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

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

Written Rebuttal of the United States

November 26, 2002

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I. INTRODUCTION

1. This dispute has serious implications for both the industries in the United States that have suffered serious injury caused by increased imports and for the World Trade Organization system as a whole. The EC, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil (collectively, "Complainants") have advanced interpretations of the *Agreement on Safeguards* ("Safeguards Agreement") and Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") that would effectively render these agreements unworkable. The Safeguards Agreement and Article XIX of GATT 1994 are part of the carefully negotiated balance of concessions that produced the WTO Agreement. The interpretations advanced by the Complainants would upset this balance. They would undermine Members' confidence in the WTO rules-based system, and could consequently make Members less willing to undertake new obligations or grant new concessions. Specifically:

- Complainants have argued that the Panel should disregard the findings and reasoned conclusions of the U.S. International Trade Commission ("ITC"), based on an exhaustive investigation, on the spurious grounds that the agency's objective methodologies would *in all cases* result in an outcome inconsistent with WTO rules.

- They interpret the Safeguards Agreement to require an analysis of increased imports so completely divorced from the facts of the case as to render the outcome entirely arbitrary.

- They propose a process for defining imported products and corresponding domestic like products that would prevent the use of objective standards or evidence.

- They argue for an impossible mathematical precision in the nonattribution of injurious effects caused by factors other than increased imports that no competent authority could ever satisfy.

- They seek to require competent authorities to consider new evidence even after their period for information gathering has ended – a standard that would prevent any safeguard proceeding from ever ending.

- They propose a limitation on the extent of a safeguard measure that would result in a remedy so small that it could never achieve the explicit objectives of the Safeguards Agreement – to prevent or remedy serious injury and to facilitate adjustment.

2. The Panel should decline Complainants' invitation to write the Safeguards Agreement out of existence, and instead interpret the text as instructed in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), giving the terms their ordinary meaning, in their context and in light of the object and purpose of the Agreement.

A. The History and Purpose of the Agreement and Article XIX

3. From the inception of the GATT in 1947, the availability of safeguard relief (incorporated in Article XIX[1]) was considered to be a critical component of the international system of rules-based trade. One of the primary motives for the inclusion of a safeguard provision was the conviction that the existence of a "safety valve" would facilitate trade concessions.[2] The common-sense logic behind this notion was that, in the absence of such a provision, trade negotiators may decline to make reciprocal trade concessions for fear of adverse political consequences in the future if an increase in imports were to seriously injury a domestic industry.[3] Accordingly, the suggestion that the safeguard provision is somehow disfavored as a form of unjustified protectionism – a claim that pervades the submissions of most of the Complainants – is incorrect. From the beginning, safeguard measures have been seen as an essential tool to facilitate the broader goal of trade *liberalization*.

4. In 1994, as part of the Uruguay Round trade agreements, the members of the newly created WTO once again affirmed the importance of allowing temporary safeguard actions to address injurious increases in imports. The negotiation of a comprehensive Safeguards Agreement was pursued based, once again, on the belief that the availability of safeguard relief would enhance, not reduce, free trade.

5. Prior to the adoption of the Agreement, Contracting Parties to the GATT had increasingly resorted to the use of so-called "grey area measures," including "voluntary export restraints" ("VERs"), in lieu of the safeguard measures consistent with Article XIX, and were doing so to restrict enormous volumes of trade in major manufacturing sectors of the world economy.[4] VERs in particular were considered to suffer from certain serious disadvantages of a type that are not associated with safeguard measures.[5]

6. For that reason, Article 11 of the Safeguards Agreement barred VERs and other "grey area measures." Indeed, the negotiation of a comprehensive Safeguards Agreement was seen as a way to encourage WTO Members to employ open, transparent and established procedures in considering temporary import relief, under rules that would ensure to the greatest extent possible

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[1] 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.

[2] K. Dam, *The GATT: Law and International Economic Organization* 99 (1970) (Exhibit US-87).

[3] A. Sykes, "Protection as a Safeguard: A Positive Analysis of the GATT 'Escape Clause' with Normative Speculations," 58 *U. Chi. L. Rev.* 255, text at notes 75-76 (Winter 1991) (Exhibit US-88).

[4] E. Hizon, "The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection," 15 *NW. J. Int'l L. and Bus.* 105, text at notes 17-19, 22-39 (Fall 1994) (Exhibit US-89).

[5] For example, certain exporters (usually the most efficient exporters) could be discriminated against; the adjustment process in the importing country was distorted; the "cartelization" of exports in both the exporting and importing countries was encouraged; resources were transferred from the importing to the exporting country when minimum prices formed part of the arrangement; VERs were especially injurious to developing countries; and VERs were not transparent. *Ibid.*, text at notes 21-22 and text at notes 34-37.

fair and equitable treatment of foreign producers and importers, and the least distortive form of trade relief.

7. The limitations on retaliation that were agreed during the Uruguay Round negotiations similarly demonstrate that parties wished to encourage the use of transparent safeguard measures where justified – as opposed to resorting to less transparent mechanisms. In this regard, Article 8.3 of the Agreement provides for a three-year prohibition, applicable in most cases, against any retaliation taken in response to the application of a safeguard measure. This represents a substantial change from the rules previously applicable to such measures. Under those rules, Contracting Parties to the GATT could, and often did, immediately demand compensation in response to safeguards measures, and impose retaliatory trade sanctions if such compensation was not provided.[6]

8. Parties to the Uruguay Round negotiations were concerned that the compensation and retaliation costs that then existed were prohibitively high, created a disincentive for the use of safeguards measures, and exerted pressure on GATT members to resort to other means to address import surges, such as VERs and other so-called "grey area measures."[7] The suggestion of the Complainants that the Panel should view the Safeguards Agreement with disfavor and, accordingly, interpret it narrowly, is flatly inconsistent with the objective of encouraging the use of a transparent WTO mechanism where appropriate.

9. In short, the Safeguards Agreement reflects a carefully balanced bargain – a bargain that the parties relied upon in establishing and becoming Members of the WTO. That Agreement must be interpreted and applied based on the ordinary meaning of its terms, in their context and in light of the object and purpose of the Agreement, namely to permit temporary safeguard measures in appropriate circumstances, and to encourage the use of this mechanism rather than the non-transparent measures that had previously proliferated.

B. The Situation of the Domestic Steel Industries Before Application of the Safeguard Measures

10. The notion, advanced by the European Communities ("EC") in particular, that the U.S. safeguard measures were applied for "short-term, political and electoral motives"[8] is utterly devoid of merit. The Safeguards Agreement envisages temporary import relief by means of safeguard measures in precisely this type of situation.

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[6] Article XIX:3(a) specifically provided compensation and retaliation rights to Contracting Parties to the GATT that were affected by a safeguard measure.

[7] *E.g., The Uruguay Round Agreements Act: Statement of Administrative Action*, p. 286 (1994) (Exhibit US-90).

[8] EC, Oral Statement presented by the European Communities at the First Meeting of the Panel: Conclusions, para. 3 (29 October 2002).

11. The injury suffered by the domestic industries was unquestionably serious. With respect to the flat-rolled industry, for example, capacity utilization fell by 10 percentage points in the period of investigation;[9] the average unit value of commercial shipments fell almost $100 per short ton ("ST");[10] operating income dropped from 6.1 percent in 1997 to an operating *loss* of 11.5 percent by the first half of 2001;[11] and capital expenditures fell by 35 percent from 1996 to 2000.[12] Industry giants like Bethlehem Steel Corporation declared bankruptcy, and LTV Corporation, one of the largest steelmakers in the United States, was forced out of business altogether. Similarly, with respect to the domestic industry producing hot-rolled bar, net commercial sales fell by 1.1 million ST during the period of investigation;[13] average unit sales values fell by over $60/ST;[14] operating income went from $213.4 million in 1997 to a *loss* of $89.0 million in the first half of 2001;[15] and three hot-rolled bar production facilities were completely shut down. Similar examples could be repeated for every industry for which the ITC made an affirmative determination.

12. Perhaps the most extraordinary fact about these developments is that they occurred at a time of generally very strong demand. The ITC found, for example, that "[b]y any measure, the period of investigation saw significant growth in U.S. demand for certain carbon flat-rolled steel."[16] Similarly, "[t]he record indicates strong demand [for hot-rolled bar] during the period examined, with apparent U.S. consumption of hot-rolled bar increasing during every full year but one of the period."[17] To give yet another example, the ITC found that U.S. apparent consumption of rebar increased 48.1 percent from 1996 to 2000.[18] Thus, rather than suffering unprecedented injury, domestic steelmakers generally would have been expected to perform well during the relevant period.

13. That they did not is clearly attributable to imports. With regard to flat-rolled products, for example, imports increased 37.5 percent from 1996 to 1998, and remained at historically high levels in 1999 and 2000;[19] the average unit value of these imports was consistently $60/ST to $110/ST below that of the domestic like product;[20] and import prices fell to extraordinary lows after 1998 – *i.e.*, during the exact period in which the domestic industry suffered serious injury. In general, the years 1998 - 2000 saw the highest levels of steel imports in history – imports

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[9] *Steel*, Inv. No. TA-201-73, USITC Pub. 3479, p. 51 (December 2001) ("ITC Report").
[10] ITC Report, p. 53.
[11] ITC Report, p. 53.
[12] ITC Report, p. 54.
[13] ITC Report, p. 93.
[14] ITC Report, p. 93.
[15] ITC Report, p. 94.
[16] ITC Report, p. 56.
[17] ITC Report, p. 95.
[18] ITC Report, p. 112.
[19] ITC Report, p. 50.
[20] ITC Report, p. 61.

which, for many products, were sold at prices that were literally unsustainable and that were demonstrably ruinous to domestic industries.

II. ARGUMENT

A. Analytical Framework

1. Complainants Bear the Burden of Proof to Establish With Respect to Each of the Ten Safeguard Measures Imposed That the United States Acted Inconsistently With Its Obligations.

14. Complainants in this dispute have challenged the *application* of the U.S. safeguards law with regard to ten specific steel products.[21] No claim has been made that any aspect of the U.S. safeguards law or practice is on its face inconsistent with WTO obligations.[22] As the application of the U.S. safeguards law took the form of ten separate safeguards measures,[23] each of these measures therefore must be considered separately by the Panel to determine whether each was applied consistently with WTO rules.

15. Accordingly, Complainants bear the burden of proof to establish a *prima facie* case that each of these ten measures is inconsistent with the United States' WTO obligations. This requires a presentation of how, given the unique set of facts pertaining to each of the ten products, the U.S. safeguard measures were in fact inconsistent with U.S. WTO obligations.

16. It is not enough for Complainants to challenge the general *methodologies* used by the ITC in investigating the impact of increased imports on each of the ten domestic industries identified. Article 2.1 of the Safeguards Agreement requires a *fact-based* determination as to each of the conditions for imposing a safeguards measure. Methodologies provide a framework for analyzing the facts of a given case. They are not a substitute for that analysis, and cannot by themselves guarantee compliance with WTO obligations. Thus, regardless of the general methodologies employed, Complainants must demonstrate separately with respect to each

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[21] *E.g.,* EC, Oral Statement presented by the European Communities at the First Meeting of the Panel: Standard and Scope of Review, para. 12 (29 October 2002) ("EC first oral statement (scope of review)").

[22] *E.g.,* Japan, Responses to Questions Posed By the United States to Complaining Parties, question 3 (15 November 2002).

[23] While Complainants at times make general statements and claims regarding the U.S. measures as a group, there can be no doubt that ten separate safeguard measures are at issue in this proceeding. In its initial notification to the WTO, the United States identified ten separate measures, and separately described each of ten remedies: (a) certain carbon and alloy steel flat products ("CCFRS"); (b) hot-rolled bar; (c) cold-finished bar; (d) rebar; (e) certain welded pipe; (f) fittings, flanges and tool joints ("FFTJ"); (g) stainless steel bar; (h) stainless steel rod; (i) tin mill; and (j) stainless steel wire. G/SG/N/10/USA/6 (14 Mar. 2002). Likewise, the terms of reference before the Panel reference Proclamation 7529, the U.S. decision imposing the safeguard measures in question. This document describes ten separate remedies governing ten separate products. *E.g.*, WT/DS248/12 (8 May 2002); WT/DS249/6 (24 May 2002).

measure how the facts cited by the ITC with respect to that product and industry do not satisfy the conditions set forth in Article 2.1.

17. Moreover, to the extent the Panel finds it useful to explore the particular methodologies employed by the ITC in each of the ten safeguards investigations at issue, the proper inquiry is whether a methodology *permits* results consistent with the terms of the Safeguards Agreement. This is clear from the approach taken by the panel in *US – Line Pipe*[24] and is directly at odds with the position taken by the EC at the first meeting of the Panel that the critical question was whether the methodologies employed by the ITC "*ensure* that the conditions set out in the *Agreement on Safeguards* and the GATT are satisfied."[25]

18. In *US – Line Pipe,* in response to challenges to the ITC methodology for examining increased imports over a five-year period, the panel noted that:

> in determining whether the US methodology for the analysis of the existence of increased imports complied with its obligations under the Agreement on Safeguards and the GATT 1994, our review will consist of an objective assessment . . . of whether the methodology selected is unbiased and objective, such that its application *permits* an adequate, reasoned and reasonable determination with respect to increased imports.[26]

19. The *US – Line Pipe* panel then went on to conclude that the methodology chosen by the ITC was permissible because:

> first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC *allows* it to focus on the recent imports; and third, the period selected by the ITC is sufficiently long to *allow* conclusions to be drawn regarding the existence of increased imports.[27]

This, of course, was not the end of the panel's inquiry, as it then went on to review the ITC's actual factual findings on increased imports to determine their consistency with the requirements of the Safeguards Agreement.[28]

20. Thus, the *US – Line Pipe* panel recognized that, so long as a methodology permits an analysis of the facts consistent with the terms of the Safeguards Agreement, the methodology is

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[24] *United States – Definitive Safeguard Measures on Imports of Certain Carbon Quality Line Pipe from Korea*, Panel Report, WT/DS202/R, adopted 8 March 2002, as modified by the Report of the Appellate Body, WT/DS202/AB/R ("*US – Line Pipe*")

[25] EC first oral statement (scope of review), para. 12 (emphasis added).

[26] *US – Line Pipe*, para. 7.194 (emphasis added).

[27] *US – Line Pipe*, Panel Report, para. 7.201.

[28] *US – Line Pipe*, Panel Report, para. 7.205.

permissible. And regardless of the conclusion as to the methodology, a panel must then consider whether the complainant has demonstrated that the *factual findings* resulting from the application of the methodology are inconsistent with the obligations provided for in the Safeguards Agreement.

21. The EC argues that a competent authority's methodology must *ensure* compliance with WTO obligations, rather than simply *permit* action consistent with WTO obligations. Under this approach a methodology that allowed the competent authorities to comply with WTO rules, but could also be applied in a manner that did not comply, would be a *per se* breach. Thus, even if an injury determination complied fully with the Safeguards Agreement, it would have to be rejected by a panel simply because it employed methodologies that in a hypothetical case could produce a result contrary to the Agreement. Thus, while the EC challenged the ITC determinations and resulting safeguard measures, its arguments on methodology would require the Panel to disregard what the ITC and U.S. government actually did.

22. In addition, the EC standard would hold "methodologies" to a stricter standard of WTO consistency than the legislation under which those methodologies are applied. Under the DSU, legislation *as such* may be found inconsistent with WTO rules only if it mandates a Member to take action inconsistent with those rules. In contrast, legislation that grants a Member discretion either to comply or not comply with WTO rules is not as such WTO-inconsistent.[29] This would be an absurd result, as it would allow Members to challenge the discretionary methodologies arising out of discretionary legislation on their face when they are not permitted to so challenge the underlying legislation.

23. Therefore, it is incumbent upon the Panel to separately evaluate each unique set of facts pertaining to each of the ten safeguard measures in question. For example, and as further explained below, even if the Panel were to determine that a methodology used by the ITC might permit a conclusion that is inconsistent with a provision of the Safeguards Agreement, the Panel would still have to determine whether each of the ITC's determinations for each of the ten products that was based on that methodology was *in fact* inconsistent with the Safeguards Agreement. Anything less would be fundamentally unfair to Members seeking to avail themselves of their rights under Article XIX.

2. The Complainants Have Not Met Their Burden of Proof to Establish That the Methodologies Applied by the ITC Result in Determinations Inconsistent with the Safeguards Agreement.

24. Complainants only rarely deal with the facts of each of the ten safeguard measures at issue, and instead complain that various methodologies used by the ITC are inconsistent with the

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[29] *E.g., United States – Antidumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88; *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS/221/R, adopted 15 July 2002, paras. 6.22-6.33.

Safeguards Agreement. A review of the arguments presented demonstrates that Complainants have not met their burden of proof to establish that the methodologies applied by the ITC did not permit a reasoned analysis, much less that they actually resulted in factual determinations inconsistent with the Safeguards Agreement.

a. A five year period of investigation does not preclude a consideration of intervening trends in imports, and the ITC engaged in such an analysis

25. The EC has alleged that the ITC's practice of reviewing imports over a five-year period precludes the ITC from considering trends within that period, including recent trends in imports, as directed by the Appellate Body in *Argentina – Footwear*.[30] As an initial matter, the panel in *US – Line Pipe* has already upheld the ITC's use of a five-year period of investigation because it allows an analysis of recent trends in imports, consistent with the Appellate Body's rulings.[31] Moreover, as outlined below, the record demonstrates that for each of the ten measures at issue in this proceeding, the ITC in fact examined trends within the five-year period, including recent trends in imports.

b. Use of like product factors different from those suggested by Complainants does not prevent determinations consistent with the Safeguards Agreement

26. Complainants assert that the ITC's methodology for analyzing like product contravenes the Safeguards Agreement because it employs factors different than those suggested by Complainants. This argument fails for several reasons. First, as the United States noted in its first submission, the Safeguards Agreement does not stipulate which factors are to be considered in the like product analysis under the Safeguards Agreement.[32]

27. Second, there is no Appellate Body or panel ruling that provides any interpretive guidance as to the criteria to be used in determining the like product for purposes of the Safeguards Agreement. Japan in its oral statement to the Panel continues to cite to *US – Lamb Meat* as allegedly providing such guidance.[33] But, as explained in the United States' first submission, *US – Lamb Meat* did *not* address the ITC's methodology for determining like product. Rather, that dispute concerned the definition of the domestic industry. Indeed, the two

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[30] *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, ("*Argentina – Footwear*").

[31] *US – Line Pipe*, Panel Report, para. 7201.

[32] U.S. first written submission, paras. 66-71.

[33] Japan, Oral Statement of the Government of Japan Regarding The Proper Definition of the Domestic Industry Producing the Like Product, para. 13 (29 October 2002) ("Japan first oral statement (like product)"); *citing United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, adopted 16 May 2001, para. 90.

factors at issue in *US – Lamb Meat* that are cited repeatedly by Complainants – "continuous line of production" and "substantial coincidence of economic interests" – are factors used by the ITC to identify who are the appropriate domestic industry members *after* the like product was defined. They are cited nowhere by the ITC in its like product findings with regard to flat-rolled products or any of the other like products. While Complainants try to imply that these criteria were applied in the determinations at issue here,[34] they fundamentally misstate the analysis actually performed by the ITC.

