposals by *domestic industries* does not apply to the safeguard measures established by the President, including the measure on certain carbon flat-rolled steel.

189. As a matter of interpretation, New Zealand also 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,

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<sup>171</sup> New Zealand second written submission, para. 3.180.

<sup>172</sup> New Zealand second written submission, para. 3.180.

<sup>173</sup> ITC Report, p. 358.

*but no more than necessary* to facilitate adjustment.” As it does not, 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.”<sup>174</sup>

- ***If so, what would provision for such adjustment in a remedy entail?***

190. 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. As we have noted previously, the United States did not increase the levels of the steel safeguard measures in this fashion.

***57. Could the restraints/limitations that the United States considers exist in relation to regression and correlation analyses for the purposes of Article 4.2(b) equally apply to the analysis the United States conducted under Article 5.1?***

191. As an initial point, the modeling exercise used COMPAS, a comparative statics economic model, to confirm the consistency of the safeguard measures with Article 5.1. This type of model simulates a limited number of the competitive conditions surrounding sales of a product, and then estimates how a change in some of those conditions would change some of the other conditions. This differs from computerized regression or correlation analyses (often referred to as “*econometric* analyses”), which estimate the relationship between changes in various market conditions. COMPAS does not use regression or correlation analysis.

192. Although our general concerns regarding the inability to quantify the injurious effects of increased imports apply to the COMPAS model,<sup>175</sup> the specific concerns we raised with regard to regression and correlation analysis do not.<sup>176</sup> We noted that at the second Panel meeting, Korea argued that the numerical and modeling exercises presented in the U.S. first written submission did not demonstrate the safeguard measures’ consistency with Article 5.1. These arguments demonstrate that modeling does *not* provide any greater certainty than a qualitative analysis – it merely changes the nature of the debate. With a qualitative analysis, a Panel must consider arguments that the competent authorities did not reach findings consistent with WTO rules. With modeling, they must consider arguments that the inputs were incorrect, the model needed adjustment, the interpretation of the results was somehow inadequate, or that the model did not

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<sup>174</sup> *US – Line Pipe*, AB Report, para. 250.

<sup>175</sup> We described these concerns in paragraphs 150 through 153 of the U.S. Responses to the Panel’s Questions for the Parties.

<sup>176</sup> We described these concerns most fully in paragraphs 157 through 163 of the U.S. response to questions from the Panel.

adequately address all of the Article 4.2(a) factors. In either case, the analysis contains a significant subjective element.

193. We have addressed Korea’s arguments in our response to question 50. We remain confident that, for the reasons given in response to question 116 of the Panel’s first set of questions, our use of modeling to confirm the Article 5.1 consistency of the safeguard measures is more reliable and acceptable than the use of modeling that Complainants have proposed for purposes of Article 4.2(b).<sup>177</sup>

**58. *Do parties agree that a Member is free to impose a less restrictive remedy than the remedy that otherwise would be needed to remedy or prevent serious injury and to facilitate adjustment? If so, are there any legal limitations on the exercise of this discretion?***

194. As we have stated previously, Article 5.1 defines the outer limit for application of a safeguard measure. It does not restrict a Member’s discretion to apply a measure to a lesser extent. Many of the Complainants share this view.<sup>178</sup> The Appellate Body seems to have reached a similar conclusion in *US – Line Pipe* in finding that a Member could rebut a *prima facie* case of inconsistency with Article 5.1 by showing that the safeguard measure was “applied in such a manner that it addressed only a portion of the identified injurious effects, namely, the portion that is equal to or less than the injurious effects of increased imports.”<sup>179</sup> Thus, in the view of the Appellate Body, application of a measure less than the injurious effects of increased imports would be consistent with Article 5.1.

195. However, a Member’s discretion under Article 5.1 is not limitless. In applying a measure less than the extent necessary to prevent or remedy serious injury and to facilitate adjustment, a Member will still have to comply with its other obligations under the Safeguards Agreement. For example, consistent with Article 2.2, it must apply the measure without regard to source among the covered sources. It must still observe the requirements of Article 5.2 for quantitative restrictions, and Article XIII for TRQs.