28. Third, Complainants' own submissions and presentation to the Panel do not specifically challenge six of the ten like product determinations made by the ITC in the ten safeguards measures at issue.[35] The failure of Complainants to specifically challenge the majority of the like product determinations made by the ITC by itself suggests that the ITC's methodology is not inconsistent with the requirements of the Safeguards Agreement. Indeed, as demonstrated in the United States' first submission, those like product factors considered by the ITC are entirely consistent with the United States' obligations under the Safeguards Agreement.[36]

29. As a result, the only basis on which the Panel can consider whether Complainants have met their burden of proof with respect to like product is to examine whether the specific factual findings made by the ITC with respect to each of the contested like product findings cannot support a finding of "likeness" consistent with ordinary meaning, of the Safeguards Agreement, in its context and in light of the object and purpose of the agreement. In this regard, the United States recalls that the Panel is not to engage in a *de novo* review, but rather to engage in a review that is

> limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with {the United States'} obligations under the Safeguards Agreement.[37]

30. As has been previously demonstrated,[38] the ITC's like product determinations were fully justified given the specific facts with respect to each of the products in question, and the ITC's

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[34] Japan first oral statement (like product), para. 13 ("a continuous line of production between products – a characteristic heavily relied upon by the U.S. in this case").

[35] EC first written submission, paras. 235-236 (taking issue with only four specific like product determinations).

[36] U.S. first written submission, paras. 83-93.

[37] *Argentina – Safeguard Measures on Imports of Footwear*, Panel Report, WT/DS121/R, adopted 12 January 2000, para. 8.124 ("*Argentina – Footwear*").

[38] U.S. first written submission, paras. 113-171.

adequate and reasonable explanations of its analysis with respect to each like product determination.

c. The causation methodology of the ITC allows for the separation and distinction of the effects of imports from the effects of other factors

31. Likewise unsupported is the claim that the ITC's causation analysis in and of itself prevents the ITC from complying with its Article 4.2(b) obligation to ensure that injury caused by factors other than increased imports is not attributed to the subject merchandise. Five of the Complainants allege that the ITC's causation analysis prevents it from separating and distinguishing between alternative causes.[39] There is no basis to this claim. As described in the United States' first submission, the ITC's methodology *requires* it to separate and distinguish the effects of alternative causes of injury, and ensures that the injurious effects from any alternative causes of injury is not attributed to the subject imports.[40]

32. Moreover, in actual practice, the ITC clearly separated and distinguished the injury caused by increased imports of each of the ten products from the injury caused by other factors. Every alternative cause of injury identified by any party to the investigation was analyzed, separated and distinguished from the injury caused by the subject imports. No other obligation can be imposed on the United States.

3. An Allegation of a Procedural Violation of the Safeguards Agreement Does Not Establish a *Prima Facie* Case of a Substantive Violation

33. Complainants also confuse substantive and procedural obligations imposed by the Safeguards Agreement by improperly concluding that a failure to explain a determination adequately is sufficient to establish a *prima facie* case of inconsistency with a substantive obligation. For example, in response to a question posed by the United States, several Complainants assert that the failure to explain a like product determination adequately would establish a *prima facie* case of inconsistency with Article 2.1.[41] This argument fundamentally misstates the burden imposed on complaining parties under the DSU.

34. Article 2.1 is a substantive provision. It establishes the substantive conditions that must be met prior to the imposition of a safeguard measure: imports in such increased quantities and

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[39] *See* Japan first written submission, paras. 227, 249-250; EC first written submission, paras. 435, 454, 459; New Zealand first written submission, para. 4.120; Switzerland first written submission, paras. 278, 297; Norway first written submission, paras. 298-301.

[40] U.S. first written submission, paras. 419-423, 438-444.

[41] EC, Replies of the European Communities to the Questions of the United States at the First Substantive Meeting of the Panel, question 1 (15 November 2002) ("EC response to US questions"); Korea, Answers to U.S. Questions Following the First Substantive Meeting of the Panel with the Parties, question 1 (15 November 2002); Norway, Replies of Norway to the Questions of the United States at the First Substantive Meeting of the Panel, question 1 (15 November 2002).

under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Article 2.1 does not impose an obligation to explain why one product is deemed to be like another. The obligation to explain the competent authorities' determinations, including the obligation to explain the like product determination, is set forth separately in Article 3.1.

35. While a *prima facie* case that the competent authorities have failed to explain some aspect of a safeguards determination adequately may support a claimed inconsistency with Article 3.1,[42] it would not support a separate claimed inconsistency with Article 2.1. A procedural violation does not automatically establish a substantive violation. Each claim must be separately proven on its own merits. Thus, to the extent that Complainants rely on a *prima facie* case of a failure to explain a determination as the basis for their allegation of a substantive violation under Article 2.1, Complainants cannot be considered to have met their burden of proof with respect to the alleged substantive violation.

4. The Safeguards Agreement Does Not Impose Any Required Chronological Order of Analysis

36. The EC and Switzerland argue that Article XIX and the provisions of the Safeguards Agreement require that the competent authorities analyze the Article 2.1 conditions in a particular order.[43] As Brazil recognizes, however, "the sequencing issue masks the real issue."[44] While there is admittedly a logical order to parts of the analysis, there is no specified order of analysis imposed by the Safeguards Agreement. At the end of the day, if the Article 2.1 conditions are met, it is irrelevant whether the competent authorities found increased imports or serious injury first. All that is required is that each of the conditions for imposing a safeguard measure is met.

37. The United States agrees that Article XIX and the Safeguards Agreement envision a chronological order in the evolution of an increase in imports that would meet the requirements of Article XIX: an obligation or tariff concession, then an unforeseen development, then an

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[42] Of course, as demonstrated in the U.S. first written submission, and as further demonstrated below, this obligation was fully upheld in this instance.

[43] Switzerland argues that Article 2.1 and Article XIX require the competent authorities first to identify the product imported, then to analyze increased imports, then serious injury/threat, and finally, to define the domestic industry. Switzerland, Answers to the Questions of the Panel at its First Substantive Meeting, question 23 ("Switzerland, response to questions from the Panel"). Switzerland does not specify how the competent authorities are to determine how the domestic industry is seriously injured if the domestic industry is not yet defined. The EC argues that Article XIX:1 establishes a "logical continuum" that dictates the order of analysis, and that the domestic industry need only be defined in order to assess the question of serious injury, *i.e.*, the question of the like or directly competitive product is not reached if imports have not increased.

[44] Brazil, Responses to the Panel's Questions for the Parties, question 23 ("Brazil, responses to questions from the panel").

increase in imports, and finally, serious injury. But this does not impose an obligation on the competent authorities to follow this chronological order in structuring their analysis.

38. There are certainly logical first steps in the analysis. The domestic like product must be identified before determining whether the domestic industry producing the like product was seriously injured, and both the domestic like product and the imported product must be defined before determining whether imports have increased relative to domestic production. However, there is no requirement in the Safeguards Agreement that the imported product must be defined before the domestic like product, or that unforeseen developments be established before determining whether there were increased imports.

39. So long as the competent authorities have made all of the requisite findings, it is largely irrelevant in what order those findings are made. A failure to follow the order of findings advocated by the EC and Switzerland thus does not establish a *prima facie* case of a violation of the Safeguards Agreement.

5. There Is No Obligation to Engage in Quantitative Analysis, or Any Other Type of Analysis When the Competent Authorities' Analysis Is Deemed to Be "Counterintuitive" by a Party to the Investigation.

40. Brazil suggests that competent authorities are required to engage in quantitative analysis under Article 5.1 to justify conclusions based on qualitative analysis that are "counterintuitive."[45] Brazil cites no authority to support this proposition. This oversight is not surprising, as there is no basis for this claim in the text of the Safeguards Agreement.

41. The term "counterintuitive" does not appear in the Safeguard Agreement or any other WTO Agreement. The United States has undertaken no obligations relevant to "counterintuitive" arguments or determinations.

42. Even if such an obligation could be read into the Safeguards Agreement, it is not at all clear how it would be applied, for every party that presents a losing argument will declare the competent authorities' determination to be "counterintuitive." In this instance, there is no basis to the claim. The ITC considered and rejected claims regarding increased domestic capacity and intra-industry competition as alternative causes of the domestic industry's injury.[46] These determinations are fully supported by the record, and thus are not in any respect "counterintuitive."

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[45] Brazil, response to questions from the Panel, question 85.

[46] ITC Report, pp. 63-65.

B. Both the U.S. Methodology for Determining "Such Product" And "Like Product" and the ITC's Particular Like Product Findings Are Consistent with the Safeguards Agreement

1. Introduction

43. The issues and arguments presented to this Panel regarding "such product" and "like product" have little to do with whether the methodology,[47] employed by the United States in defining domestic products like imported products, is consistent with the Safeguards Agreement but rather are about the application of that methodology to the particular facts in the Steel investigation. In fact, many Complainants acknowledge that their main complaint is with the broad range of imports subject to investigation, a matter wholly unrelated to "like product" methodology, and where particular lines were drawn in defining specific like products.[48] Nevertheless, as the United States will demonstrate below, U.S. methodology as well as the particular like product findings in this case are consistent with U.S. obligations under the Safeguards Agreement.

44. The Panel should be mindful of the following points of agreement and disagreement between the parties in reviewing the U.S. measure for consistency with the Safeguards Agreement:

Agreement:

a. Imported and domestic steel consist of mainly the same types of steel and, thus, the domestic steel is like corresponding imported steel. Moreover, corresponding categories of imported and domestic steel generally are interchangeable and thus compete with each other.

b. There is no dispute that the ITC matched imports corresponding to its like product definitions in its individual analyses of whether increased imports of a specific product have caused serious injury to the domestic producers of the like product.[49]

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[47] The term "methodology" as used in this section means the traditional practice or approach employed to conduct an analysis of the facts in any investigation. It does not mean the analysis of the particular facts in a given investigation.

[48] The vast majority of safeguard investigations conducted by the ITC, as well as those undertaken by other countries, involve a narrowly described item rather than the broad range of steel subject to this investigation, and the definition of one or a few like products rather than the 27 like products in this case. The ITC employed the same like product analysis in this investigation as when a single product, such as line pipe, was investigated where neither the ITC methodology nor finding was an issue. Moreover, Brazil's exaggerated assertion that the ITC would define cotton shirts and color televisions as a single like product if both were subject to the same investigation fails to recognize that in the present investigation, the ITC found clear dividing lines between the range of subject steel so as to define 27 like products. *See* Brazil, response to questions from the Panel, question 23.

[49] Instead, the disagreement is about the breadth of steel included in certain product definitions.

c. There is some consensus that the order of analysis employed in the ITC's general methodology (*i.e.*, whether the domestic like product or specific imports are identified first) is not the issue but rather the issue is whether some product definitions in this particular investigation were too broad.[50]

d. There is consensus on some of the criteria considered appropriate (though not necessarily required) for like product analysis.[51] All parties agree on the following criteria: physical properties/characteristics, uses, and customs treatment/tariff classification. Many parties agree that consideration of manufacturing processes may be appropriate.[52] While several Complainants maintain that consumer tastes is an appropriate criteria, no party has objected to the ITC's consideration of marketing channels.

e. There is consensus that there is a distinction between "like products" and "directly competitive products" in Article 2.1.[53]

Disagreement:

a. There is disagreement on certain of the ITC's product definitions. The disagreement stems more from whether some allegedly universally accepted steel product definitions, on which even Complainants themselves have not reached a consensus, should have governed the analysis than from complaints about the

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[50] *See, e.g.*, Brazil, response to questions from the Panel, question 23 ("sequencing issue, however, masks the real issue."); Japan, response to questions from the Panel, questions 21, 32, and 33; Korea, Answers to the Panel's Questions for the Parties and Answers to Questions from the United States Following the First Substantive Meeting of the Panel with the Parties, question 30 (12 November 2002) ("Korea's response to questions from the Panel").

[51] *See, e.g.*, Brazil, response to questions from Panel, questions 19, 24, and 150; EC, Replies by the European Communities to the Questions of the Panel at its First Substantive Meeting, question150 ("EC, response to questions from the Panel"); Japan, Japan's Answers to the Panel's Questions for the Parties, questions 19, 21, 32, and 150 ("Japan, response to questions from the Panel"); Korea, response to questions from Panel, question150; and Norway, Replies by Norway to the Questions of the Panel at its First Substantive Meeting, including additional questions posed at the close of the meeting, and additional question posed by the Panel thereafter, question150 (12 November 2002) ("Norway, response to questions from the Panel").

[52] *See, e.g.*, Brazil, response to questions from Panel, questions 69 and 150; Japan, response to questions from Panel, questions 69 and 150; Korea, response to questions from Panel, questions 69 and 150; and Norway, response to questions from Panel, question150.

[53] *See, e.g.*, Brazil, response to questions from Panel, question 57; Japan, response to questions from Panel, question 57; Korea, response to questions from Panel, question 57; New Zealand, New Zealand's Responses to the Panel's Questions for the Parties, question 57 ("New Zealand, response to questions from the Panel"); and Norway, response to questions from Panel, question 57.

appropriate methodology, or even criteria, to employ in defining product like products.[54]

b. The EC contends that imports first should be identified by tariff lines in order to first consider whether imports have increased.[55] Other Complainants and the United States do not agree that tariff lines should govern the imported product definitions or that the first step in any analysis must be the consideration of whether imports have increased.[56]

2. Methodology

a. "Such Product"

45. Article 2.1 of the Safeguards Agreement states in relevant part that:

> A Member may apply a safeguard measure to a product only if that Member has determined . . . that such product is being imported into its territory . . . . as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

The text of the Safeguards Agreement does not specify that a competent authority's analysis of the relevant product begin with either the imported product or the like or directly competitive product produced by the domestic industry. Instead, the Agreement simply describes a relationship which must exist between the imported product or "such product" and the "like or directly competitive" domestic product.[57] While the Agreement establishes this relationship, it

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[54] For example, the ITC found that steel at various stages of processing were a single like product, CCFRS, *i.e.*, in the terminology of the *US - Lamb Meat* Appellate Body Report, the ITC found that "input products" and "end-products" were like. Complainants contend that such inputs and end products should be defined as separate like products, but can not reach a consensus on where the particular lines should be drawn.

[55] *See* EC, response to questions from the Panel, questions 19 and 20.

[56] *See, e.g.*, Brazil, response to questions from the Panel, questions 20; Japan, response to questions from the Panel, questions 20 and 31; Korea, response to questions from the Panel, questions 20 and 31; New Zealand, response to questions from the Panel, questions 20; and Norway, response to questions from the Panel, questions 20.

[57] In response to the Panel's questions, most responding Complainants (Japan, Korea, New Zealand, and Brazil) agree that there should be a one-to-one relationship between such imported product and the domestic like product. *See, e.g.*, Brazil, response to questions from Panel, question 19; Japan, response to questions from Panel, question 19; Korea, response to questions from Panel, question 19; and New Zealand, response to questions from Panel, question 19. The EC, and to some degree Norway, provided conflicting views, arguing on the one hand that imports should be identified by tariff lines, which may not correspond to domestic like products, but also arguing that imported products and domestic like products should match. *Compare* EC, response to questions from the Panel, questions 19 and 20 (the EC "considers that the primary basis for identifying the imported product should be tariff codes") *to* EC, response to questions from the Panel, question 53 ("'matching' of imported and domestic products, i.e. to establish that all domestic products the producers of which are grouped in one domestic industry are like the imported product concerned."). *See also European Communities - Imposing Definitive Safeguard Measures*

does not set forth a particular order or method for conducting the analysis for delineating these products. The initial focus of the ITC's analysis on the domestic product is in accord with the object and purpose of the Safeguards Agreement, as discussed below.

46. To summarize, the ITC starts its analysis with the universe of imports subject to investigation, as identified in the request or petition which results in the institution of an investigation.[58] The ITC first considers what domestic products are like or directly competitive with the subject imports.[59] This comparison shows whether domestic and imported products are similar and whether they are interchangeable, and as such establishes whether there is a competitive relationship between domestic and imported products. The ITC then 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.[60] The ITC then returns to consideration of the subject imports (or "such" imported product) and identifies those that correspond to each of its definitions of like product so that it may conduct individual analyses of whether those imports corresponding to each like product have caused serious injury to the domestic producers of that like product.

47. The ITC's focus on the domestic product rather than the imported product for its analysis of whether there is a single or multiple like products is fully consistent with the object and purpose of the Safeguards Agreement.[61] The Safeguards Agreement provides for an analysis of

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Against Imports of Certain Steel Products, Commission Regulation (EC) No. 1694/2002 of 27 September 2002, paras. 10-15 (US-85) (For example, EC defined hot-rolled coils as a single "product concerned", or imported product, consisting of numerous tariff classifications and found that it corresponded to a single like or directly competitive product. The EC made similar findings regarding other products in that action.).

[58] *See also* U.S. first written submission, paras. 94-102, and U.S., response to questions from the panel, paras. 42-51. To clarify, under U.S. practice, subject imports may be equivalent to "such product" if there is only a single corresponding domestic like product. However, in the present case, subject imports would comprise all of the 27 "such products" that correspond to the 27 defined domestic like products.

[59] This analysis considers whether subject imports and domestic products generally share similar physical properties, uses, production processes and marketing channels.

[60] The ITC has traditionally taken into account, such factors as the physical properties of the product, its customs treatment, its manufacturing process (i.e, where and how it is made), its uses, and the marketing channels through which the product is sold, and any other relevant factors. *See also* U.S. first written submission, paras. 83-93.

[61] The Appellate Body in *US – Line Pipe* stated that:

> ***raison d'etre* of Article XIX of the GATT 1994 and the Agreement on Safeguards** is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member, **makes it necessary to protect a domestic industry temporarily**.

United States – Definitive Safeguard Measures on Imports of Certain Carbon Quality Line Pipe from Korea, Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002, para. 82 ("*US – Line Pipe*") (emphasis added); *see also United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Panel Report, WT/DS177/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, para. 7.76 ("*US – Lamb Meat*") (the Agreement's objectives of "**creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury**. . . ."

the condition of the domestic industry (*i.e.*, consideration of whether the domestic producers of the like product are experiencing serious injury) in order to protect it if necessary, albeit temporarily, from increased imports. Given the purpose of the Agreement, examining the products domestically-produced to ascertain the composition and scope of the pertinent like products is eminently reasonable. After all, if the objective is a precise identification of the domestic like product so as to be able to define the relevant domestic industry "so as to ensure that only domestic producers suffering *serious injury* are given temporary breathing room to facilitate adjustment,"[62] logic dictates that the analysis start with consideration of the domestic products, not the subject imports. The focus of the safeguard analysis is on the condition and response to stimuli of th domestic industry. The nature of the exporting producer and industries would not logically further this required analysis.

48. Moreover, it is not clear how subdividing or explicitly defining the imports as separate products prior to defining corresponding domestic like products, as Complainants generally favor, would necessarily result in different like product definitions in many instances. This is particularly true in the present case where 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. Significantly, Complainants have not disputed that the imports and domestic products are generally the same types of steel or that the ITC matched-up imports to its corresponding domestic like product definitions for each of its overall analyses. Rather, it is some of the product definitions themselves that are at issue.

49. Further, the United States submits that any like product analysis must be based on an evidentiary record. Subdividing imports into various groups prior to the collection of any evidence as part of the investigation, as some Complainants advocate, would call into question the very basis of any resulting finding. In contrast, the ITC does not predetermine its like product definitions, but rather first gathers evidence, and only then proceeds to an analysis using the factors appropriate to its investigation, and a like product determination based on the facts of the particular case. This approach ensures that, as with other pertinent issues of law and fact, the consideration of like product definitions is consistent with Article 3.1.

50. Requiring a competent authority to delineate the relevant like product divisions based exclusively on the imported products set forth in a petition or request for investigation raises a number of concerns, not the least of which is the fact that there is no basis for such an obligation in the Agreement. The imposition of such a requirement also could hamstring the competent authority in ways that would prove detrimental to its investigation and, therefore, are likely to also detract from the conclusions that the authority ultimately reaches. The very global nature of a safeguards proceeding will mean that an investigation often will implicate products from many countries and the products originating in each of those countries may vary considerably.

(emphasis added)).

[62] EC, response to questions from Panel, question 51.

Therefore, for the competent authority to focus its inquiry on the imported products rather than the domestic products is far less likely to produce information that will be useful for defining the domestic like product or products and the relevant domestic industry or industries.

51. In addition, this Panel should be cognizant of the fact that most safeguard investigations are likely to involve one or a few products rather than the 27 products covered by the steel investigations that are the subject of this dispute. If the U.S. experience is at all representative, most safeguard investigations involve a limited range of goods and are instituted as the result of a petition crafted by a domestic industry that asserts that it is seriously injured by particular increased imports of a product that the industry itself identifies. The petitioning industry can be expected to fashion the scope of the imports subject to investigation in a manner that the industry believes will be most conducive to obtaining the relief that it seeks. The competent authority should have all the latitude afforded by the Agreement to reach the necessary findings regarding like product based on its own investigation, not the predilections or judgments held by a particular industry, be it either domestic or foreign.

52. Similarly, Complainants' arguments for further subdivisions of imported product and/or domestic like product seem to be premised on the erroneous notion that there are universally accepted definitions of what constitutes specific steel products, and that the ITC disregarded such definitions. Complainants' varied and inconsistent arguments in their submissions and presentations to this Panel regarding the appropriate definitions of like product demonstrate that no such universal definitions of steel products exist.[63] Moreover, Complainants are urging the Panel to identify a requirement for analysis in all cases. No one contends that such alleged universal definitions exist and should control in all cases.

53. Forsaking any possibility of universal agreement among the Complainants, Japan contends that Complainants do not have to agree on what definition would be appropriate, but rather it is enough to show that "what the U.S. did was too broad."[64] This begs the question of how the Complainants know that the ITC's definitions were too broad if Complainants cannot reach a consensus on any alternative definition.

54. The EC takes yet another approach, contending that imports first should be identified by tariff lines, which will not necessarily correspond to domestic like product definitions, in order to

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[63] Complainants' proposals for appropriate like product definitions ranges from product definitions used in trade remedy cases under other statutes, to tariff classifications (612 classifications in all), to product descriptions contained in requests for product exclusions.

[64] Japan, first oral statement (like product), para. 23. Japan stated in relevant part:

> First of all, it should be noted that none of the complainants intends to suggest that there is only one possible definition of the "like product" for the products at issue in this case. . . . The Panel need not decide which of the breakdowns presented in the complainants' submissions is most appropriate; it mere needs to find that what the U.S. did was too broad, which it clearly was."

Ibid.

first consider whether imports have increased.[65] Like many of the Complainants, the United States takes the view that while consideration of customs treatment/tariff classification may be a relevant factor in an analysis of whether there are clear dividing lines between products, depending on the facts of a particular case, it is still just one of a number of criteria and not alone dispositive.[66] The Appellate Body in *Japan-Alcohol*, albeit interpreting a different agreement with a different object and purpose, reached the same conclusion and considered that tariff classifications of products could be relevant as one of a series of factors in determining what are "like products," but not as the primary or decisive factor.[67]

55. Moreover, it is clear that identification by tariff lines has not been the decisive factor in other safeguard actions, which have involved single like products covering multiple tariff classifications.[68] [69] In fact, in its recent safeguard action on steel the EC also included numerous tariff classifications in each of its single imported products that correspond its various like or directly competitive products.[70]

56. The EC's reference to tariff concessions as the basis for using tariff lines to identify products also fails to recognize that tariff concessions may include a wide range of products. The Appellate Body in *Japan - Alcohol*, interpreting a different agreement, warned that while precise tariff bindings "can provide significant guidance as to the identification of 'like products' . . . these determinations need to be made on a case-by case basis. . . . [since] tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product 'likeness.'"[71]

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[65] *See* EC, response to questions from the Panel, questions 19 and 20; *compare* EC, response to questions from the Panel, questions 33 and 53.

[66] *E.g.*, Brazil, response to questions from Panel, question 20; Japan, response to questions from Panel, questions 20 and 31; Korea, response to questions from Panel, questions 20 and 31; and New Zealand, response to questions from Panel, question 20. *See also* U.S. first written submission, paras. 86-89.

[67] *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 21-22 ("*Japan-Alcohol*"); *accord Japan-Alcoholic Beverages 1987*, Panel Report, L/6216 (BISD 34S/116-117), adopted 10 November 1987, para. 5.6 ("*Japan-Alcoholic Beverages 1987*").

[68] *See, e.g., U.S. – Line Pipe*; *Korea – Dairy*, Notification pursuant to Article 12.1(c), G/SG/N/10/KOR/, dated 27 January 1997; *Argentina – Footwear*, Notification pursuant to Article 12.1(c) and Article 9, G/SG/N/10/ARG/1/Suppl.3, G/SG/N/11/ARG/1/Suppl.3, dated 17 May 1999.

[69] Allegations that tariff classifications should define specific products begs the question of the appropriate level of tariff classification (*i.e.*, 4-digit level, 6-digit level, 8- digit level, or 10-digit level), not all of which are harmonized among countries.

[70] *See also European Communities - Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products*, Commission Regulation (EC) No. 1694/2002 of 27 September 2002, paras. 10-15 (US-84) (For example, EC defined hot-rolled coils as a single "product concerned", or imported product, consisting of numerous (11) tariff classifications and found that it corresponded to a single like or directly competitive product. The EC made similar findings regarding other products in this action.).

[71] *Japan - Alcohol*, AB Report, p. 22.

57. The EC's rationale for defining imported products by tariff lines first is intended by the EC to require authorities to consider whether such imports have increased, as a "filter," prior to conducting the like product analysis.[72] The EC's proposed methodology is neither required by the Agreement nor apparently followed by the EC in its own safeguard actions.[73] The EC's proposal would appear to place the cart before the horse in that it focuses on what imports are increasing regardless of whether there is serious injury to an industry and before the composition of the relevant domestic industry has been defined. The EC would look at increased imports by tariff lines, without regard to whether tariff lines should be grouped together, as most parties agree is appropriate. The approach advanced by the EC would result in a scrutiny of imports to determine which imports are showing increases in volume only then to be followed by an investigation to determine the domestic like product corresponding to an import tariff line or lines and then if there is an industry somewhere that is being injured as a result of such increased imports. Therefore, looking at increases in imports by tariff lines, as proposed by the EC, before defining the domestic like product prevents any consideration of increases in imports relative to domestic production, since the industry has not yet been defined, which the Safeguards Agreement requires. The Appellate Body in *US - Lamb Meat* has stated that the **first step is defining the like product**, not that the first step is to determine first whether imports have increased.[74] Moreover, it is ironic that the EC, which has alleged incorrectly that the ITC's like product definitions, particularly CCFRS, were made in order to attain a desired result, actually proposes that the ITC should have conducted a results-oriented test prior to defining the like product. The EC would have the ITC conduct an unwarranted and contrived test of whether imports increased first before defining a like product and an industry, which would serve as a rational delineation of imports, so as to reach the results Complainant desired.

b. Like Product Criteria

58. There is consensus among the parties on some of the criteria considered appropriate for the like product analysis.[75] All parties agree on the reasonableness of the following criteria: physical properties/characteristics, uses, and customs treatment/tariff classification. Many parties agree that consideration of manufacturing processes may be appropriate. While several Complainants maintain that consumer tastes also is an appropriate criteria, no party has objected to the ITC's consideration of marketing channels.

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[72] *See, e.g.*, EC, response to questions from Panel, questions 19 and 20; EC first written submission, paras. 184-188; Norway first written submission, para. 206.

[73] *See European Communities - Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products*, Commission Regulation (EC) No. 1694/2002 of 27 September 2002 (US-85).

[74] *US - Lamb Meat*, AB Report, para. 87.

[75] *See, e.g.*, Korea, response to questions from the Panel, question150 ("In fact, the factors cited by the ITC are the correct factors but the analysis of those factors was not complete."); Japan, response to questions from the Panel, questions 19 ("the 'like product' criteria . . . which are adopted by the Appellate Body in its GATT Article III jurisprudence, though we are not proposing those four factors as a GENERAL requirement."), 21, 31, and 150; Brazil, response to questions from Panel, questions 19, 24, and 150; EC, response to questions from the Panel, question150; and Norway, response to questions from the Panel, question150.

59. The Appellate Body has found, albeit in the context of GATT Article III, that "general criteria . . . provide a framework for analyzing the 'likeness' of particular products . . . [but] it is well to bear in mind [that such criteria are] simply tools to assist in the task of sorting and examining the relevant evidence."[76]

60. The term "like products" is not defined in the Safeguards Agreement or GATT 1994.[77] The issue of the interpretation and application of the Safeguards Agreement term "like product" has not been before any dispute settlement proceedings. Therefore, while the ITC's traditional like product criteria are consistent with the Safeguards Agreement, there is no directly related treatment of the term in panel or Appellate Body reports to provide guidance on the issue of the appropriate criteria for the like product analysis.

61. Moreover, resorting to the "ordinary" or "plain" meaning of the term "like" provided by the dictionary "leave[s] many interpretative questions open."[78] The Appellate Body in *EC-Asbestos*, interpreting Article III of the GATT, noted that the dictionary definition of "like" does not resolve the following three issues of interpretation: 1) which characteristics or qualities are important; 2) the degree or extent to which products must share qualities or characteristics; and 3) from whose perspective "likeness" should be judged.[79] Thus, reliance on the dictionary definition for the plain or ordinary meaning of "like" leaves many issues unresolved.

62. The Appellate Body, addressing the term like pursuant to Article III of the GATT, recognized in *Japan-Alcohol*, and most recently affirmed in *EC-Asbestos*, that the purpose and context of the covered agreement is important in interpreting the term "like products"[80] and that such interpretation for one context cannot be automatically transposed to other provisions or agreements where the phrase "like products" is used.[81] [82] In accordance with the Appellate

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[76] *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, para. 102 ("*EC-Asbestos*") (general criteria "are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.").

[77] *See* U.S. first written submission, paras. 66-82.

[78] *EC – Asbestos*, AB Report, para. 92.

[79] *EC – Asbestos*, AB Report, para. 92.

[80] As the Appellate Body has clearly set forth, the term "like products" "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears." *EC – Asbestos*, AB Report, para. 88.

[81] *EC – Asbestos*, AB Report, footnote 60, at p. 34 ("We also cautioned against the automatic transposition of the interpretation of 'likeness' under the first sentence of Article III:2 to other provisions where the phrase 'like products' is used."), *referring to Japan – Alcohol*, AB Report, at 113 (p. 20). The Appellate Body in *EC – Asbestos* even rejected directly applying its interpretation of like products under Article III:2 to a dispute under Article III:4 and found that the starting point for its interpretation was the "general principle" in Article III:1. *EC – Asbestos*, AB Report, para. 93 ("in interpreting the term 'like products' in Article III:4, we must turn, first, to the 'general principle' in Article III:1, rather than to the term 'like products' in Article III:2.").

[82] Specifically, the Appellate Body in *Japan – Alcohol* stated:

> No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is

Body's findings, this Panel should recognize the clear distinction between agreements with different purposes and reject Complainants' proposals to automatically transpose criteria established for another context, such as Article III, to the Safeguards Agreement.

63. The purpose of the Safeguards Agreement is to permit the temporary protection of a domestic industry under certain circumstances.[83] As discussed above, the focus of the analysis in a safeguards investigation is on the condition of the domestic industry and not, as it is under Article III, on whether imports are being treated in a manner different from domestic products in the home market, *i.e.*, whether they are afforded national treatment.[84] While protecting the competitive relationship between imports and domestic products and avoiding protection to domestic production is the purpose of Article III,[85] affording temporary protection if necessary to the domestic industry is the purpose of the Safeguards Agreement.

64. The traditional like product criteria considered by the ITC focus on objective rather than subjective factors. Moreover, since the focus of the analysis in a safeguard investigation is on the condition of the domestic industry rather than the consumer or the relationship of imported and domestic products in the market, "likeness" should be viewed from the perspective of the domestic product rather than a consumer, consistent with the purpose of the Safeguards

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"like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. **The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case** to which that provision may apply.

Japan – Alcohol, AB Report, p. 21 (emphasis added); *EC – Asbestos*, AB Report, para. 88.

[83] *US - Line Pipe*, AB Report, para. 82; *see also US - Lamb Meat*, Panel Report, para. 7.76 (the Agreement's objectives of "creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury. . . .").

[84] The term "like products" has primarily been addressed in dispute settlement proceedings regarding allegations that national treatment has not been afforded regarding 1) internal taxes pursuant to Article III:2 of GATT 1994, and 2) laws and regulations pursuant to Article III:4 of GATT 1994. The Appellate Body has indicated regarding the purpose of Article III of GATT 1994 that:

> The broad and fundamental **purpose of Article III is to avoid protectionism** in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures '**not be applied to imported and domestic products so as to afford protection to domestic production**'" . . . . Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. . . .

EC – Asbestos, AB Report, para. 97 (emphasis added).

[85] Specifically, the Appellate Body in *EC – Asbestos* stated:

> . . . a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.

EC – Asbestos, AB Report, para. 99.

Agreement.[86] Indeed, the Appellate Body cautioned in *EC – Asbestos* that it may be important to consider

> *from whose perspective* 'likeness' should be judged. For instance, ultimate consumers may have a view about the 'likeness' of two products that is very different from that of the inventors or producers of those products.

The ITC has focused on more objective factors than consumer' tastes in its traditional analysis of like products such as the product's marketing channels and manufacturing process, in addition to physical properties, uses, and customs treatment.[87]

65. The ITC's like product factors in a safeguard investigation include the three criteria on which all parties agree (physical properties, uses, and customs treatment), as well as focus on such other objective factors as the product's marketing channels and manufacturing process.[88] [89] These are not mandatory criteria and do not limit the ITC from considering other factors, as appropriate, in making its findings.[90] No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the particular case.

66. One of the factors considered by the ITC in defining like products is the product's manufacturing process (*i.e.*, where and how it is made). In the context of the Safeguards Agreement where the purpose is to allow measures to protect the domestic industry, albeit temporarily and under certain circumstances, consideration of the manufacturing process for a product is an appropriate and objective factor. The Appellate Body in *US – Lamb Meat* recognized that it may be appropriate to consider the production process for a product in defining like products, particularly when the question arises as to whether two articles are separate products.[91]

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[86] *US – Line Pipe*, AB Report, para. 82 (purpose of Safeguards Agreement is to permit a WTO Member to "resort[] to an effective remedy in an extraordinary emergency situation that . . . makes it necessary to protect a domestic industry temporarily.).

[87] *See Japan – Alcoholic Beverages 1987*, Panel Report, para. 5.7 (Panel recognized that "consumer habits are variable in time" and "traditional Japanese consumer habits with regard to shochu provided no reason for not considering vodka to be a 'like' product.").

[88] *Accord Japan-Alcoholic Beverages 1987*, Panel Report, para. 5.7 (Panel was of the view that the likeness of products must be examined taking into account objective criteria (such as composition and manufacturing processes of products)).

[89] *See* U.S. first written submission, paras. 83-93.

[90] *Accord EC – Asbestos*, AB Report, para. 102 (general criteria "are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.").

[91] *US – Lamb Meat*, AB Report, para. 94, n. 55. *See also Japan – Alcoholic Beverages 1987*, Panel Report, para. 5.7 (Panel thought it was important to assess "likeness," as much as possible, on the basis of objective criteria, including, in particular, composition and manufacturing processes of the product, in addition to consumption habits.).

67. While most Complainants agree that consideration of manufacturing processes, *i.e.*, how a product is made, is an appropriate criteria for a safeguards investigation, they disagree with the ITC's additional consideration of where the product is made in the manufacturing process.[92]

68. Consideration of manufacturing or production processes, both how and where a product is made, is particularly relevant where the inquiry involves a product at different stages of processing. The interrelationship of the manufacturing processes for a product at different stages of processing may be informative in finding clear dividing lines between the stages of processing.

69. For example, since earlier processed certain carbon flat-rolled steel, such as slab or hot-rolled steel, is the feedstock for further processed steel, such as cold-rolled steel or coated steel, all such steel, *i.e.*, slab, hot-rolled steel, cold-rolled steel, and coated-steel, is produced using essentially the same production processes in the initial manufacturing stages.[93] All certain carbon flat-rolled steel is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills.[94] Substantial quantities of earlier processed steel are captively consumed by the producer in the production of further processed steel.[95] This tends to blur product distinctions until the processing reaches its final stages.

70. As part of its consideration of the manufacturing process in this particular case (*i.e.*, how and where it is made), the ITC recognized that the interrelatedness of CCFRS at different stages of processing resulted in substantial captive consumption, with a concomitant commonality of production facilities and vertical integration in the industry. This interrelationship between the production processes and integration of the producers demonstrated that distinctions in markets for each type of certain carbon flat-rolled steel were blurred, all types of certain carbon flat-rolled steel was directly affected by the markets for the whole spectrum of certain carbon flat-rolled steel, given that each type of CCFRS constituted the feedstock for the next processed stage of steel within the overall category. Considering the manufacturing processes of steel at various

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[92] *E.g.*, Brazil, response to questions from the Panel, questions 69 and 150; Japan, response to questions from the Panel, questions 69 and 150; Korea, response to questions from the Panel, questions 69 and 150; and Norway, response to questions from the Panel, question150.

[93] The ITC's analysis provided a detailed discussion of the five stages of processing certain carbon flat-rolled steel. The manufacturing processes for carbon steel involve three distinct stages that include: (1) melting or refining raw steel; (2) casting molten steel into semifinished form, such as slab; and (3) performing various stages of finishing operations, including hot-rolling, cold-rolling, and/or coating. ITC Report, p. OVERVIEW-7.

[94] ITC Report, pp. 40-41.

[95] Virtually all U.S.-produced slab is internally consumed by the domestic slab producers in their production of hot-rolled steel (sheet, strip, or plate), with large shares of hot-rolled and cold-rolled steel also internally transferred. During the year 2000, 99.4 percent of the quantity of domestic producers' total U.S. shipments of slab were internally transferred, as were 66 percent of the quantity of domestic producers' total U.S. shipments of hot-rolled steel, and 58.7 percent of the quantity of total U.S. shipments of domestically-produced cold-rolled steel. ITC Report, pp. FLAT-1 and 3, nn. 4 and 5.

stages of processing, particularly the fact that they are feedstocks, is a "product-oriented" and not "producer-oriented" analysis, as alleged by Complainants.[96]

71. Substitutability is not one of the traditional factors considered by the ITC in conducting it analysis of whether there are clear dividing lines between domestic products in order to define like product(s).[97] Nor has substitutability been one of the criteria suggested for the like product analysis in the context of dispute settlement proceedings regarding other covered agreements.[98] Complainants' references to in *US - Cotton Yarn* as relevant to the like product definition fail to recognize the Appellate Body's statement that "there is no disagreement . . . that yarn imported from Pakistan and yarn produced by the producers of the United States . . . are like products. . . . It is, therefore, not necessary for us to address the meaning of the term "*like products*" for the purposes of this appeal."[99] The issue in *US - Cotton Yarn* was whether imported and domestic products determined to be like could be determined not to be directly competitive.[100]

72. There clearly is a competitive relationship between the imported and domestic products. Complainants have not disputed, and neither did the parties in the underlying investigation, that the imported and domestic products generally consist of the same types of steel, are interchangeable and thus compete with each other. Moreover, within any defined like product and the corresponding specific imported product there exists a range or continuum of goods of different sizes, grades, or stages of processing. While goods along the continuum share identical or similar factors, individual items at the extremes of the continuum may not be as similar or substitutable.[101] For example, a size 36 skirt is like a size 44 skirt, but are they substitutable? Or is size number 3 rebar substitutable for size number 18 rebar? Or are calves substitutable for cattle at other stages of development (*i.e.*, yearling or stocker cattle, feeder cattle, or fed cattle ready for immediate slaughter)?