## **IX. PARALLELISM**

### **A. QUESTIONS FOR THE COMPLAINANTS**

**59. *The EC argues in its Second Written Submission (para. 448) that the fact that "in addition to the increased imports and serious injury findings based on imports from all***

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<sup>177</sup> A description of these conclusions appears in paragraphs 202 through 208 of the U.S. response to questions from the Panel.

<sup>178</sup> EC, Responses to the Panel’s Questions for the Parties, question 100; Japan, Responses to the Panel’s Questions for the Parties, question 100; Japan second written submission, para. 192; Norway, Responses to the Panel’s Questions for the Parties, question 100; Brazil, Responses to the Panel’s Questions for the Parties, question 100.

<sup>179</sup> *US – Line Pipe*, AB Report, para. 262.

***sources, the ITC made separate determinations on imports from Canada and Mexico 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." What would be the practical consequences if this argument were to be upheld?***

196. The EC’s argument would mean that the 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 EC were correct, the competent authorities could not even correct ministerial errors in the report. Nothing suggests that the Safeguards Agreement placed such a straitjacket on the competent authorities.

## **B. QUESTIONS FOR THE UNITED STATES**

***60. What is the legal basis for asserting that a de minimis requirement applies so as to dispense with the requirement to provide findings and reasoned conclusions that imports from other sources by themselves caused serious injury?***

197. As the United States noted in its first written submission,<sup>180</sup> the United States 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.

198. As a substantive matter, parallelism requires that imports from sources that were not excluded (the “covered sources”), by themselves, satisfy the requirements of the Safeguards Agreement. 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 ITC provided.

199. Thus, the United States does not contend that the Safeguards Agreement contains a “de minimis” requirement, as it does not. Rather, as a legal matter, the ITC 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 change the analysis in any way. The U.S. first written submission demonstrates that this is manifestly true, and no party has argued otherwise. Thus, Articles 3.1 and 4.2(c) do not require any further explanation.

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<sup>180</sup> U.S. first written submission, paras. 754-756.

**61. Japan responded to Question 117 of the Panel's questions to the parties by arguing that the interpretation adopted by the United States of GATT Article XXIV:8(b) would mean that FTA members would also have to eliminate AD and CVD measures. What is the response of the United States?**

200. Japan is incorrect. As an initial point, it has misunderstood the U.S. position. In its second written submission, Japan states that “the United States expects to back away from the contention made in its first submission that it must eliminate safeguard measures as a ‘restrictive regulation of commerce’ because they are not among the measures that Article XXIV:8(b) permits an FTA member to retain.”<sup>181</sup> Japan cites several paragraphs of the U.S. submission, but they simply do not support Japan’s characterization of the U.S. position. In fact, one of the cited paragraphs states that “[a]s we have shown above, those [GATT 1994] provisions permit the exclusion of free trade agreement partners from safeguard measures.”<sup>182</sup> An earlier portion of the U.S. discussion of Article XXIV:8 (which Japan does not cite) states without qualification that “safeguard measures *may* be made part of the general elimination of ‘restrictive regulations of commerce’ under any FTA.”<sup>183</sup>

201. Japan’s response to question 117 is premised on its misunderstanding of the U.S. position. Japan begins by “[a]ssuming, for purposes of argument, that an FTA member must eliminate application of safeguard measures to its FTA partners.”<sup>184</sup> Not only is this not the U.S. position, but also, as we explained in our own response to question 117, it is not even a proper interpretation of GATT 1994. The language of Article XXIV:8(b) permits FTA parties to eliminate safeguard measures among themselves, but does not require them to do so.<sup>185</sup> Japan has not stated any basis to question our reasoning other than to claim (incorrectly) that the United States changed position on the issue. Thus, Japan has not established that the U.S. interpretation of Article XXIV:8(b) would require elimination of AD/CVD measures.