73. Each like product definition must be based on the facts of the particular case and as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent

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[96] *Accord United States – Transitional Safeguard Measure on Combed Cotton Yarn from* Pakistan, Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, para. 86 ("*US – Cotton Yarn*").

[97] The ITC has considered substitutability between products to be a factor it would consider if it made its definition(s) on the basis of a directly competitive product analysis.

[98] *See, e.g.*, *Border Tax Adjustments*, Report of Working Party, L/3464, adopted 2 Dec. 1970, BISD 18S/97, para. 18; *quoted in part in Japan – Alcohol*, AB Report, p. 20.

[99] *US – Cotton Yarn*, AB Report, para. 89.

[100] The terminology in the safeguard provision of the *Agreement on Textiles and Clothing* ("ATC") is different, *i.e.*, "like **and/or** directly competitive products" rather than the "like **or** directly competitive products"language in the Safeguards Agreement. Based on this different terminology and the findings of the underlying investigation, the Appellate Body in *US – Cotton Yarn* rejected a finding that a product could be part of the like product definition but then defined out as not directly competitive and thus not included in the definition of the domestic industry. *US – Cotton Yarn*, AB Report, para. 105.

[101] Moreover, goods within a single tariff line consist of a range of items as demonstrated most clearly by requests by some Complainants for like products to be defined more narrowly than by tariff line.

evidence."[102] The methodology used by the ITC is unbiased and objective. Neither Article 2 nor any other provision in the Safeguards Agreement sets forth the factors or the order that the competent authority must consider in identifying the imported product that is like or directly competitive with the domestic product. Complainants have not met their burden of making a *prima facie* case that the U.S. measure is inconsistent with the Safeguards Agreement because of the manner in which like products were defined.

3. ITC's Like Product Analysis in this Safeguard Investigation

74. The ITC considered the record evidence using long established factors, as discussed above, and determined whether there were clear dividing lines among the various types of domestic steel corresponding to the imported steel subject to this investigation. The ITC's definitions of like products were reached in a manner consistent with U.S. obligations under the Safeguards Agreement.

75. In the present case, the ITC's definitions of like product are coextensive with the subject imports.[103] The ITC defined 27 separate like products that correspond to all the subject imports.[104] It is not in dispute that the ITC defined like products that match-up with imports subject to investigation and did not define like products that encompass more types of steel than subject imports. Rather the disagreement is about the range of steel included in certain product definitions.

76. The U.S. first written submission and responses to questions from the Panel addressed the allegations of the Complainants' involving the ITC's definitions of like product. The United States now briefly responds to the arguments made by Complainants which relate primarily to the ITC's findings that certain carbon flat-rolled steel ("CCFRS") and certain welded pipe each constitute a single like product.[105]

77. **CCFRS:** As discussed in the ITC Report, the U.S. first written submission, and responses to questions,[106] the ITC applied its traditional factors in determining that there was no

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[102] *EC-Asbestos*, AB Report, para. 102.

[103] In defining the domestic like product, the investigating authority begins with the scope of the imports subject to investigation. If the subject imports in one investigation are different from those in another investigation, then the definition of the like product or products will not necessarily be the same since each begins with a different starting point, and are derived from a different factual record.

[104] Ten of these definitions correspond to subject imports on which remedies were imposed and are subject to review by this Panel.

[105] With the exception of Norway, Complainants responding to questions from the Panel on tin mill agreed with the ITC's definition of this like product. *Compare* Norway, response to questions from the Panel, question 34 *to* Brazil, Japan, and Korea, response to questions from the Panel, question 34.

[106] *See* U.S. first written submission, paras. 116-142; ITC Report, pp. 36-45; U.S. response to questions from the Panel, questions 26, 29, 60, 67, 146, 147, and 149.

clear dividing line between types of certain carbon flat-rolled steel ("CCFRS") and defined such steel to constitute a single like product.

78. The ITC found that CCFRS at various stages of processing shared certain basic physical properties, were interrelated, had common end-uses, were generally distributed through the same marketing channels, and were essentially made by the same production processes (at least at the initial stages). The ITC also recognized that there were some differences in physical properties and end-uses.

79. In particular, the ITC found that CCFRS at different stages of processing share certain basic physical properties and are interrelated to a certain degree.[107] Specifically, the ITC found that this steel has a common metallurgical base, with desired properties and essential characteristics embodied in the steel prior to the initial casting or semifinished stage.[108] The mix in metallurgy depends on the requirements of the end-use or uses, whether the end-use(s) is at the same or different stages of processing.

80. An important fact for the ITC in defining this like product was that CCFRS at one stage of processing generally is feedstock for the next stage of processing.[109] For example, slab is feedstock for hot-rolled steel (sheet, strip, and plate);[110] hot-rolled steel is feedstock for cold-rolled steel and cut-to-length plate; and cold-rolled steel is feedstock for coated steel.[111]

81. Since carbon flat-rolled steel in an earlier processed form is the feedstock for further processed carbon flat-rolled steel, all such steel is produced using the same production processes at the initial stages, with downstream steel merely employing additional stages of processing. All certain carbon flat-rolled steel is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills.[112] Substantial quantities of earlier

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[107] *See* U.S. first written submission, para. 119; ITC Report, pp. 37-38.

[108] The ITC found that all certain carbon flat-rolled steel originally is made of raw materials that include carbon and iron.

[109] *See* U.S. first written submission, paras. 119-121, 127, and 140; ITC Report, pp. 37-42.

[110] The data for plate are included in both the hot-rolled data collection category, if in coil form, and the plate (cut-to-length) category, if flat. ITC Report, p. 40, n.102 and FLAT-1-2. Thus, the hot-rolled steel in thicknesses from 3/16 inch to 3/4 inch, and possibly up to one inch, is the same as plate, except its in coil form rather than flat (or it already has been cut from coil). The majority of cut-to-length plate are in this range of thickness. ITC Report, p. 41, n. 107.

[111] For example, slab is dedicated for use in producing the next stage steel, hot-rolled steel, whether produced as sheet, strip, or plate. The majority of hot-rolled steel is further processed into cold-rolled steel. The remaining hot-rolled steel is about equally divided between being further processed into CTL plate or pipe and tube, and used in the manufacture of structural parts of automobiles and appliances. The majority of cold-rolled steel also is used as the feedstock for further processing into coated steel, with smaller amounts further processed into tin mill products or GOES.

[112] Moreover, the evidence shows that advances in technology have blurred the former differences in hot-rolled production processes for sheet/strip and plate. The Steckel mills permit rolling to thinner gauges than a traditional reversing mill thus permitting a producer to switch production between sheet and plate. Steckel mills also

processed steel are internally transferred for production of further processed steel.[113] The ITC found that this tends to blur product distinctions until the processing reaches its final stages since earlier stages of steel comprise feedstock for the next stage.[114] As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the ITC also recognized that there is substantial commonality in production facilities and vertical integration in the industry.

82. The majority of certain carbon flat-rolled steel, specifically feedstocks products – slab, hot-rolled, and cold-rolled – is internally transferred. Thus, the ITC found that when certain carbon flat-rolled steel enters the commercial market, the primary marketing channel generally is directly to end-users.[115] The ITC recognized that the interrelationship between the production processes and integration of the producers demonstrates that the market for each type of certain carbon flat-rolled steel is not isolated, but directly affected by the markets across the spectrum of all certain carbon flat-rolled steel.[116]

83. The ITC also found that the primary end-use applications for commercial shipments of certain carbon flat-rolled steel are the automotive and construction industries.[117] The ITC found that all types of certain carbon flat-rolled steel are substantially affected by the collective demand of these two markets.[118]

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allow steelmakers to coil the finished plate, as on a hot-strip mill. Moreover, the addition of temper mills to CTL lines has made heavy gauge hot-rolled interchangeable with discretely produced plate. Without the temper mill process, coils cut into lengths tend to retain memory and "snap back" or bend after the initial flattening. While plate in coils can only be produced in thicknesses up to 3/4 inch and thus can only be substituted for CTL plate up to 3/4 inch thick, this portion of the CTL plate market is large. There is evidence that some mills can produce plate in coils in gauges up to one inch. Thus, the share of the CTL plate market which can be, and is being, supplied with plates cut from coil is substantial. ITC Report, pp. 40-41.

[113] Virtually all U.S.-produced slab is internally consumed by the domestic slab producers in their production of hot-rolled steel (sheet, strip, or plate), with large shares of hot-rolled and cold-rolled steel also internally transferred. During the year 2000, 99.4 percent of the quantity of domestic producers' total U.S. shipments of slab were internally transferred, as were 66 percent of the quantity of domestic producers' total U.S. shipments of hot-rolled steel, and 58.7 percent of the quantity of total U.S. shipments of domestically-produced cold-rolled steel. ITC Report, pp. FLAT-1 and 3, nn. 4 and 5.

[114] ITC Report, pp. 38-39.

[115] *See* U.S. first written submission, para. 122; ITC Report, p. 44. In 2000, the marketing channels for certain carbon flat-rolled steel, except for CTL plate, ranged from 60 percent to 99.6 percent to end-users. ITC Report, Tables FLAT 12-15 and FLAT-17. The marketing channels for CTL plate were more evenly split with 45.2 percent to end-users and 54.8 percent to distributors. *Ibid*., Table FLAT-13.

[116] In reaching this finding, the ITC considered the evidence that showed some cross-price effects between CCFRS from one stage of processing to an adjacent stage. Specifically, the domestic slab importers acknowledged that slab prices are solely a function of downstream prices for hot-rolled steel and cold-rolled steel, which would suggest a strong cross-price effect between these stages of CCFRS. ITC Report, pp. 42-43 and n. 124.

[117] U.S. first written submission, para. 122; ITC Report, pp. 43-44.

[118] The ITC recognized that while hot-rolled steel may not be used in place of, or substituted for, a coated sheet in a car fender, all certain carbon flat-rolled steel is directly affected by the demand for automobiles, since all types are used in the production of automobiles, albeit in different applications. The ITC also found that similarly, but to a lesser extent, all types of such steel are used for end-use applications in the construction industries. Thus, all types of certain carbon flat-rolled steel are substantially affected by the collective demand of these two markets. ITC

84. The ITC also recognized that the vertical nature of the relationship between certain carbon flat-rolled steel at different stages may result in differences in uses between stages of CCFRS.[119] Nevertheless, the ITC found that the evidence demonstrated that in some situations, there may be some substitution for use between products from one stage to another, *e.g.*, coated steel can be adapted for use in applications that typically use cold-rolled steel and vice versa, and hot-rolled has some limited interchangeability with cold-rolled steel.[120]

85. In sum, the ITC applied its traditional like product factors in determining that there was no clear dividing line between categories of certain carbon flat-rolled steel. The ITC found that CCFRS at various stages of processing, from slab to coated (*i.e.*, corrosion resistant) steel, shared certain basic physical properties, were interrelated, had common end-uses, were generally distributed through the same marketing channels, and were essentially made by the same production processes (at least at the initial stages)[121] to be part of a continuum. While goods along the continuum share similar or like factors, individual items at the ends of the continuum may be less similar than those in the middle of the continuum.

86. Complainants' arguments fail to recognize that within almost every defined like product, and the corresponding imported product, there exist a range of goods of different sizes, grades, or stages of processing. As discussed above, while goods along the continuum share similar or like factors, individual items at the end of the continuum may not be as similar.[122]

87. As discussed in the U.S. first written submission,[123] the Appellate Body in *US – Lamb Meat* also has recognized that a like product definition may include both input products and end-products.[124] The Appellate Body recognized that, when faced with products at various stages of production, a relevant factor for determining the like product definition (as opposed to the domestic industry definition) was whether products at different stages of processing were

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Report, pp. 43-44.

[119] ITC Report, p.44.

[120] *See* ITC Report, p. 44. Specifically, several U.S. companies produce hot-rolled sheet in thicknesses (*i.e.*, light-weight gauges) that have been more typically characteristic of and competitive with cold-rolled sheet. Although the overlap between hot-rolled steel and cold-rolled steel has traditionally been considered to begin at approximately 2 mm and thinner, improvements in hot-rolling have allowed mills to hot-roll below 2 mm. In addition, while cold-rolled steel generally is used as the feedstock for coated steel, coated hot-rolled sheet is a growing product niche. USITC Pub. 3446, p. I-8, and nn.18 and 19.

[121] *See* U.S. first written submission, paras. 116-142; ITC Report, pp. 36-45.

[122] *See* paragraph 72 above.

[123] U.S. first written submission, para. 93.

[124] *US – Lamb Meat*, AB Report, para. 90 ("In our view, under Article 4.1(c), input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products.").

different forms of a single like product or had become different products.[125] Thus, the Appellate Body has recognized that a continuum of items can be defined as a single like product.[126]

88. **Certain Welded Pipe**: As discussed in the ITC Report, the U.S. first written submission, and responses to questions,[127] the ITC applied its traditional factors in determining that there was no clear dividing line between types of certain welded pipe and defined it as a single like product.

89. The ITC found that certain welded pipe included tubular products that have a weld seam that runs either longitudinally or spirally along the length of the product. Certain welded pipe is used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. Thus, it is used to transport liquids at or near atmospheric pressure rather than for high pressure containment.[128] The various types of certain welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[129] Certain welded pipe is generally produced on electric resistance weld (ERW) mills. The ITC found that the various forms of certain welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas, and other fluids at or near atmospheric pressure.

90. In the underlying investigation, the ITC considered arguments that it should find that large diameter line pipe (pipe 16 inches or over in outside diameter) was a separate like product from other welded pipe.[130] The evidence showed that while welded large diameter line pipe generally is made on mills designed to make large pipe, these mills also are capable of producing other types of large diameter pipe, such as pipe for water transmission, piling, and structural

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[125] The Appellate Body quoted the underlying Panel's reference to *Canada-Beef* regarding this first issue of consideration of products at various stages of production in defining the like product. The quote in relevant part states:

> . . . the issue is (i) whether the products at various stages of production are *different forms of a single like product* or have become *different* products. . . ."

Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC, 13 October 1987, unadopted, SCM/85, *quoted* in *US – Lamb Meat*, AB Report, paras. 92 and 94; *see also US – Lamb Meat*, Panel Report, para 7.95 and 7.96.

[126] See also *Argentina – Footwear*, Notification pursuant to Article 12.1(c) and Article 9, G/SG/N/10/ARG/1/Suppl.3, G/SG/N/11/ARG/1/Suppl.3, dated 17 May 1999 (a single like product consisting of a range of footwear).

[127] *See* ITC Report, pp. 147-157; U.S. first written submission, paras. 156-157; U.S. response to questions from the Panel, paras. 268-283 & 290-291; United States, Response to the Questions from the Other Parties, question KOR-1 (15 November 2002) ("U.S., response to questions from parties").

[128] ITC Report, p. TUBULAR-2.

[129] Certain welded pipe used in the movement of oil and gas is produced to standards set by American Petroleum Institute (API), while many other forms of certain welded pipe are produced to standards set by the American Society for Testing and Materials (ASTM) and the American Water Works Association (AWWA).

[130] Prehearing Brief of European Steel Tube Association (September 12, 2001), pp. 3-6 (US-30).

members.[131] A substantial portion of welded large diameter line pipe is made by the ERW process,[132] which is the process used to make virtually all types of certain welded pipes.[133] Moreover, many of the firms that produce welded large diameter line pipe also produce other welded pipe that is less than 16 inches in outside diameter. Large and small diameter welded pipe also share common physical characteristics, particularly a weld seam that has an effect on its uses relative to other tubular products such as seamless pipe. Based on this evidence, the ITC found large and small welded pipe to be part of a continuum of certain welded pipe and saw no reason to define large diameter line pipe separately from other certain welded pipe.

91. An important factor in ITC's finding of a clear dividing line between certain welded pipe and other tubular products was the physical characteristic of the welded seam. All welded pipe, large and small, share the common physical characteristic of a weld seam that runs either longitudinally or spirally along the length of the product and that has an effect on the pipe's uses relative to other tubular products such as seamless pipe. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. The ITC found that welded pipe ranging from small to large shared similarities in physical characteristics, uses, marketing channels, and production processes as discussed above to be part of a continuum of certain welded pipe and saw no clear dividing lines to define separate like products within this continuum.

C. The ITC Satisfied the "Increased Imports" Requirement

92. In their responses to the Panel's questions, Complainants reveal a continued confusion about the actual import data for the products subject to this dispute proceeding. Complainants continue to make sweeping statements concluding that "imports were declining, not increasing, after 1998."[134] Thus, we begin this discussion by reiterating that Complainants' characterization is not accurate as to any of the products subject to this dispute proceeding. For seven of the ten products – hot-rolled bar, cold-finished bar, certain welded pipe, flanges, fittings, and tool joints, stainless steel bar, stainless steel rod, and stainless steel wire – imports peaked in 2000, the final full year of the ITC's period of investigation.[135] Imports in *US – Line Pipe* followed this precise

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[131] ITC Report, p. 154, *citing Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, pp. I-5-6 (March 2001) (US-29).

[132] In 2000, 45.6 percent of domestic welded large diameter line pipe was produced by the ERW process as compared to 54.4 percent by the SAW process. *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Publication 3400, pp. Table 1-2 (March 2001) (US-29). ERW pipe is normally produced in sizes from 2 3/8 inches through 24 inches outside diameter. Id. at I-5.

[133] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Invs. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Publication 3316, p. CIRC-I-19 (July 2000) (US-31).

[134] Japan, response to questions from the Panel, question 38.

[135] ITC Report, Vol. III, Tables LONG-C-3 (hot-rolled bar), LONG-C-4 (cold-finished bar), TUBULAR-C-4 (certain welded pipe), TUBULAR-C-6 (fittings, flanges, and tool joints), STAINLESS-C-4 (stainless steel bar), and STAINLESS C-7 (stainless steel wire); ITC Report at Vol. I, pp. 234-235; *see also* Exhibit US-66. Imports also

pattern, and the panel in that dispute rejected Korea's contention that the ITC's finding of increased imports was inconsistent with Article 2.1.[136] For two other products – tin mill and rebar – imports peaked in 1999 and remained well above pre-1999 levels in 2000.[137] For certain carbon flat-rolled steel, imports peaked in 1998, declined somewhat in 1999 and increased slightly in 2000; moreover, imports in 2000 were significantly greater than in 1996 or 1997.[138]

93. There is no merit to Complainants' assertion that the United States has "read out the separate increased imports requirement by collapsing it with the causation analysis."[139] On the contrary, the United States recognizes that the Safeguards Agreement contains a separate "increased imports" requirement. However, unlike the Complainants, the United States does not invest this requirement with more significance than is warranted by the text of the Safeguards Agreement. This separate "increased imports" requirement is satisfied, *in the first instance*, by any increase in imports, absolute or relative to domestic production. However, this does not mean that ultimately "any increase will do." As competent authorities consider the other conditions necessary for imposition of a safeguard, they determine as directed by the Appellate Body in *Argentina – Footwear*, whether the increase in imports was recent enough, sudden enough, sharp enough, and significant enough to cause or threaten serious injury.

94. We do not understand Complainants' assertion that "the ITC did not conduct any analysis anywhere in its report to see if the increase in imports was recent, sudden, sharp and significant enough to cause serious injury."[140] For each of the products for which the United States applied a safeguard measure, the ITC found that the pertinent domestic industry was seriously injured or threatened with serious injury and found the requisite causal link between the increased imports and that injury or threat. This analysis, taken as a whole, established that the increases in imports were "recent enough, sudden enough, sharp enough, and significant enough"[141] to cause serious injury or the threat of serious injury.