202. The evaluation of the NAFTA by the Committee for Regional Trade Agreements (and before that, by the Working Party on the North American Free Trade Agreement) demonstrates WTO Members’ understanding that Article XXIV:8(b) does not affect AD/CVD measures. In that process, members of the working party asked hundreds of questions about how the agreement functioned, and whether it was consistent with Article XXIV. They inquired whether Article XXIV:8(b) permitted the exclusion of FTA partners from global safeguard measures.<sup>186</sup> They also inquired into the workings of the NAFTA special procedures for review of AD/CVD

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<sup>181</sup> Japan second written submission, para. 179.

<sup>182</sup> U.S. first written submission, para. 1246.

<sup>183</sup> U.S. first written submission, para. 1230.

<sup>184</sup> Japan, Responses to the Panel’s Questions for the Parties, question 117.

<sup>185</sup> U.S., Responses to the Panel’s Questions for the Parties, paras. 209-212.

<sup>186</sup> Working Party on the North American Free Trade Agreement, *Questions and Replies*, WT/REG4/1, questions 125-128 (questions 125-128) (“NAFTA Working Party questions”). “Global” safeguard measures refer to those pursuant to Article XIX and the Safeguards Agreement.

determinations.<sup>187</sup> However, they did not at any point suggest that the possibility of applying AD/CVD measures among the NAFTA parties was relevant to the question of NAFTA’s consistency with Article XXIV:8(b). The absence of any claim that AD/CVD measures should – let alone must – be eliminated among parties to an FTA suggests strongly that Members did not consider this to be the case.

203. This is typical of FTAs. We reviewed the 98 FTAs notified to the WTO or under GATT 1947. For 94 of these, the available materials (primarily notifications and texts of the agreements) are either silent regarding antidumping measures or explicitly authorize application of antidumping measures consistent with Article VI and the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.<sup>188</sup> Antidumping measures were eliminated in only three of the FTAs.<sup>189</sup> Thus, the Members of the WTO clearly understand that an FTA *may* eliminate antidumping measures, but need not necessarily do so.

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<sup>187</sup> North American Free Trade Agreement, Questions and Replies – Goods, Addendum, WT/REG4/1/Add.1, Additional Questions Q1-Q5.

<sup>188</sup> For example, the FTA between the European Free Trade Area and the Czech Republic states that

If an EFTA State finds that dumping within the meaning of Article VI of the General Agreement on Tariffs and Trade is taking place in trade with the Czech Republic, or if the Czech Republic finds that dumping within this meaning is taking place in trade with an EFTA State, the State Party concerned may take appropriate measures against this practice in accordance with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and with the procedure laid down in Article 25.

Free Trade Agreement EFTA-Czech Republic, Article 20, <http://secretariat.efta.int/Web/ExternalRelations/PartnerCountries/FTACzechRepublic>. Article 25 requires consultations prior to application of any antidumping measure, and places limitations on the continuation of such measures once imposed, but does not question the parties’ right to impose such measures.

<sup>189</sup> These are the Canada-Chile FTA, the Australia-New Zealand Closer Economic Relations Agreement, the European Free Trade Association Agreement. Canada-Chile FTA, Art. M-01, [http://www.sice.oas.org/trade/chican\\_e/chca13e.asp](http://www.sice.oas.org/trade/chican_e/chca13e.asp); Biennial Report on the Operation of the Agreement, Australia and New Zealand Closer Economic Relations Agreement, WT/REG111/R/B/1, item 6; Annex to the Agreement Amending the Convention Establishing the European Free Trade Association: Consolidated version of the Convention establishing the European Free Trade Association, Article 36, [http://secretariat.efta.int/EFTA\\_Sec/Web/EFTAConvention/EFTAConventionTexts/EFTAConvention2001.pdf](http://secretariat.efta.int/EFTA_Sec/Web/EFTAConvention/EFTAConventionTexts/EFTAConvention2001.pdf). We could not find the text for one agreement, the Australia/Papua New Guinea Trade and Commercial Relations Agreement. The Working Party Report indicated that the agreement contained “safeguard clauses” that might result in a reduction in the percentage of duty-free trade, but did not indicate the terms of those clauses, or that any party objected to their maintenance. Report of the Working Party, the Australia/Papua New Guinea Trade and Commercial Relations Agreement, L/4571, adopted 11 November 1997, BISD, 24S/63, para. 16.

## C. QUESTIONS FOR ALL PARTIES

**62. Do parties agree with the assertion by the EC in its Second Written Submission (para. 489) that the distinction between scope and source parallelism is redundant? Do parties, therefore, consider that product exclusions are addressed by Article 2.2 of the Agreement?**

204. The answer to the first question is no. We addressed these issues extensively in prior submissions.<sup>190</sup> We will not repeat that analysis here. We also suggest that the Panel consider Japan’s analysis of this issue, which appears in paragraphs 191 through 194 of Japan’s second written submission.

205. The answer to the second question is also no. 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.<sup>191</sup> 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.

206. We note that the EC’s position on this question remains self-contradictory. EC steel producers continue to request exclusions from the steel safeguard measures. The EC itself has never suggested to the administrative authorities considering these requests that they are inconsistent with WTO rules. Nor has the EC requested the United States to revoke exclusions previously granted at the request of EC steel producers, which would be the fastest way to secure the removal of exclusions that the EC professes to find inconsistent with WTO rules.

## X. ARTICLE 5.2 SGA/GATT ARTICLE XIII

### A. QUESTION FOR CHINA

**63. Is China effectively suggesting in its Second Written Submission (paras. 356 - 357) that the determination of what amounts to a "substantial interest" is a comparative exercise?**

207. China appears to be making precisely this argument – that a Member cannot have a substantial interest if any other source accounts for a significantly greater share of imports. This is not the standard applied by Article XIII.

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<sup>190</sup> U.S. first written submission, paras. 760-768; U.S. second written submission paras. 206-210; U.S. second oral statement, paras. 100-102.

<sup>191</sup> 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.*



208. Article XIII simply states that a Member is entitled to an allotment of a TRQ if it has a “substantial interest in supplying the product.” This provision and the remainder of Article XIII do not impose any obligation regarding how a Member applying a TRQ determines whether another Member has a substantial interest. Accordingly, a Member remains free to base its compliance with Article XIII solely on the volume of another Member’s shipments, on its share of imports, or on any other information that would establish that the other Member had a substantial interest in supplying the product.

209. In fact, elsewhere in its submission, China appears to argue for an absolute rule that countries accounting for at least ten percent of imports must be treated as having a substantial interest. Clearly, a Member could meet this threshold regardless of whether another source accounts for a significantly greater share of imports.

## **B. QUESTIONS FOR THE UNITED STATES**

**64. *How does the United States respond to China's assertion in its Second Written Submission (para. 350) that GATT Article XIII:2 applies to the allocation of shares under the TRQ in this case?***

210. The United States agrees that Article XIII:2 applies to the allotment of shares under a TRQ applied in accordance with Article 5 of the Safeguards Agreement.

**65. *How does the United States respond to China's assertion in its Second Written Submission (para. 359) that the United States' determination of "substantial interest" was based on full year 2001 data? If so, why does the US argue that such data could not have been used in assessing the increased imports requirement?***

211. The United States based the determination of “substantial interest” on full year 2001 data. There is no inconsistency between this approach and the ITC’s analysis of whether imports increased.

212. 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.” However, Article XIII provides no guidance for determining what constitutes a “previous representative period,” and the Safeguards Agreement does not require that the period used to be coterminous with or subsumed within the investigation period. 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. It was, therefore, entirely consistent with Article XIII:2 for the President to use 2001 as the recent representative period.