95. The United States notes that neither Article XIX nor the Safeguards Agreement supplies a specific numeric standard by which imports must increase, or a specific time frame in which to determine whether imports have increased. Every authority – Article XIX, the Safeguards Agreement, previous Appellate Body and Panel reports – suggests that the interpretation of this condition employed by the United States is correct, namely, that whether a product "is being imported in such increased quantities" can only be determined in the context of the facts specific to those imports and the domestic industry.

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peaked in 2000 for the stainless steel wire and rope category defined by Commissioner Bragg.

[136] *US – Line Pipe*, Panel Report, para. 7.214.

[137] ITC Report, Vol. III, Tables FLAT-C-8 (tin mill) and LONG-C-5 (rebar); *see also* Exhibit US-66.

[138] ITC Report, Vol. I, pp. 49-50; *see also* Exhibit US-66.

[139] Korea, Oral Statement of the Republic of Korea Regarding the Issue of Increased Imports, para. 7 (29-31 October 2002) ("Korea first oral statement (increased imports)").

[140] Korea, oral statement (increased imports), para. 31.

[141] *Argentina – Footwear*, Appellate Body Report, para. 131.

96. The fact that the drafters of the Safeguards Agreement did not intend to impose a specific "increased imports" standard is reinforced by a comparison with Article 5 of the Agreement on Agriculture, in which the drafters laid out specific numeric standards for measuring increased imports and setting specific measures for each level of imports.

97. Complainants seek to support their position that the increased imports requirement encompasses temporal, quantitative and qualitative conditions that are independent of the causation analysis by pointing to the fact that the Appellate Body addressed the question of increased imports as "a stand-alone issue" in *Argentina – Footwear*.[142] The fact that the Appellate Body organized its report in *Argentina – Footwear* in a certain way (*i.e.*, with subheadings entitled "Increased Imports," "Serious Injury," and "Causation" – all under the heading of "Interpretation and Application of Articles 2 and 4 of the Agreement on Safeguards") does not detract from the fact that the Appellate Body was interpreting Article 2.1, which encompasses the entire investigative responsibility of competent authorities under the Safeguards Agreement.

98. Complainants maintain that there is an independent temporal condition that imports be "recent and sudden," that is derived from the words "is being imported" in Article 2.1 of the Safeguards Agreement and from the interpretation of that text in paragraph 130 of the Appellate Body's report in *Argentina – Footwear*.[143] Complainants seem to agree that paragraph 131 explicitly abjures arbitrary standards and cut-offs.[144] They draw a distinction between "sudden and recent" in paragraph 130 of *Argentina – Footwear* and the "recent enough, sudden enough, sharp enough, and significant enough" language in paragraph 131 of the same Appellate Body report.[145] But Complainants overlook that paragraph 130, like paragraph 131, does not provide an absolute standard. The conclusion to be drawn from this is that "sudden and recent," like "recent enough, sudden enough, sharp enough, and significant enough" will depend on the specific facts of each investigation.

99. Nonetheless, Complainants apparently believe that there is an absolute standard to determine whether the increase in imports has been "sudden and recent" as described in paragraph 130 of *Argentina – Footwear*. Complainants generally agree that an increase which occurred 18 months ago is "insignificant,"[146] although Complainants do not divulge the reason

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[142] Japan, response to questions from the Panel, question 36.

[143] Korea, oral statement (increased imports), paras. 14-26.

[144] Brazil, response to questions from the panel, question 37; Japan, response to questions from the Panel, question 37; Korea, response to questions from the Panel, question 36; New Zealand, response to questions from the panel, question 36; and Switzerland, response to questions from the Panel, question 36.

[145] *Argentina – Footwear*, AB Report, paras. 130-131.

[146] China, Written Answers of China to the Questions off the Panel for the First Substantive Meeting (including additional questions posed by the Panel thereafter), question 46 (12 November 2002) ("China, first response to questions from the Panel"); Japan, response to questions from the Panel, question 46; Korea, response to questions from the Panel, question 46; and New Zealand, response to questions from the Panel, question 46. Norway admits that an 18-month-old increase might be significant if the product is still being imported "at increased

for their certainty. In fact, no such basis exists. Neither Article XIX nor the Safeguards Agreement specifies a period beyond which an increase in imports is "insignificant." Certainly the Appellate Body in *Argentina – Footwear* did not attempt to draw a line beyond which an increase in imports would be *per se* insignificant.

100. In asserting that an 18-month-old increase is "irrelevant," Complainants do not discuss the Panel Report in *US – Line Pipe*, which contains an extensive discussion of this issue. That panel considered that

> the word "recent" implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation.[147]

The Appellate Body in *Argentina – Footwear* did not offer a precise definition of "sudden" or "recent," and, as the Panel in *US – Line Pipe* noted, the word "recent" does not imply, much less compel, an exclusive focus on conditions "at the very end" of the period of investigation.

101. Turning to the substance of the ITC's findings, the ITC followed precisely the same methodology that the Panel in *US – Line Pipe* found consistent with Article 2.1. The ITC gathered data for the same time frame – five years and two interim periods – as it had in *US – Line Pipe*. The ITC considered the import data in precisely the same way. Indeed, as noted elsewhere, the ITC found the same pattern of import increases in most of the products subject to this dispute as it did in *US – Line Pipe*.

102. The Panel in *US – Line Pipe* carefully considered and analyzed the increased import requirement of Article 2.1 and, as noted, found both the U.S. methodology and the U.S. finding to be consistent with Article 2.1:

> We have already found that the methodology applied by the ITC was appropriate. However, there remains the question of whether the finding of increased imports can be maintained in light of the decline in absolute imports from the first semester of 1998 to the first semester of 1999. In order to answer this question we recall our discussion regarding the meaning of "recent", and our finding that "recent" does not imply an analysis of the present. We are also of the view that the fact that the increase in imports must be "recent" does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation. We find support for our view in Article 2.1, which provides "that such

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quantities, *i.e.*, if there has been no steady and significant decline." Norway, response to questions from the panel, question 46. This is essentially the pattern described by the Panel in *US – Line Pipe* and exhibited by imports in these investigations.

[147] *US – Line Pipe*, Panel Report, para. 7.204.

> product is being imported … in such increased quantities". The Agreement uses the adjective "increas**ed**", as opposed to "increas**ing**". The use of the word "increas**ed**" indicates to us that there is no need for a determination that imports are presently still increas**ing.** Rather, imports could have "increas**ed**" in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination. Provided the investigated product "is being imported" at such increas**ed** quantities at the end of the period of investigation, the requirements of Article 2.1 are met.[148]

In a footnote to this discussion, the Panel noted that "an increase in imports before the date of a determination, but not sustained at the date of the determination, could still cause actual serious injury at the time of the determination."[149]

103. Complainants are silent on the subject of the Panel Report in *US – Line Pipe*. In light of the similarities noted above, and in light of the Panel's approval of both the ITC's analysis and findings in that report, the onus is on Complainants to explain why the ITC's analysis and findings in these determinations are not similarly consistent with Article 2.1.

104. Complainants' efforts to dismiss the Appellate Body's report in *US – Lamb Meat* are also unpersuasive. The United States explained in its first written submission (in paragraphs 185-188) that the *US – Lamb Meat* report has a bearing on the question of how recent the increase in imports must be. Specifically, the Appellate Body found that 21 months was too brief a period for the temporal focus of data evaluation in a threat case. Complainants maintain that the *US – Lamb Meat* report is not relevant because it addresses the temporal scope of the data to be assessed, and not the temporal scope of the increase in imports.[150] This is an artificial distinction. Import data are part of the overall data to be assessed by competent authorities. If the question of the temporal focus of data evaluation did not encompass import data, the Appellate Body would not have referred in the *US – Lamb Meat* report to its discussion of increased imports in *Argentina – Footwear*.[151]

105. In its opening statement, Korea asserts that the pattern of import levels for certain carbon flat-rolled steel was almost identical to that in *Argentina – Footwear*. Again, we wish to reiterate that imports of certain carbon flat-rolled steel followed a different pattern; while imports peaked in 1998, import levels in 1999 and 2000 remained well above pre-surge levels and in fact rose slightly between 1999 and 2000. This hardly constitutes a steady decline; rather, this pattern meets the definition of "is being imported in such increased quantities" as that phrase was interpreted by the Panel in *US – Line Pipe*.[152]

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[148] *US – Line Pipe*, Panel Report, para 7.207 (emphasis in original).
[149] *US – Line Pipe*, Panel Report, n.176 (emphasis in original).
[150] Korea, oral statement (increased imports), paras. 25.
[151] *US – Lamb Meat*, AB Report, para. 138 n.88.
[152] *US – Line Pipe*, Panel Report, para. 7.207.

106. In the same opening statement, Korea asserts "[e]ven for Commissioner Miller ... there was no absolute increase in imports of tin mill."[153] Yet the paragraph Korea cites from the ITC opinion clearly shows that imports did increase. The total volume of imports peaked in 1999, but imports in 2000 were still 30 percent higher than in 1996. Contrary to Korea's assertion, Commissioner Miller did find an absolute increase in imports.[154] Korea also asserts that the ITC found the increase in imports to be "temporary." To do so, however, Korea cites to a portion of the Report not joined by any of the Commissioners who made an affirmative determination regarding tin mill imports and was not the determination of the United States.[155] Therefore, the statement regarding a "temporary" increase is not a part of the findings of the ITC with regard to tin mill.

107. Complainants also continue to raise arguments about the import data for items for which a separate injury determination was not made.[156] Given the ITC's like product determinations, the ITC was not required to make separate increased import determinations for slab or corrosion-resistant steel, and the trends for those products are not relevant to whether the ITC's analysis of the increase in imports for certain carbon flat-rolled steel was consistent with Article 2.1.

D. The ITC's Determinations of Serious Injury and Threat of Serious Injury Pertained to Each Pertinent Domestic Industry in Its Entirety

108. There does not appear to be any dispute among the parties that, under Articles 4.1(a), 4.1(c), and 4.2(a) of the Safeguards Agreement, a competent authority's finding of serious injury must pertain to the entire domestic industry.[157] The Complainants' Oral Statements and responses to the Panel's questions have focused on whether the financial analysis the ITC used in making findings of serious injury and threat of serious injury met this standard.[158]

109. The ITC's analysis, including its financial analysis, did pertain to each industry in its entirety. Our prior submissions established that the ITC used financial data relating to commercial sales not to evaluate the performance of an industry "segment," but to evaluate the

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[153] Korea, oral statement (increased imports), para. 42.

[154] ITC Report, Vol. I, pp. 71-72.

[155] Korea, oral statement (increased imports), para. 44. *See also* ITC Report, Vol. I, p. 25 n.3 (Commissioner Bragg's Separate Views) p.71 n.368 (Commissioner Devaney not joining), p. 74 n.402 (Commissioner Miller not joining).

[156] Brazil, response to questions from the Panel, question 41.

[157] *See*, *e.g.*, U.S., response to questions from the Panel, para. 123; New Zealand, response to questions from the Panel, question 70; Japan, response to questions from the Panel, question 151; Brazil, response to questions from the Panel, question 151; Korea, response to questions from the Panel, question 151.

[158] In particular, no Complainant has raised any further argument concerning the ITC's product-specific findings of serious injury or threat of serious injury. Consequently, we will not discuss those findings in this submission.

performance of each industry as a whole. Consequently, the ITC did not, as the EC alleges, "reduce[] the scope of its injury examination."[159]

110. Instead, in every instance the ITC properly conducted an examination of the entire industry and used data that would ensure that its analysis was comprehensive and objective. For factors such as shipments and production, the record contained objective data concerning the quantity of internal transfers. The ITC used these data in its analysis. By contrast, objective financial data were not available with respect to internal transfers. Consequently, the ITC used data relating to commercial sales to assure that its financial analysis was objective and consistent with U.S. generally accepted accounting principles.[160]

111. The EC's arguments to the contrary are speculative and evince a misunderstanding of the financial data available to the ITC. For example, the EC hypothesizes that an industry may perform better with respect to internal transfers than with respect to commercial sales.[161] This assumes, however, that there is some objective manner of measuring financial "performance" with respect to what is not an arm's-length commercial transaction, but merely a single producer's internal transfer. Not surprisingly, the EC provides no comments concerning how an authority could conduct such an analysis and no rebuttal to our statements about the lack of objective data pertaining to financial performance concerning internal transfers. Indeed, the EC responded to the Panel's question asking it to "explain what it considers the difference would have been on the injury analysis had [internal transfers] been taken into account," by admitting that it could not do so.[162]

112. Moreover, to the extent that there are "serious questions as to how costs were allocated between production for commercial sale and that for internal transfer," as the EC asserts,[163] we have fully responded to them and allayed any possible concerns about the ITC's cost allocation methodology. As we have explained, the ITC accounting staff reconciled the financial data U.S. producers reported in their questionnaire responses with those producers' audited financial statements to ensure that cost data in its report were allocated to commercial sales in a manner consistent with U.S. generally accepted accounting principles. Indeed, because the audited financial statements contain information about commercial sales only, and do not encompass internal transfers, the ITC could not have performed an analogous reconciliation process had it attempted to use data concerning such transfers for its financial analysis.[164]

113. The nature of the reconciliation process ensured that the financial data on which the ITC relied were objective. By contrast, a financial analysis based on data relating to internal transfers,

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[159] EC, response to questions from the Panel, question 71.
[160] *See* U.S. first written submission, para. 332; U.S. response to questions from the Panel, paras. 126-29.
[161] *See* EC, response to questions from the Panel, question 71.
[162] EC, response to questions from the Panel, question 71.
[163] EC, response to questions from the Panel, questions 71, 151.
[164] U.S., response to questions from the parties, paras. 11-12.

as the EC advocates, would have raised many difficulties with respect to double counting of product, particularly with respect to the CCFRS like product.[165]

114. Finally, because a serious injury finding must focus on an entire industry, an authority is not obliged to conduct an analysis that focuses only on one segment of an industry in isolation. For this reason, the Panel must reject New Zealand's claim that the ITC gave insufficient attention to minimill producers in determining that the CCFRS industry was seriously injured.[166] As we have explained, minimill producers accounted for less than 15 percent of overall U.S. CCFRS production in 2000.[167] The ITC acted appropriately, and consistently with U.S. obligations under the Agreement, by basing its serious injury finding for CCFRS on data relating to the entire industry, rather than to only the 15 percent of the industry which was represented by minimill production.

E. Complainants Have Failed to Show That the ITC's Causation Analysis Was Inconsistent with the Safeguards Agreement

115. In its first written submission, the United States demonstrated that the Complainants' criticisms of the ITC's causation analyses were premised on significant misintepretations of the Safeguards Agreement and on misleading characterizations of the ITC's causation findings. Complainants' oral statements and response to questions from the Panel merely repeat these same mistakes by reiterating the flawed arguments contained in their initial submissions and failing to address the errors noted by the United States in its submission. Moreover, Complainants' responses to the Panel's written questions do not significantly clarify the basis for their challenges to the ITC's determination.

116. In essence, the additional arguments made by Complainants are no more meritorious than those made in their initial written submission. The United States addresses several of these arguments below.

1. Complainants Agree That Imports Can Have a Direct, Albeit Lagged, Effect on Certain Indicia of the Industry's Condition

117. As an initial matter, Complainants now appear to agree with the United States that imports can have a direct, albeit lagged, impact on certain indicia of an industry's condition. In response to questions 81 and 86 from the Panel, Complainants have conceded the Safeguards Agreement does not require increased imports to have a direct and immediate impact on all indicia of an industry's condition in the same year when an import surge occurs.

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[165] *See* U.S., response to questions from the Panel, para. 128. This is not disputed by Complainants.
[166] *See* New Zealand, response to questions from the Panel, question 70.
[167] U.S., response to questions from the Panel, para. 132.

118. As recognized by the EC, under the Safeguards Agreement, "there is no mathematical formula which dictates the applicable time frame for establishing [a] causal link" between imports and declines in the condition of the industry during the period of investigation.[168] Similarly, Japan agrees that there is "no test for determining when the effect of increased imports on the domestic industry must materialize."[169] In other words, like several other Complainants,[170] Japan and the EC clearly recognize that the nature of the temporal "correlation" between import increases and changes in an industry's condition is dependant upon the performance factors being examined and the manner in which imports affect those factors.

119. In this regard, as the United States has previously noted,[171] an import increase can have an immediate and direct impact on many performance factors for an industry, such as market share, production levels, or shipment levels. For example, an increase in the market share of imports in one year will always have a direct impact on the industry's market share in that same year. Similarly, in a market of stable demand, an increase in import shipments will result in a decline in domestic shipments.

120. Notwithstanding this, an increase in imports can also have a direct but delayed impact on certain performance factors for an industry, such as the industry's employment levels, capital investment levels, or its research and development expenses. For example, a company affected by a substantial surge of imports in one year will not necessarily immediately go into bankruptcy, as Japan and others suggested in their initial submissions.[172] On the contrary, most companies will take every action possible to avoid entering bankruptcy because entering bankruptcy will have a substantial negative impact on their commercial reputation and their access to capital. Accordingly, companies may delay entering bankruptcy for a number of years, even after their business has been seriously harmed by a major event such as a sudden and serious surge in imports. Indeed, this very situation occurred in the certain carbon flat-rolled steel market, when a number of carbon flat-rolled steel companies entered bankruptcy in 2000 and 2001,[173] even though imports first surged into the market in 1998.[174]

121. Similarly, a company may not immediately cut its workforce when imports first surge into a market. Instead, the company might reasonably take some time to assess whether import increases appeared to reduce its shipment or pricing levels over an extended period, which might indicate that a long-term reduction in the company's work force was necessary to reduce its costs. For example, the carbon flat-rolled steel industry did not immediately reduce the size of

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[168] EC, response to questions from Panel, question 86.
[169] Japan, response to questions from Panel, question 86.
[170] *See, e.g.,* Brazil, New Zealand, and Norway, responses to questions from the Panel, questions 81 and 86.
[171] For the United States' previous discussion of this issue, *see* the U.S. first written submission, paras. 445-450.
[172] Japan first written submission, para. 237.
[173] ITC Report, Table OVERVIEW-11.
[174] INV-Y-209, Table FLAT-ALT7 (US-33).

its work force in 1998, when carbon flat-rolled imports first surged into the U.S. market, even though the surge caused substantial market share losses, reduced prices, and reduced profits for the industry.[175] Instead, the industry first substantially reduced the size of its work-force in 1999, when it became clear that imports would remain at elevated levels in the market and would continue to cause price declines in the market.[176]

122. Indeed, it is possible that an increase in imports can have both an immediate and a delayed impact on one of the industry's performance factors. For example, as the ITC noted in its report, the massive surge in carbon flat-rolled imports in 1998 directly caused significant declines in the price of domestic and imported merchandise in that year, with average unit values of imports falling by 8.4 percent and those of domestic commercial sales falling by 3.2 percent.[177] Although there was a clear and direct impact of this surge on prices in 1998, the surge also had a lagged negative effect on domestic pricing levels in 1999 and 2000, in that elevated levels of low-priced imports were able to continue depressing prices from their already depressed 1998 levels. In this regard, the 1998 imports surge permitted elevated levels of imports in 1999 and 2000 to drive prices down to lower levels than would have occurred in the absence of the 1998 surge.

123. Moreover, the United States notes that, in the antidumping context, an adopted Panel report has specifically found that there need not be an immediate temporal link between import trends and declines in an industry's condition to establish a causal link between imports and those declines. In *Egypt - Antidumping Measures on Steel Rebar from Turkey*, the Panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry,[178] noting that this argument:

> rest[ed] on the artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing company. Such an assumption implicitly rests on the existence of so-called "perfect information" in the market (i.e., that all actors in the market are instantly aware of all market signals.)"[179]

In other words, the Panel concluded that a competent authority need not be expected to find that there is a direct and immediate causal link between imports and downward trends in an industry's condition, as Complainants consistently urge here.

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[175] INV-Y-209, Table FLAT-ALT7 (US-33).

[176] The industry reduced its work force by 4.2 percent (a total of approximately 4.5 thousand workers) in 1999. INV-Y-209, Table FLAT-ALT7 (US-33). The industry kept its work force at essentially this level in 2000. Id.

[177] INV-Y-209, Table FLAT-ALT7 (US-33) & ITC Report, p. 61.

[178] *Egypt - Antidumping Measures on Steel Rebar from Turkey*, WT/DS211/R, Panel Report, adopted 1 October 2002, paras. 7.127-7.132 ("*Egypt – Rebar*").

[179] *Egypt - Rebar*, Panel Report, para. 7.129.

124. Accordingly, Complainants are mistaken when they argue that a competent authority must provide a "more compelling" causation analysis if there is a time lag between an increase in imports and declines in certain performance factors of the industry. It is simply not the case – as Complainants assume – that a temporal lag between import increases and declines in industry performance factors indicates a lack of "correlation" or coincidence between the import increase and the performance declines. As the Panel correctly suggested in question 80, natural business cycles or other external factors may cause imports to have a direct but delayed impact on one or more of an industry's performance indicia.

125. The Panel need not, therefore, apply a heightened standard of scrutiny to the ITC's analysis simply because there is a temporal lag between an import increase and declines in certain of the performance factors for an industry. Instead, the sole inquiry for the Panel should be whether the ITC's explanation of the causal link between imports and the declines in the industry's condition is "reasoned," "adequate," and "clear."[180]

126. Finally, Complainants are wrong in arguing that there was not a demonstrable contemporaneous coincidence between increases in carbon flat-rolled steel imports and any declines in the industry's condition. The record clearly showed that the import surge in 1998 had a direct and negative impact on the market share, pricing, and profitability of the carbon flat-rolled industry in that same year. More specifically, when import volumes increased by 31.3 percent and import unit sales values dropped by 8.4 percent in 1998,[181] the industry's share of the overall market fell by 2.5 percentage points, its aggregate net sales value dropped by 3.0 percent (despite an increase in its overall net sales quantity of 0.5 percent), its average unit sales prices fell by 3.2 percent, its aggregate gross profits fell by 19.8 percent, its aggregate operating income levels dropped by 36.9 percent, and its operating income margins fell by 2.1 percentage points.[182] These declines occurred in a market in which demand grew by 3.2 percent. Given these trends, it is difficult to understand how Complainants could now argue that there were no declines in the industry's overall condition that were directly correlated to the 1998 surge.[183]

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[180] *See US - Line Pipe*, AB Report, para. 217.

[181] INV-Y-209, Table FLAT-ALT7 (US-33).

[182] INV-Y-209, Table FLAT-ALT7 (US-33); ITC Report, p. 61.

[183] The United States notes that Brazil is fundamentally mistaken when it asserts that, "by all accounts[,] 1997 was a record peak year for the industry." Brazil, Oral Statement of Brazil Regarding the Issue of Causation, para. 11 (29 October 2002) ("Brazil first oral statement"). The industry did experience its highest operating income margin (of 6.1 percent) in 1997 and therefore might be said to have had a "peak" operating income level in that year. INV-Y-209, Table FLAT-ALT7 (US-33). However, 1997 was not a peak year for demand in the market nor was it the peak year for the industry with respect to its production and shipment levels. Total U.S. consumption of carbon flat-rolled steel continued to grow in 1998, 1999 and 2000, as did the industry's production and shipment levels, albeit at a slower rate overall than demand. INV-Y-209, Table FLAT-ALT7 (US-33). Thus, aside from the dramatic surge of low-priced imports into the market in 1998, there is simply no reason that the industry's profitability levels should not have remained stable, or even grown, in 1998, 1999, and 2000.

127. Similarly, the record showed that there was also a clear correlation between the volume and price trends of imports and the continuing declines in the industry's condition in 1999 and 2000. Even though import volumes "slackened somewhat" in 1999 and 2000 from their 1998 surge level, import volumes in both years remained higher than their 1996 and 1997 levels,[184] with import levels being 13.7 percent higher in 2000 than 1996.[185] These elevated levels of imports in 1999 and 2000 continued to be sold at prices that were substantially lower than domestic prices, and were, in fact, lower than their 1996 and 1997 levels.[186] As a result of this continued and substantial underselling, imports depressed and suppressed domestic prices in both 1999 and 2000, and caused continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[187]

128. In other words, the Panel should reject out of hand Complainants' assertions that, for products like carbon flat-rolled steel, there was not a direct and immediate impact on the industry during the first year of an import surge. As the United States showed in its first submission, imports of every steel product covered by the President's remedies generally had a direct, immediate, and adverse impact on the industry's condition. Complainants' arguments on this score should be rejected.

2. Complainants – Including Norway – Have Not Provided a Technical Explanation of The Manner In Which A Competent Authority Can Use Econometric Modeling to Isolate and Quantify the Overall Level of Injury Attributable to Increased Imports

129. Complainants' responses to the Panel's request that they explain "in technical terms" how a competent authority could quantify the injury attributable solely to increased imports highlight the problems associated with attempting to quantify the overall level of injury caused by imports.

130. First, the United States notes that no Complainant has actually provided the Panel with a technical description of an economic model that quantifies the overall level of injury caused by imports. In fact, although the Panel specifically asked Norway to respond to this question, Norway provided no answer of its own, choosing instead to refer to a response submitted by another Complainant, Brazil.[188] In the United States' view, it is telling that the one Complainant who has strongly argued that injury be quantified has not been able to explain how such an analysis might be done.

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[184] INV-Y-209, Table FLAT-ALT7 (US-33).

[185] INV-Y-209, Table FLAT-ALT7 (US-33).

[186] ITC Report, pp. 60-62 & Tables FLAT-66-71 & FLAT-73-74 (pricing comparison charts); INV-Y-209, Table FLAT-ALT7 (US-33).

[187] ITC Report, pp. 60-62 & Tables FLAT-66-71 & FLAT-73-74 (pricing comparison charts); INV-Y-209, Table FLAT-ALT7 (US-33).

[188] *See* Norway, response to questions from the Panel, question 85.

131. Moreover, Brazil and Japan – the only Complainants who chose to respond to the Panel's question 85 in some detail – have not provided a technical explanation of the manner in which a competent authority can perform such a quantification. Instead, they have responded to the question with the bald assertion that economists and statisticians have been developing models and techniques to answer these sorts of questions "for more than 100 years."[189] After noting that the foreign steel producers provided the ITC with an econometric model that quantified the effects of imports in the steel safeguards investigation, they contend that the ITC was required by the Agreement to use the model or develop its own econometric analysis to rebut it.[190]

132. There are a number of problems with Brazil and Japan's approach to the question, however. First, although Brazil and Japan argue that it is possible to use an econometric model to quantify the effects of imports on the condition of the industry, the only example to which they cite is the economic analysis submitted by foreign respondents to the ITC during the steel safeguards investigation.[191] However, as the United States noted in its initial written submission, the ITC's economic staff examined this model in detail (as well as one submitted by the domestic industry) and concluded that the model had substantial methodological flaws that rendered it unreliable from an economic perspective.[192]

133. Second, the foreign respondents's economic model did not quantify the overall level of injury caused by imports. As both Japan and Brazil concede,[193] the model only purported to estimate the effects of imports on domestic prices, which is only one of several factors that should be considered by a competent authority under the Agreement. The model did not "quantify" the effects of imports and other injury factors on the industry's production, shipment, or sales revenue levels, its productivity and employment levels, its capacity utilization rates, its profitability levels, or its capital investment levels. In other words, as the United States pointed out to the Panel in its first written submission, neither Brazil nor Japan has described a model that comes close to estimating the effects of imports and other injury factors on all of the factors required to be considered by the Safeguards Agreement.

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[189] Brazil, response to questions from the Panel, question 85; Japan, response to questions from the Panel, question 85.

[190] Brazil, response to questions from the Panel, question 85; Japan, response to questions from the Panel, question 85.

[191] Brazil, response to questions from the Panel, question 85; Japan, response to questions from the Panel, question 85.

[192] Contrary to the assertions of Brazil and Japan, the domestic and respondents economic consultants did not agree that imports did not have a significant effect on the domestic prices of cold-rolled or corrosion-resistant merchandise. Instead, as can be seen from the domestic industry consultant's testimony before the Commission, the consultant's model showed that imports had an important effect on the price of domestically produced hot-rolled, cold-rolled, corrosion-resistant, and plate merchandise during the period of investigation. Testimony of Professor Jerry Hausman, Transcript of Commission Hearing, September 19, 2002, at pp. 412-423 & Related Exhibit, "Effect of Imports on Flat and Long Products" (US-84).

[193] Brazil, response to questions from the Panel, question 85; Japan, response to questions from the Panel, question 85.

134. Third, although Brazil and Japan explicitly concede that the Safeguards Agreement does not require the use of econometric models, Brazil and Japan assert that a competent authority must, in fact, use an econometric analysis in its analysis if such an analysis is submitted by a party to the investigation and the data is available.[194] The Safeguards Agreement simply does not contain language suggesting that parties have a right to dictate the analytical methodology that should be used by a competent authority in its causation analysis, nor have Brazil and Japan pointed to any such language in the Agreement.[195] While parties are clearly free to suggest possible analytical approaches during the course of an investigation, the Agreement does not require the competent authority to respond to these suggestions by conducting a full-blown causation analysis to account for every methodology offered by the parties. Moreover, as long as the United States complies with its obligation to adequately and clearly explain why there is a "genuine and substantial" causal link between imports and the serious injury being suffered by the industry, there is nothing in the Agreement that suggests that United States must "test" its conclusions by performing a series of economic modeling exercises.

135. Fourth, Complainants are mistaken when they imply that the ITC failed to perform a quantitative analysis of the effects of imports on the industry.[196] The ITC clearly performed a quantitative assessment of the manner in which imports and other factors affected the condition of the industry during the period of investigation. The ITC collected extraordinary volumes of quantitative data concerning the prices and volume of imports, the prices of domestic merchandise, the trade and financial operations of the domestic industry, the effect of imports and other factors on the industry's operations, and the conditions of competition in each of the markets in question. After collecting this data, the ITC examined in detail the manner in which imports affected each of the industry's injury indicia and examined the extent to which other factors adversely affected those data. It is absolutely clear that this analysis was both detailed and based primarily on quantitative data. For Complainants to assert otherwise is simply unfounded.

136. Finally, despite Brazil's assertions to the contrary,[197] it is not true that the United States is "eager" to avoid the use of economic models in safeguards investigations. As we have pointed out, it has developed and used such models in its antidumping and safeguards investigations. The United States believes, however, that it is important to dispel the notion that the use of economic modeling lends any more accuracy or scientific certainty to the assessment of the amount of injury caused by imports or other injury factors than that afforded by the ITC's current analysis. Economic models are subject to substantial ranges of error due to variations in the reliability, consistency, or amount of statistical data used in them. Moreover, many economic models rely on quantitative inputs (like elasticities of supply or substitution) that are only, in

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[194] Brazil, response to questions from the Panel, question 85; Japan, response to questions from the Panel, question 85.

[195] *See*, *e.g.,* Safeguards Agreement, Article 3.1.

[196] *See, e.g.,* Brazil, first oral statement, para. 34.

[197] Brazil, first oral statement, para. 33.

essence numerical assessments of qualitative judgments about condition of competition in the market. In sum, economic models will generally only result in quantitative *estimates* of the *likely* effects of imports on particular indicators of an industry's condition.

137. As the United States has pointed out on a number of occasions in this proceeding, economic models are no more precise a method assessing injury than the examination of hard, quantitative market data that the ITC now performs when conducting its causation analysis.

3. Most Complainants Agree with the United States that Imports Can Cause Significant Adverse Price Declines, Even in the Absence of Underselling

138. As the United States stated in its first written submission – and as the Complainants now agree – basic economic pricing theory indicates that prices can decline as a result of a number of different market conditions, even in the absence of underselling.[198] For example, it is a basic principle of economic theory that prices can be affected by variations in supply and demand.[199] In this regard, prices can be driven down when there is increased supply of the product in the market where demand is stable. Similarly, prices can be driven down in market of stable supply if demand declines. In essence, basic economic theory holds that, when supply of a product outpaces demand (such as a situation where the supply of imports increases substantially in a slowly growing market), prices are likely to be affected by that change in supply.

139. The tin mill steel market provides an example of the manner in changes in supply can cause substantial price declines in a market. During the first three years of the period of investigation, prices for tin mill products remained relatively stable, primarily because both imports and the domestic industry occupied somewhat stable shares of the market in this period.[200] In 1999, however, a massive surge of tin mill imports entered the market, with import volumes increasing by 45 percent and with the market share of imports growing to 17.9 percent of the market.[201] As would be expected from the basic economic theory summarized above, this massive increase in the volume and market share of imports resulted in substantial price declines, with average unit values of imports falling by 10.8 percent and average unit values of domestic commercial sales falling by 4.2 percent in that one year.[202] These price declines occurred even though imports were generally not underselling domestic shipments in 1999.[203] Nonetheless, as Commissioner Miller reasonably found, the massive surge of imports into the tin mill market that year had a predictable and negative effect on pricing in the tin mill market, even in the absence on underselling. In other words, Commissioner Miller's finding of a significant price-effect from imports was consistent with basic economic pricing theory.

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[198] *See, e.g.,* EC, Japan, and New Zealand, responses to Panel questions, question 84.
[199] New Zealand, response to Panel questions, question 84.
[200] ITC Report, Table FLAT-C-8.
[201] ITC Report, Table FLAT-C-8.
[202] ITC Report, Table FLAT-C-8.
[203] ITC Report, Table FLAT-75; *see also* ITC Report, Table FLAT-C-8.

140. Similarly, the record showed that an increase in import supply had a substantial impact on pricing in the carbon flat-rolled market. Between 1996 and 2000, the market for carbon flat-rolled steel exhibited moderate but steady growth in demand on a year-to-year basis.[204] On an overall level, the domestic industry's production levels grew also grew at a moderate and consistent rate between 1996 and 2000.[205] Accordingly, as a matter of basic economic theory, if imports had grown at a similar consistent but moderate rate, prices in the market should have remained relatively stable during this period. In fact, that is what happened in the carbon flat-rolled steel market between 1996 and 1997, when domestic production and imports both grew at rates that kept pace with the growth in demand, thus allowing the price of domestic and imported products to remain somewhat stable.[206]

141. In 1998, however, the stability of this supply and demand equation was fractured by a massive surge of imports into the carbon flat-rolled market. In that year, although domestic production grew at a slightly slower rate than demand in the U.S. market (which itself grew by 3.2 percent), import volume increased by an extraordinary 31.3 percent, thus outpacing the growth in demand in 1998 by 28.1 percentage points.[207] Needless to say, this import surge was accompanied by a decline in carbon flat-rolled steel prices, with the average unit value of imports declining by 8.4 percent in that one year alone.[208] At the same time, the average unit values of domestic commercial sales fell by 3.1 percent,[209] even though demand had grown in that year. In essence, in 1998, the massive increase in the supply of imports resulted in a clear and serious depression of prices in the market, a set of circumstances that is again consistent with basic economic price theory.

142. Two final points are warranted on the importance of underselling in the ITC's causation analysis, however. First, the United States does not agree with Complainants that the ITC places too much emphasis on the existence of underselling when assessing whether imports have had an impact on domestic prices during the period of investigation. Like the laws of supply and demand, it is an elementary concept of economic theory that purchasers are more likely to shift purchases between suppliers on the basis of price, if the products offered by those suppliers have similar characteristics and share similar conditions of sale.[210] Or, as an economist would say, when the elasticity of substitution between two products is reasonably high, a purchaser is likely to make his purchase decision on the basis of which supplier offers the lowest price.

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[204] INV-Y-209, Table FLAT-ALT7 (US-33).
[205] INV-Y-209, Table FLAT-ALT7 (US-33).
[206] INV-Y-209, Table FLAT-ALT7 (US-33).
[207] INV-Y-209, Table FLAT-ALT7 (US-33).
[208] INV-Y-209, Table FLAT-ALT7 (US-33).
[209] ITC Report, p. 61. Although these percentages are derived using aggregate annual values, the product-specific pricing charts show similar declines. ITC Report, Tables FLAT-66-FLAT-71 & FLAT-73-74.
[210] *See, e.g.,* ITC Report, pp. FLAT-60, n. 42.

143. Accordingly, when there is a moderate to high elasticity of substitution between imports and domestic product (which is the case in the carbon flat-rolled steel market), the existence of underselling by imports is a strong indicator that purchasers are likely to shift purchases to imports from domestic producers, and that volume shifts are the result of low-priced import competition. Or, if imports and domestic merchandise are reasonably interchangeable, the existence of underselling is a good indicator that price declines in the market are the result of import price competition. Given these basic economic principles, the United States believes that the ITC places an appropriate amount of weight on underselling in its analysis.

144. Secondly, Japan mistakenly tries to minimize the importance of consistent underselling by imports in the carbon flat-rolled steel market by asserting that domestic producers were the price leaders in the carbon flat-rolled steel market.[211] However, an examination of the charts used by Japan to support this argument shows that the argument has no foundation in fact.[212] As can be seen, those charts show clearly that domestic producers attempted to initiate price increases for cold-rolled and hot-rolled steel at three points in the period of investigation but that domestic prices collapsed on each occasion due to persistent underselling by imports throughout the period of investigation.[213] In sum, the charts relied on by Japan actually show that import underselling, not alleged domestic price leadership, caused the broad price declines in the carbon flat-rolled market during the period of investigation.

145. In conclusion, the United States believes that underselling by imports is one factor that tends to support a finding that imports are causing price declines in the market, particularly when imports are considered to be substitutable for domestic merchandise. However, as the United States has explained and Complainants appear to agree, the existence of underselling is not a necessary condition for an affirmative finding that imports have caused price-suppression or depression in the market, given that import supply increases alone can have such an effect.

4. Despite Complainants' Assertions to the Contrary, the United States Does Not Believe That Imports Can Be Considered an "Important" Cause of Serious Injury to the Domestic Industry If They Contribute "Negligibly" to That Injury

146. In general, in their responses to Panel question 85, Complainants appear to acknowledge that imports need not be the sole or sufficient cause of serious injury to the domestic industry.[214] In fact, they generally concede that the United States has correctly stated that it may find a

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[211] Japan, response to questions from the Panel, question 84, p. 29.

[212] Japan, responses to questions from the Panel, question 84, p. 29.

[213] Japan, responses to questions from the Panel, question 84, p. 29.

[214] *US - Line Pipe*, AB Report, paras. 209; *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001, para. 67 ("*US – Wheat Gluten*").

"genuine and substantial" causal link between imports and serious injury if imports "contribute to 'bringing about,' 'producing' or 'inducing' the serious injury" being suffered by an industry.[215]

147. However, the United States would like to correct one important mischaracterization of its position by Brazil and Japan. The United States does not believe, as Brazil and Japan now assert, that imports may be considered to be contributing in a "genuine and substantial" way to serious injury if they are having only a "negligible" impact on the industry.[216] As the United States has repeatedly emphasized during this proceeding, the U.S. statute itself requires that imports be an "important," that is, a "substantial," cause of the serious injury being suffered by the domestic industry.[217] Accordingly, to the extent that imports were only contributing "negligibly" to serious injury – that is, in a "small" or "insignificant" way [218] – the ITC would not be permitted by the U.S. statute to find that imports are an "important" cause of injury.