213. Article XIII:2(d) does not require any form of investigation, or input from interested parties in selection of the historic period or allocations, again leaving the procedure for

compliance to the discretion of the Member applying a TRQ. In the case of carbon and alloy steel slab, import data for 2001 was accessible and allowed an easy allocation of import shares. It could be evaluated in isolation from other data.

214. In contrast, identifying the period for examining whether imports have increased is based on the terms of the Safeguards Agreement. Even at its simplest, this inquiry requires a comparison of imports with domestic production. For this comparison to be accurate, increased import data must be matched with domestic industry data for the same period, even if import data from outside that period is available. Thus, an analysis based exclusively on import data, which is consistent with Article XIII:2(d), would be inconsistent with the Safeguards Agreement.

215. In addition, the Safeguards Agreement requires a full investigation and report by the competent authorities. To allow a full investigation, with an opportunity for interested parties to comment, the record of the investigation has to close at some point. In the case of the *Steel* proceedings, the ITC closed the record after collecting information for 1996 through the first half of 2001. Data for full year 2001 could not be used without reopening the record, conducting a new investigation based on the revised data, and issuing a new report.

**66. *Did the United States treat imports from Members with less than 2% market share in the same manner?***

216. Yes. Apart from those developing countries and FTA partners that were excluded entirely from the safeguard measures, the United States treated all Members with less than 2 percent share of imports in the same manner.

## **C. QUESTIONS FOR ALL PARTIES**

**67. *Was the United States entitled to allocate quotas to some countries falling below the "substantial interest" threshold while not to others that also fell below that threshold?***

217. No. The United States provided specific allocations only to those countries that it considered to have a substantial interest.

## **XI. ARTICLE 9.1**

### **A. QUESTIONS FOR THE UNITED STATES**

**68. *With regard to the period used for computing percentages for the purposes of Article 9.1, what is the United States' response to a fact noted by Norway in its Second Written Submission (para. 204) that the Article is written in the present tense.***

218. Article 9.1 does not specify any particular time period for computing the relevant percentages. The use of the present tense in Article 9.1 does not preclude the possibility of using

any period within the investigation period. In this case, the United States chose a period prior to the increase in imports.

219. We also question 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, it appears that the negotiators did not attach great significance to the tense of the obligation under Article 9.1.

## XII. DECISION-MAKING PROCESSES

### A. QUESTIONS FOR COMPLAINANTS

**69. *What is the legal basis for the assertion by Japan in its Second Written Submission (para. 60) that anytime the President makes a decision that departs from or lacks an ITC majority then he must provide an explanation for the decision as the competent authority? Does Japan consider that this approach applies to all cases of deviation between the President and the ITC or only certain deviations? If the commissioners' recommendations were confidential and only the President's decision was public, would Japan's position be the same?***

220. Japan makes this argument in the context of its discussion of the four tie votes by the ITC. In each of these cases, the President did not make a decision that “departs from” the ITC’s decision. Instead, he simply identified which votes constituted the determination of the ITC.

221. Japan argues that the President must provide an explanation of his decision with respect to the tie votes because the Commissioners voting in the affirmative differed in their reasoning. Therefore, according to Japan, it is not possible “to know with whom the President agreed.”<sup>192</sup> Japan misunderstands the President’s role. In deciding that an affirmative determination constitutes the determination of the ITC, the President decides which of two determinations – one negative and one affirmative, each of them potentially consistent with U.S. law – shall be the collective determination of the ITC. 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. This is entirely consistent with the Safeguards Agreement, provided that the Commissioners’ written views provide explanations (albeit alternative explanations) demonstrating the legal sufficiency of the determination that the President selected.