148. Brazil and Japan are simply trying to confuse this issue by misstating the ITC's findings.

5. The United States Is Not Required to Treat NAFTA Imports as an "Other" Possible Cause of Injury in Its "Parallelism" Analysis

149. In their responses to Panel question 82, the Complainants contend that the United States did not perform its "parallelism" causation analysis properly because it did not treat NAFTA imports as another cause of injury in its parallelism analysis.[219] According to Brazil and the other Complainants, the Appellate Body has stated that authorities can only except imports from certain sources falling within the scope of the measure if the authorities "'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.'"[220] Complainants assert that, because the United States is required to perform a non-attribution analysis for all non-import causes of injury for its initial injury analysis under Article 4.2(b), it must also conduct such an analysis for excluded imports for purposes of its "parallelism" causation analysis.

150. Such an analysis is not required under Article 4.2 of the Safeguards Agreement. The second sentence of Article 4.2(b) of the Agreement – which is the provision of the Agreement that requires a competent authority not to attribute to imports the effects of other factors –

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[215] *US - Wheat Gluten*, AB Report, para. 67 (emphasis added).

[216] Japan and Brazil, responses to Panel questions, question 87.

[217] 19 U.S.C. §2252(b)(1)(B).

[218] In this regard, the word "negligible" is defined in the *New Shorter Oxford English Dictionary* as "[a]ble to be neglected or disregarded; unworthy of notice or regard; so small and insignificant as to be ignorable." The *New Shorter Oxford English Dictionary*, 1993 Edition, p. 1900 (US-86). This definition clearly contrasts with the same Dictionary's definition of "important" as "having great significance, carrying with it great weight or consequences, weighty, momentous...." *Ibid.*, p. 1324; *see* US. first written submission, para. 442.

[219] Brazil, first oral statement, para. 28; *see also* Japan, EC, Brazil, New Zealand and Korea, responses to questions from the Panel, question 82.

[220] *US - Line Pipe*, AB Report, para. 181 (quoting *US - Wheat Gluten*, AB Report, para. 98.)

specifically states that, "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."[221] Accordingly, the Safeguards Agreement indicates that a non-attribution analysis is only required for factors "other than imports" that may be causing injury to the domestic industry, even when certain imports are excluded from the remedy. Accordingly, as a matter of law, Complainants's arguments have no foundation in the language of the Agreement.

151. Notwithstanding the lack of an explicit requirement in the Safeguards Agreement, however, the ITC did, in fact, properly isolate the effects of NAFTA from non-NAFTA imports in its parallelism analysis. In particular, the United States expressly separated and distinguished the price and volume effects of non-NAFTA imports from those of NAFTA imports as an integral part of the its parallelism analysis. The United States notes that it discussed this particular aspect of its parallelism analysis in its first written submission and in its submitted responses to the Panel's questions.[222] Accordingly, for the reasons set forth in those discussions, the United States believes that it has isolated and distinguished the injurious effects of NAFTA and non-NAFTA imports.

6. A Flaw in the ITC's Like Product Analysis Will Not Inherently Lead to A Flaw in Its Causation Analysis

152. Contrary to the views of several Complainants, the Panel may not find that the ITC's causation analysis is flawed solely because the ITC's like product and industry analysis is flawed.

153. First, the Appellate Body has stated that a reviewing Panel should assume that an authority's findings on like product and industry are proper when reviewing that authority's causation findings.[223] In its *US - Lamb Meat* report, the Appellate Body made clear that it will review the various aspects of the ITC's safeguards decision (i.e., increased imports, injury, causation) as though the authority's decisions on earlier issues had been correct. More specifically, the AB noted that:

> *[N]otwithstanding the findings we have made previously in this appeal {invalidating the ITC's industry definition for example}, we must assume in our examination: first, that the definition of the domestic industry given by the USITC is correct, and second, that the USITC correctly found that the domestic industry is threatened with serious injury.* On this basis, we must examine whether the USITC properly established, in accordance with the Agreement on Safeguards, the existence of the causal link between increased imports and threatened serious injury.

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[221] Safeguard Agreement, Article 4.2(b).

[222] US. first written submission, paras. 451-455 & 769-774; U.S., response to questions from the Panel, question 95, paras. 173-179.

[223] *US - Lamb Meat*, AB Report, para. 172.

Accordingly, even if the Panel were to conclude that the ITC's definition of like product and industry were flawed, it would still need to examine whether the ITC's existing causation analysis was proper under the Agreement; it could not declare the analysis flawed on the grounds that the ITC's like product analysis was found to be flawed.

154. Second, a finding by the Panel or the Appellate Body that the ITC's like product or industry finding was flawed would not necessarily require the ITC to alter its like product or industry definition upon reconsideration. For example, the Panel might conclude that the ITC's like product analysis was flawed because it failed to take into account certain factors or relied too heavily on one set of facts. If this occurred, it is possible that the ITC could alter its analysis to reflect the findings of the Panel but still conclude that its original definition of the like product and industry was proper. In this circumstance, the ITC's analysis would have changed in response to the Panel's or Appellate Body's reports but the ITC's definition of the industry would remain the same. Accordingly, the Panel may not, and should not assume, that a flawed like product or industry analysis will inherently lead to a mistaken causation analysis.

155. In sum, Complainants' argument that a flawed industry analysis inherently leads to a flawed causation analysis is legally flawed. The Panel should reject it.

7. Conclusion

156. In conclusion, the United States has shown that the ITC's causation analysis was fully in accordance with the requirements of the Safeguards Agreement. Complainants have offered only conclusory and shallow arguments to the contrary. The Panel should reject their arguments and find that the ITC's analysis is fully consistent with the Agreement.

F. The United States Fully Satisfied the Requirements of Parallelism in Articles 2.1, 2.2, and 4.2

157. In both our First Written Submission and our Responses to the Panel's Questions, we have demonstrated that the ITC's findings with respect to non-NAFTA imports fully satisfy the requirements of parallelism in Articles 2.1, 2.2, and 4.2 of the Agreement.

158. In particular, we have emphasized that findings relevant to the parallelism analysis are found throughout the ITC Report. While many of the pertinent findings are in the section of the report issued as the Second Supplemental Response, which deals specifically with non-NAFTA imports, there are also pertinent findings in the analysis of all imports. The findings are not limited to a discrete section of the report.

159. Complainants' contrary arguments continue to disregard this. In its Oral Statement, for example, the EC asserted that "the ITC simply add[ed] the recurrent assertion that exclusion [of

imports from NAFTA sources] would not change the determination based on all imports,"[224] and that in the Second Supplemental Response "the ITC merely said that non-NAFTA imports increased absolutely and as a share of domestic production."[225]

160. As we have explained in detail in our prior submissions,[226] even a casual reading of the ITC report demonstrates that the EC's assertions are unsubstantiated. First, the ITC expressly found, for each pertinent like product, that increased non-NAFTA imports caused serious injury or threat of serious injury. Second, the analysis of non-NAFTA imports contains not only a description of how such imports increased, but a particularized causation analysis. Third, the ITC's analysis of all imports contains findings concerning serious injury, conditions of competition, and causes of serious injury that were also equally pertinent to and part of the analysis of non-NAFTA imports.

161. We have further demonstrated that the ITC's particularized causation analysis served to separate and distinguish the effects of non-NAFTA imports from the effects of NAFTA imports. Because in the particularized causation analysis the ITC considered only non-NAFTA imports, the ITC separated the volume and pricing effects of non-NAFTA imports from those of NAFTA imports. The ITC's analysis also incorporated from the analysis of all imports those factors that were unchanged regardless of which imports were analyzed.[227]

162. We have stated above that Article 4.2(b) of the Agreement explicitly requires a non-attribution analysis only for "factors other than increased imports." It thus does not require that an authority conduct the same type of analysis with respect to *imports* from sources not included in the remedy as it does for factors *other than* imports.[228] Consequently, Complainants' arguments with respect to a non-attribution analysis for parallelism are premised on a misunderstanding of the basic provisions of the Agreement. Moreover, insofar as Complainants contend that the ITC attributed to non-NAFTA imports effects due to NAFTA imports, they have misread the ITC Report.

163. Japan, for example, presents a hypothetical where all imports have increased from 30 to 35, but those from non-NAFTA sources have declined from 20 to 15. It expresses the view that "it makes no sense to find that increase [in all imports] to be the cause of injury, and then apply the remedy only to the non-NAFTA imports."[229] Japan neglects to mention that the ITC specifically examined non-NAFTA import volume, and found that non-NAFTA import volume

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[224] EC, Oral Statement at the First Panel Meeting Concerning Parallelism, para. 9 ("EC first oral statement (parallelism)").

[225] *Ibid.*, para. 11.

[226] *See* U.S. first written submission, paras. 779-786; U.S., response to questions from the Panel, paras. 173-181.

[227] U.S., response to questions from the Panel, paras. 177-179.

[228] *See* section E.5. above.

[229] Japan, response to questions from the Panel, question 91.

increased for every like product on which the ITC made an affirmative determination. Japan's hypothetical cannot be reconciled with the ITC's particularized examination of whether non-NAFTA import volumes increased.

164. The EC and Korea argue that the ITC should have analyzed NAFTA imports as an alternative cause of injury to each pertinent domestic industry.[230] These Complainants overlook that the ITC, in its analysis of non-NAFTA imports, found a causal link between non-NAFTA imports, viewed alone, and the serious injury experienced by the pertinent domestic industry. Because NAFTA imports were not considered in the ITC's particularized causal link analysis, their effects were already excluded when the ITC found that there was a causal link between the non-NAFTA imports and the serious injury. Further analyzing NAFTA imports as an alternate cause of serious injury, as the EC and Korea advocate, would have been redundant and hence was unnecessary.

165. Complainants' arguments are flawed in several other respects. The EC proceeds from the premise that the Appellate Body has established in what sequence and by what methodology an authority must separate and distinguish the effects of various causes of injury.[231] The Appellate Body, however, has found that the Agreement prescribes no particular methodology.[232] Korea appears to assume that there can only be one cause of serious injury to the domestic industry.[233] This overlooks Appellate Body reports acknowledging that injury can be from several different factors, but a safeguard measure will still be appropriate if injury from increased imports is separated and distinguished.[234] As previously stated, the ITC accomplished this by conducting a causation analysis focusing exclusively on non-NAFTA imports.

166. The ITC's analysis thus fully satisfies the requirements of Articles 2 and 4 of the Agreement as articulated by the Appellate Body in *Line Pipe* -- that an authority establish explicitly "through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for application of a safeguard measure. . . ."[235] The ITC found that non-NAFTA imports, considered alone, satisfied the conditions for application of a safeguard measure when it separated and distinguished non-NAFTA imports in its analysis of increased imports and causation, the areas in which distinguishing between imports from different sources was appropriate and necessary, and adopted other pertinent portions of its analysis of all imports that did not change depending on the set of imports examined.

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[230] EC, response to questions from the Panel, question 91; Korea, response to questions from the Panel, question 91. Brazil, New Zealand, and Norway advocate similar views in their responses to Panel question 82.

[231] *See* EC, response to questions from the Panel, question 91.

[232] *U.S. – Lamb Meat*, AB Report, para. 181 ("We emphasize that the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards.").

[233] *See* Korea, response to questions from the Panel, question 91 ("Otherwise, the perverse possibility exists . . . that imports from NAFTA sources were the cause of injury. . . .").

[234] *U.S. – Line Pipe*, AB Report, para. 209; *U.S. – Lamb Meat*, AB Report, paras. 170, 179.

[235] *U.S. – Line Pipe*, AB Report, para. 198.

G. The ITC's Demonstration of Unforeseen Developments Satisfies the Requirements of Article XIX

167. The Panel's questions have revealed several areas of agreement between Complainants and the United States. For example, all responding Complainants agree with the United States that macroeconomic developments can be unforeseen developments under Article XIX.[236] The EC, and perhaps Norway, acknowledge that the required connection between unforeseen developments and increased imports is not the same connection that must be demonstrated to exist between increased imports and serious injury.[237] Complainants generally agree that the standard as to whether an event was unforeseen is essentially a subjective one, dependent on the expectations of the negotiators at the time the concession was made.[238] Complainants have also generally agreed that imports from non-WTO Members, such as Russia, could be relevant.[239] However, several areas of contention remain.

168. Complainants continue to assert that the ITC did not fulfil its Article 3.1 obligation to provide interested parties the opportunity to submit evidence and views and comment on the presentation of other parties. The EC apparently believes that Article 3.1 requires a competent authority to list explicitly the issues under consideration and request the interested parties to present their views on each issue. There is no basis for this claim in the text of the Safeguards Agreement. Indeed, the Appellate Body has defined a competent authority's obligation as limited to giving interested parties "an opportunity" to submit evidence and to comment on evidence presented by others.[240] In fact, the ITC far exceeded this requirement by providing multiple opportunities for parties to present evidence, argument, and comment, as well as actively seeking parties' input.[241] At the first meeting of the Panel the EC representative

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[236] EC, response to questions from the Panel, question 4; New Zealand, response to questions from the Panel, question 4; Norway, response to questions from the Panel, question 4; Switzerland, response to questions from the Panel, question 4.

[237] Norway, response to questions from the Panel, question 2; EC, response to questions from the Panel, question 3. Norway admits that it might not always be "feasible" to establish a "direct correlation between the magnitude of the 'unforeseen development' and the exact increase of imports," but gives no clue as to what portion of the GATT 1994 or the Safeguards Agreement requires such a "direct correlation," or, indeed, any correlation. The EC in fact seems uncertain on this issue, as its response to question 3 mentions "an indirect multistage link" but its response to question 7 reverts to the phrase "causal link." As noted in the United States' first written submission, the phrase "causal link" is borrowed from Article 4.2(b) of the Safeguards Agreement, which does not refer to unforeseen developments. Only Article XIX contains a reference to unforeseen developments, and Article XIX uses "cause" only to refer to the relationship between increased imports and serious injury. US first written submission, paras. 931-932.

[238] EC, response to questions from the Panel, question 13; New Zealand, response to questions from the Panel, question 13; Norway, response to questions from the Panel, question 13; Switzerland, response to questions from the Panel, question 13.

[239] EC, response to questions from the Panel, question 6; New Zealand, response to questions from the Panel, question 6; Switzerland, response to questions from the Panel, question 6.

[240] *US – Wheat Gluten*, AB Report, para. 54.

[241] U.S., response to questions from the Panel, question 1; U.S., response to questions from the parties, question EC-1.

suggested that a competent authority has a responsibility to provide a draft of the authority's own views for comment by the interested parties. Such an obligation cannot be extrapolated from Article XIX or the Safeguards Agreement.

169. Complainants also continue to assert that the ITC's demonstration of unforeseen developments could not be considered part of the "report" required by Article 3.1.[242] Complainants do not even address the findings in *Chile – Price Bands*, in which the panel accepted a multi-part document (Minutes from individual meetings of Chile's Competition Committee) as the report of the competent authorities for the purposes of Article 3.1[243] Nor have Complainants attempted to explain why the format and structure of the report is not the sort of internal detail specifically left to a competent authority.[244]

170. Complainants acknowledge that the test of whether an event is "unforeseen" is essentially a subjective one, to be determined by the perspective of the Member applying the safeguard measure.[245] Complainants argue that the developments cited by the ITC were "foreseeable," but Complainants' assertions that financial crises or interest rates changes are "foreseeable" do not address the distinction first noted in *Felt Hats* between "unforeseen" and "unforeseeable."[246] The *US – Lamb Meat* panel noted that

> while the Working Party [in *Felt Hats*] did not view fashion changes over time *per se* as an "unforeseen development", it nevertheless accepted that the scale of the particular change in fashion and its duration as well as the degree of its impact on the competitive situation was *unforeseen* in that case. In other words, fashion changes in general are *foreseeable* ("change is the law of fashion"[247]), but the extent of the fashion change in the US market relating to women's fur felt hats (and hat bodies) was *unforeseen*.[248]

Complainants fail to address, much less rebut, the evidence presented by the ITC indicating that the developments it identified were in fact unforeseen. In its demonstration, the ITC cited to evidence regarding the expectations of the negotiators of the Uruguay Round relating to the likely

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[242] EC, response to questions from the Panel, question 15; Norway, response to questions from the Panel, question 15; Switzerland, response to questions from the Panel, question 15.

[243] *Chile – Price Band System*, Panel Report, WT/DS207/R, adopted 23 October 2002, para. 7.131 ("For the purpose of our analysis of the consistency of the *definitive* safeguard measure, and the investigation preceding its recommendation by the CDC, with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, we shall only consider findings and reasoning by the CDC reflected in the Minutes of Sessions Nos. 181, 185 and 193, respectively recommending the initiation of the investigation, the adoption of provisional measures and the adoption of definitive safeguard measures").

[244] *US – Line Pipe*, AB Report, para. 158.

[245] EC, response to questions from the Panel, question 13; New Zealand, response to questions from the Panel, question 13; Switzerland, response to questions from the Panel, question 13.

[246] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of GATT*, GATT/CP/106, Working Party Report adopted 22 October 1951, GATT/CP.6/SR.19, paras. 10-12 ("*Felt Hats*").

[247] *Felt Hats*, Working Party Report, para. 10.

[248] *US – Lamb Meat*, Panel Report, para. 7.24.

effects of that Round on imports of steel products.[249] The ITC also cited evidence indicating that the currency crises surprised even professional forecasters, who considered the matter at a much later time, and had more recent information available to them.[250] Thus, the ITC established that the developments were unforeseen. It was not required to find that those developments were also unforeseeable.[251]

171. Complainants next simply assert that the ITC failed to establish any link between the unforeseen developments and the resulting increase in imports.[252] The ITC noted the existence of export-oriented industries, currency crises, contraction in consumption in those countries experiencing the currency crises, and the resulting disruption in world steel markets caused by those contractions.[253] The ITC further noted the counter-cyclical status of the U.S. market when these financial crises occurred, with U.S. demand remaining strong while other markets contracted or stagnated, and the persistent appreciation of the U.S. dollar, which made the U.S. market an especially attractive one for displaced imports.[254] Complainants have yet to point to any evidence on the record of the investigation which contradicts the ITC's interpretation of events, let alone demonstrates that the ITC's interpretation was not reasonable.

172. Complainants uniformly assert that a competent authority must demonstrate a specific effect from unforeseen developments on specific industries. The EC argues that this requirement of specificity arises from "the expression 'such increased imports'."[255] However, that phrase occurs in neither Article XIX nor Article 2 of the Safeguards Agreement, so it is difficult to discern how the phrase could be used to justify a burden not stated in Article XIX or the Safeguards Agreement.[256]

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[249] ITC Second Supplemental Report, p. 2 and n.5.

[250] ITC Second Supplemental Report, p. 2 nn. 6-8.

[251] *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, Appellate Body Report, WT/DS98/AB/R, adopted 21 June 1999, para 84 (*Korea – Dairy*); *see also Argentina – Footwear*, AB Report, para. 91; and *US – Lamb Meat*, Panel Report, para. 7.22.

[252] *See, e.g.*, EC, response to questions from the Panel, question 2; Norway, response to questions from the Panel, question 2. Complainants insist that a "temporal nexus," *see, e.g.,* EC first written submission, para. 135, must exist between the unforeseen development and the increased imports, but overlook the fact that a close temporal connection between the financial crises and the initial import surge did in fact exist. ITC Second Supplemental Report, pp.2-4.