222. This question also refers to a situation in which the President diverges from “the commissioners’ recommendations.” Japan did not raise this issue in the portion of its second

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<sup>192</sup> Japan second written submission, para. 61.

written submission referenced by the Panel, namely, paragraph 60. In any case, the only issues on which the ITC offers “recommendations” are whether to exclude imports from NAFTA partners and what remedy to impose, if any. As explained elsewhere in our written submissions and oral statements, the Safeguards Agreement imposes no obligation for the competent authorities to make a recommendation or to provide an explanation with respect to either of these issues at the time of imposing a safeguard measure.

### **Panel's Additional Questions for the Parties**

#### **XIII. LIKE PRODUCT**

##### **A. QUESTION FOR THE UNITED STATES**

**70. *Can the United States explain the relative importance attributed to production and processing methods in its like product analysis in relation to CCFRS as compared to the other like product criteria it applied?***

223. The ITC’s like product analysis applies its traditional like product criteria to the particular facts of the case. The ITC traditionally has taken into account at least five factors in its like product analysis in a safeguards investigation, including 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. These are not statutory criteria and do not limit what factors the ITC may consider in making its determination. One of the factors generally considered is the manufacturing or production processes. However, no single factor is dispositive and the weight given to each individual factor,<sup>193</sup> including the manufacturing processes, depends upon the facts in each particular like product analysis.

224. In this safeguards investigation, the ITC considered the manufacturing processes in each like product analysis, including its CCFRS definition. The relative importance attributed to this factor in each analysis varied, but it generally appeared to be an important factor in all the ITC’s like product analyses. An important factor in the CCFRS definition was the feedstock or sequential relationship of CCFRS at different stages of processing to those at the next stage of processing. Thus, the physical properties (i.e., common metallurgical components), the interrelationship of manufacturing processes, and uses (i.e., feedstock for next stage of processing) all played an important role in the ITC’s CCFRS definition. As discussed in the U.S. first written submission, the ITC found that the facts in this investigation did not make customs treatment or tariff classification a particularly useful factor in finding clear dividing lines between products.

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<sup>193</sup> The weight given any particular factor also may vary for each individual Commissioner in their determination of the appropriate like product definition.

#### XIV. CAUSATION

##### A. QUESTION FOR THE UNITED STATES

**71. In paragraph 9 of its oral statement, Brazil questions the existence of "lingering effects" of the 1998 import surge of CCFRS, arguing that inventory levels of domestic producers were low at the end of 1998. What is the United States' response to this point?**

225. The United States believes that Brazil is arguing in paragraph 9 of its oral statement that there was not a substantial increase in *importer* inventories in the United State in 1998 and thereafter. The record clearly shows that Brazil is mistaken in this regard. There was, in fact, a substantial increase in the inventory levels of importers of certain carbon flat-rolled steel in 1998, as these inventory levels grew from 788 thousand tons in 1997 to 1.322 million tons in 1998, for an increase of nearly 67.7 percent in that one year.<sup>194</sup> Similarly, in 1999, importer inventories increased by an additional 8.5 percent (to 1.434 million tons) from their 1998 levels, and then by an additional 19.2 percent in 2000 (to 1.709 million tons).<sup>195</sup> Inventory levels increased between interim 2000 and interim 2001 as well.<sup>196</sup>

226. 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 carbon flat-rolled steel to importer shipments increased from 7.3 percent to 17.5 percent, more than doubling during this period.<sup>197</sup> Indeed, the ratio increased during each year of this period, growing from 7.3 percent in 1997 to 8.6 percent in 1998, 11.0 percent in 1999, 15.1 percent in 2000, and 17.5 percent in 2001.<sup>198</sup> In other words, 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.<sup>199</sup>

227. Finally, Brazil's arguments concerning the ITC's analysis of inventory levels are flawed in several other respects as well. As the United States pointed out in its statement at the second panel meeting, the ITC did not rely upon importer inventories as a critical aspect of its causation

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<sup>194</sup> ITC Report, Vol. II, Table FLAT-49 (p. FLAT-43). These numbers are calculated by adding the inventory levels for slabs, plate, hot-rolled, cold-rolled and coated carbon flat-rolled steel set forth in the chart.

<sup>195</sup> ITC Report, Vol. II, Table FLAT-49 (p. FLAT-43).

<sup>196</sup> ITC Report, Vol. II, Table FLAT-49 (p. FLAT-43).

<sup>197</sup> ITC 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 includes 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.

<sup>198</sup> ITC Report, Vol. II, Table FLAT-49 (p. FLAT-43).

<sup>199</sup> By way of comparison, the ratio of the domestic carbon flat-rolled steel industry's inventories to shipments during this period remained relatively flat, being 4.9 percent in 1997, 5.5 percent in 1998, 5.0 percent in 1999, 5.1 percent 2000, and 4.8 percent in interim 2001. ITC Memorandum INV-Y-209, Table FLAT-ALT7 (Exhibit US-33).

analysis. Although the ITC 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 ITC did not rely on this fact as the sole, or even the most critical aspect, of its causation analysis for carbon flat-rolled products. It is instructive to note, however, that Brazil has chosen to focus on this aspect of the ITC’s analysis in its presentation to the panel.

228. Second, aside from ignoring completely the service center inventory data cited by the ITC, Brazil has also performed a series of calculations to support its arguments that result in a significant manipulation of the inventory data.<sup>200</sup> 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.

229. Third, Brazil’s arguments only reference the importer inventory data from the ITC’s report. Brazil completely ignores the fact that the ITC also relied upon the substantial increase in inventories of CCFRS at service centers in its causation discussion.<sup>201</sup> In this regard, the ITC 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.<sup>202</sup> In absolute terms, these inventories increased by 50 percent over the period of investigation, as shown in the following table:

<b>Service center inventories of CCFRS (net tons)</b>				
<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>
2.6 million	3.0 million	3.3 million	3.4 million	3.9 million

**XV. ARTICLE 5.1**

**A. QUESTION FOR THE UNITED STATES**

**72. *If the year used as the benchmark year for its numerical analysis accounts for existing non-import factors as well as imports that already existed at that time, could it be argued that***

<sup>200</sup> See, e.g., Brazil, oral statement at second panel meeting, para. 9.

<sup>201</sup> ITC Report, p. 60.

<sup>202</sup> Dewey/Skadden Prehearing Brief at 61, Exhs. 55 and 56, cited by the Commission at 60, n. 278.

***the model itself only redresses injury attributable to increased imports that occurred in the year following the benchmark year?***

230. The answer differs for the price-based and modeling exercises, because their underlying rationales are different. The numerical exercise used historical data to estimate as closely as possible how the domestic industry would perform in the absence of some of the injurious effects of increased imports. When we considered that the situation remained the same in subsequent years, we did not change the historical profit levels. When we considered that the situation changed, we made appropriate adjustments to account for the changes. Thus, we believe that the data from the base year, as adjusted, is a valid benchmark for industry performance in subsequent years.

231. The modeling exercise takes a different approach. We modeled the industry based on data for 2000 (1998 for certain carbon flat-rolled products) to compare the estimated price, volume, and revenue effects of increased imports with the estimated price, volume, and revenue effects of the safeguard measures. The estimates were most reliable for the year that we modeled, and less reliable as to performance in subsequent years – especially those after the end of the ITC investigation period – since underlying conditions may change. However, while the estimate might be most reliable in the year modeled and the immediately following year, it remains indicative of the estimated effect of the measure in subsequent years. This is especially true for the period covered by the ITC investigation period. Data for these periods demonstrates that imports continued to enter the U.S. prices in heightened quantities and for lower prices.

**EXHIBIT LIST**

- US-93 First Supplemental Report, Available Documentation on Economic Models
- US-94 Excerpts from ITC Memorandum EC-Y-046
- US-95 Corrected Spreadsheet Pages for Certain Carbon Flat-Rolled Steel and Tin-Mill Steel, from Exhibit US-57
- US-96 Corrected Calculations for Certain Carbon Flat-Rolled Steel from Exhibit US-56