[253] ITC Second Supplemental Report, pp. 2-3.

[254] ITC Second Supplemental Report, pp. 3-4.

[255] EC, response to questions from the Panel, question 4.

[256] The EC presumably is relying on the phrase "in such increased *quantities*," used in both Article XIX and in Article 2.1. But this does not support the EC's contention either, as "such increased quantities" has been interpreted by the Appellate Body to mean that the quantities be sufficient to cause serious injury, not that the quantities be linked in some particular way to unforeseen developments. *Argentina – Footwear*, AB Report, para. 131. Such a linkage would be particularly difficult to divine from Article 2.1, since Article 2.1 does not mention unforeseen developments.

173. Complainants also rely on the emergency nature of a safeguards action but do not define the relationship between this emergency nature and the relationship that must exist between unforeseen developments and increased imports.[257] Indeed, the EC goes so far as to claim that "there must be some special or extraordinary reason why the unforeseen development has an impact on the relevant sector or product."[258] Again, however, the EC offers no support for this sweeping assertion. Nothing in Article XIX, the Safeguards Agreement, or any Appellate Body or Panel report evaluating these texts indicates that the relationship between unforeseen developments and increased imports must be "special or extraordinary." The Appellate Body has found that the ensemble of events described in Article XIX would not be "ordinary events in routine commerce," or even "extraordinary."[259] But this characterization describes the confluence of events. It is not a separate legal requirement. Indeed, it cannot be, since neither "special" nor "extraordinary" appears in the text of Article XIX or Article 2. Thus, Article XIX and the Safeguards Agreement plainly do not require proof of a "special" or "extraordinary" relation between an unforeseen development and the resulting increase in imports.

174. As a practical matter, the ITC found that the cited unforeseen developments did not affect the import levels of all steel products in uniform ways. The ITC specifically noted that the surge in imports for some products occurred later in the period of investigation and found that the disruptions in the Asian markets and the markets of the former USSR republics might have played smaller roles in increasing imports of stainless and tool steel products.[260]

175. Finally, Complainants continue to assert that Article XIX only covers imports from WTO Members. Complainants treat this as a settled matter of law, rather than merely their interpretation.[261] Other, more persuasive interpretations exist. Article XIX certainly does not explicitly limit "increased quantities" of imports to imports from Member countries only. Article XIX:1(a) indicates that imports must have increased "as a result of unforeseen developments and of the effect of the obligations incurred ... under this Agreement."

176. In considering the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions" the Appellate Body found that "this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions."[262] The Appellate Body went on to find that "unforeseen developments" and "obligations incurred" are "certain *circumstances* which must be demonstrated as a matter of fact." By describing "unforeseen developments" and

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[257] EC, response to questions from the Panel, questions 4 and 7.
[258] EC response to questions from the Panel, question 7.
[259] *Argentina – Footwear*, AB Report, para. 93.
[260] ITC Second Supplemental Report, p. 4 n. 24.
[261] EC, response to questions from the Panel, question 8; New Zealand, response to questions from the Panel, question 8; Norway, response to questions from the Panel, question 8; Switzerland, response to questions from the Panel, question 8.
[262] *Argentina – Footwear*, AB Report, para. 91.

"tariff concessions" as "circumstances," plural, rather than a single "circumstance," the Appellate Body indicates that these are separate, independent occurrences.

177. Despite the lengthy discussion of this provision, the Appellate Body never indicated that any particular linkage had to exist between the unforeseen developments and the tariff concessions. Nor did the Appellate Body indicate that each circumstance had to have an equal effect, or indeed any effect, on all imports. The Appellate Body has thus construed Article XIX:1(a) as requiring that both an unforeseen development and a trade concession be demonstrated as a matter of fact. The ITC demonstrated both unforeseen developments and tariff concessions; no more is required.

178. At some point, Complainants must do more than just claim the ITC's demonstration of unforeseen developments is unreasoned or inadequate; Complainants must make some showing that the demonstration is unreasoned or inadequate. Indeed, the Panel presented Complainants with another opportunity to do so through its questions. However, Complainants have failed to rise to the challenge.[263] The ITC identified a number of developments, showed that those events were unforeseen, and demonstrated that those events resulted in increased quantities of imports. The ITC's demonstration was both reasoned and adequate. Complainants have presented no evidence or argument that would undermine the ITC's analysis.

H. Complainants Have Established No Basis for the Panel to Conclude That the Steel Safeguard Measures Were Inconsistent With Article 5.1

179. The United States explained in detail in its previous submissions how, in accordance with Article 5.1, the steel safeguard measures were applied no more than the extent necessary to prevent or remedy serious injury caused by increased imports. In response to these explanations, Complainants offer arguments based on misinterpretations of Article 5.1, attempt to layer requirements onto the Safeguards Agreement that have no grounding in the text, and assert claims that, if accepted, would undermine the fundamental purpose of the Safeguards Agreement. Furthermore, they have failed to establish a *prima facie* case that the United States has acted inconsistently with Article 5.1.

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[263] In Question 48, the Panel specifically asked New Zealand to substantiate its contention that increased consumption in Asia and the former Soviet Union republics necessarily meant that imports into the United States did not increase. New Zealand presents no evidence that undermined the ITC's conclusions, namely, that financial crises in Southeast Asia and the former USSR republics disrupted steel markets throughout the world and led to increased imports into the U.S. market. New Zealand merely points to an increase in consumption in the affected countries in 1999, but presents no evidence to substantiate its contention that the ITC's conclusions were incorrect. (New Zealand attempts to place the recovery in consumption in the affected countries in 1998, but the data presented by the United States in the ITC Report and repeated in its written response to the Panel's question 10 belie this assertion and show the severity of the contractions that occurred in 1998).

1. Complainants Misinterpret Article 5.1

a. Complainants Misinterpret the Meaning of "Remedy"

180. 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." Complainants misinterpret the first of these elements and, as explained below, would read the second out of the Agreement entirely.

181. The ordinary meaning of the word "remedy" is "to put right, reform (a state of things); rectify, make good."[264] To "rectify" or "make good" the injurious effects on the industry, a measure would have to stop the ongoing negative effects of increased imports and also address the injurious effects of increased imports as reflected in the industry's current position. A measure that did not achieve both of these objectives would leave some of the injurious effects attributable to imports in place. Neither the text of Article 5.1 nor the evaluation of that text in reports adopted by the DSB requires this result.

182. In fact, the Appellate Body has found that it is the injurious effects caused by increased imports, as determined by the competent authorities, that a safeguard measure may remedy.[265] That determination will typically reflect the historical negative effects of imports and the legal conclusion that as of the time of the determination, those effects represent a cause of serious injury.

183. Complainants ignore the ordinary meaning of "remedy". First, they argue that "the permitted maximum level of the remedy . . . should be an improvement of that profitability limited to the extent that it has been depressed by increased imports."[266] However, this view ignores the accumulation of injurious effects caused by increased imports, which may be as grave a problem as the ongoing injury. Complainants cite the Appellate Body's reasoning in *US – Line Pipe* as support for their view, but nothing in that report suggests that the concept of remedying injury is limited to the future effects of increased imports, without regard to the injurious effects that imports have already had.

184. Second, Complainants' interpretation of the word "remedy" is inconsistent with the immediate context of that term, in particular the reference in Article 5.1 to "facilitat[ing] adjustment." A remedy that merely returned prices to their previous levels would not serve this objective. After all, if an industry is seriously injured, it is clear that prices at levels equal to those before the increase in imports were not sufficient to allow an adjustment to increased

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[264] *New Shorter Oxford English Dictionary*, p. 2540. A more detailed discussion of the meaning of Article 5.1 appears in paragraphs 1025 through 1026 of the U.S. first written submission.

[265] *US – Line Pipe*, AB Report, para. 260.

[266] EC, response to questions from the panel, question 112. Korea and Brazil make similar points in its response to this question.

imports. The injury to the industry is likely to have prevented adjustment after the increase. Thus, a measure that only returned the status quo in prices or profitability might give the industry a three-year respite, but leave it in no better position to respond to increased imports than it was prior to the measure.

b. Complainants Misinterpret the Meaning of "Facilitate Adjustment"

185. Article 5.1 clearly states that a safeguard measure can be imposed to the extent necessary to "facilitate adjustment." The EC and Korea, however, argue that adjustment is not relevant to the analysis under Article 5.1. The EC takes the position that

> [t]he Appellate Body has interpreted the whole phrase 'only to the extent necessary to prevent or remedy serious injury **and to facilitate adjustment**' (emphasis added) as requiring that safeguard measures apply only to the extent that they address serious injury attributed to increased imports.[267]

The EC thus claims that Appellate Body has effectively excised the phrase "and to facilitate adjustment" from Article 5.1 of the Agreement. If the Appellate Body had done so, it clearly would have exceeded its authority under Article 3.2 of the DSU.

186. The EC and Korea misinterpret the Appellate Body's reasoning. The *Line Pipe* report addressed the U.S. argument that a safeguard measure may "prevent or remedy 'the entirety of the serious injury experienced by the domestic industry.'"[268] Accordingly, the Appellate Body focused on "the extent necessary to prevent or remedy serious injury" in the first sentence of Article 5.1, and did not consider the significance of the phrase "to facilitate adjustment". Consequently, there is no reason to assume that the Appellate Body meant to read the term "facilitate adjustment" out of Article 5.1.

187. The Appellate Body has recognized that the one of the objectives of Article 5.1 is to facilitate adjustment.[269] In fact, "facilitating adjustment" and preventing or remedying serious injury are equally important objectives. Absent adjustment, a safeguard measure would serve no purpose other than to provide a temporary respite, after which the industry would be no better off than it was when the measure began. On the other hand, if the measure succeeded in promoting adjustment, the industry might emerge from the safeguard measure better able to face import competition without the need of trade remedies.

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[267] EC, response to questions from the Panel, question 153. Korea adopts a similar position in its response to question 115 from the Panel.

[268] *US – Line Pipe*, AB Report, para. 243.

[269] *Korea – Dairy*, AB Report, para. 96 (obligation "to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.").

188. Furthermore, the preamble of the Safeguards Agreement "[r]ecogniz[es] the importance of structural adjustment and the need to enhance rather than limit competition in international markets." By allowing a domestic industry to adjust to import competition, a safeguard measure may enhance the competitiveness or efficiency of that industry, thereby bolstering the long-term degree of competition in international markets.

189. Finally, Article 5.1 treats the two objectives of preventing or remedying serious injury *and* facilitating adjustment as additive. That is, if application of a measure necessary to prevent or remedy injury attributed to increased imports would not fully facilitate adjustment to increased imports, a Member could apply the measure to a greater extent.[270] However, even if the steel safeguard measures were judged solely on the basis of their necessity to prevent or remedy serious injury, they would meet the requirements of Article 5.1. As we have noted in our first written submission, the numerical analyses demonstrate that the safeguard measures did precisely that.[271]

c. Complainants Misinterpret Article 5.1 to Require an Examination Limited to the Increase in Imports, Rather than Imports as a Whole

190. Complainants argue that safeguard measures "can only address the increase in imports."[272] The only textual basis they cite is the second sentence of Article 5.1, which they contend "prohibits in principle remedies which would have an impact on the totality of the imports and strongly suggest that safeguard measures can only address the increase in imports."[273] However, this provision applies only to quantitative measures, and is inapplicable to other types of measures.[274]

191. It is clear that the inquiry under Article 5.1 is based on imports as a whole. The Appellate Body stated that Members may apply safeguard measures "only to the extent that they address

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[270] This formulation does not suggest that a Member may apply a measure to facilitate adjustment to injury attributable to factors other than increased imports. Rather, it recognizes that remedying injury attributable to increased imports and facilitating adjustment *to increased imports* are both equally valid objectives of a safeguard measure under Article 5.1. For example, if a Member considered that a measure that remedied injury attributable to increased imports would not facilitate adjustment to those imports, it might apply the measure to a greater extent. However, if it considered that the same measure did not facilitate adjustment to other factors – such as decreased demand – applying the measure to a greater extent would not be permitted.

[271] U.S. first written submission, para. 1079.

[272] EC, response to questions from the panel, question 153. Japan, Korea, and Norway make similar arguments in their responses to that question.

[273] EC, *ibid.*

[274] *Korea – Dairy*, AB Report, para. 99 ("[W]e do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years." (emphasis in original)); *US – Line Pipe*, Panel Report, para. 7.71 ("[W]e note that Article 5.1, second sentence, does not appear to impose any disciplines regarding the imposition of safeguard measures taking the form of simple tariff surcharges (with the exception of Article 5.1, first sentence).")

serious injury attributed to increased imports."[275] As explained in detail in the U.S. response to Question 153 from the Panel, the term "increased imports" as used by the Appellate Body refers to imports as a whole, not simply the increase in imports.

d. Complainants Misinterpret Article 5.1 to Require Quantification of Either the Negative Effects of Imports or the Beneficial Effects of a Safeguard Measure.

192. We have shown in our first written submission and answers to questions from the Panel and from the Parties that the Safeguards Agreement does not require quantification of injury caused by increased imports, or of the individual injurious effects of increased imports. We will not repeat those points in this submission.

193. The Complainants take varying positions on whether quantification is necessary. Most avoid the question by stating that the competent authorities must quantify injury "if necessary," and bear the burden of doing so.[276] To the contrary, it is a well-established principle in disputes under the DSU that the party asserting the affirmative of a proposition bears the burden of proving it.[277]

194. In this dispute, the United States has presented extensive evidence that it is not possible to quantify precisely the injury caused by increased imports or the injurious effects of increased imports for use in an analysis separating the injurious effects of imports and other factors. Therefore, the proponents of quantification bear the burden of establishing both that (1) the Safeguards Agreement requires quantification and (2) an accurate quantification of injury or injurious effects caused by increased imports is possible. They have not met either aspect of this burden.

195. The only evidence that Complainants present to demonstrate that quantification is possible consists of computer models submitted to the ITC, which the ITC rejected. Although Japan and Brazil criticize the ITC for "dismissing" economic modeling results "in a single footnote,"[278] they never address the ITC's reasons for placing little weight on the models.

196. The only legal basis Complainants cite for the proposition that quantification mandatory is the Article 5.1 "no more than the extent necessary" standard. Some Complainants believe that

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[275] *US – Line Pipe*, AB Report, para. 262.

[276] EC, response to questions from the Panel, question 114. Japan, Norway, and Brazil take a similar position in response to question 114. Korea and New Zealand argue the quantification is always necessary, while China and Switzerland take no position.

[277] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, p. 17 ("*US – Wool Shirts*").

[278] Brazil first written submission, para. 213. The EC makes as similar point. EC first written submission, para. 278.

a Member can meet this standard only if it quantifies the effects of both increased imports and the safeguard measure.[279] However, a qualitative analysis could also suffice to establish that a safeguard measure was commensurate with the injury attributable to increased imports.

e. Claimants Misinterpret the Safeguards Agreement As Requiring an Explanation of How a Safeguard Measure Complies With Article 5.1.

197. In paragraph 235 of the *US – Line Pipe* report, the Appellate Body upheld, without reservation, the panel's finding that "the United States was not required to demonstrate, at the time of imposition, that the line pipe measure was 'necessary to prevent or remedy serious injury and to facilitate adjustment'."[280] The Complainants now argue that the subsequent paragraph in that report stands for the opposite proposition – that "the level of detail and the quality of justification under Articles 3.1, 4.2(b), and 4.2(c) must be high enough to ensure sufficient justification for the measure."[281] Complainants misconstrue the Appellate Body's reasoning.

198. The passage in question, appearing in paragraph 236 of *US – Line Pipe*, states that:

> Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient "justification" for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined.[282]

Complainants characterize "should" in this sentence as "prescriptive." This cannot be the case. The Appellate Body clearly stated that the justification was an "incidental" effect of compliance with Articles 3.1, 4.2(b), and 4.2(c). But if "should" were prescriptive, providing such a justification would become mandatory, and Members applying safeguards would have to take intentional steps to comply. In short, the Appellate Body would have created the very obligation that its previous paragraph had found not to exist.

199. The ITC Report did exactly what the Appellate Body envisioned in *US – Line Pipe*. It provided detailed findings with regard to injury, causal link, and nonattribution that justified application of a safeguard measure, and incidentally provided benchmarks against which the President could select the proper extent of application of the steel safeguard measures.

200. The structure of the Safeguards Agreement supports our understanding of the Appellate Body's statement regarding the "incidental effect" of complying with Article 4.2(b). Under Articles 3 and 4, the competent authorities first make their determination of serious injury and issue their report. Under Article 5, the Member subsequently bases the measure on the findings

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[279] New Zealand, response to questions from the Panel, question 114.
[280] *US – Line Pipe*, AB Report, para. 235.
[281] Japan, response to questions from the Panel, question 113.
[282] *US – Line Pipe*, AB Report, para. 236.

in that report. The Appellate Body reflected this sequence of events in stating that the report will "provide a *benchmark* against which the permissible extent of the measure *should* be determined." The report and its benchmark cannot provide a direct justification for the measure chosen, since that measure is not in existence at the time the report is issued. Thus, the better understanding of the Appellate Body's reasoning in *US – Line Pipe* is that the findings related to serious injury, causal link, and nonattribution indicate the injurious effects of imports, which would establish a Member's right to impose a safeguard measure. Those same findings would also form the basis for a Member's decision to apply a particular measure to a particular extent.

201. Article 12.3 further supports this conclusion. In *US – Wheat Gluten*, the Appellate Body found that a Member must first propose a measure, then consult with trading partners, and then apply a final measure. The competent authorities certainly cannot provide in advance a justification for changes that might arise as a result of consultations with other Members.

202. Thus, the Safeguards Agreement itself and the Appellate Body's reports in *Korea – Dairy* and *US – Line Pipe* confirm that there is no obligation to explain at or before the time of taking a safeguard measure how it complies with the first sentence of Article 5.1.[283] The reasoning in *US – Line Pipe* certainly does not support Complainants' view that the Appellate Body reversed itself immediately after reaffirming this principle. Indeed, to suggest that the competent authorities' Article 4.2(b) analysis must explain the Article 5.1 consistency of a safeguard measure that has not yet been proposed, let alone finalized, would demand a prescience that no competent authority could provide. The Safeguards Agreement clearly does not impose such an obligation on the Members.

2. Complainants Have Failed to Establish a *Prima Facie* Case of Inconsistency of the Safeguard Measures with Article 5.1

203. Complainants assert the following four arguments in attempting to establish a *prima facie* case that the United States violated Article 5.1: (1) the safeguard measures adopted by the President differ from the ITC's recommendation; (2) the United States excluded some products from the measures; and (3) the United States applied a TRQ to slab. As discussed below, none of these arguments establishes a *prima facie* case that the United States has acted inconsistently with Article 5.1.[284]

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[283] There is an exception for certain quantitative restrictions that is not relevant to this dispute.

[284] In addition, Brazil argues that the safeguard measures are inconsistent with Article 5.1 because they are "counterintuitive." Brazil, response to questions from the panel, question 85. Clearly, this a bare assertion does not establish a *prima facie* case of inconsistency.

a. The Fact that the Safeguard Measures Adopted by the President Differ from the ITC's Recommendations Does Not Establish a *Prima Facie* Case of Inconsistency with Article 5.1

204. It is well established that the President's safeguard measure may differ from the ITC's recommendation without running afoul of Article 5.1. As the panel in *US – Line Pipe* found:

> [T]he ITC stated that the recommended action "will not exceed the amount necessary to remedy the serious injury we find to exist". Even assuming that the ITC correctly analysed the restrictive effect of the measure it recommended, there is nothing in this statement to suggest that the restrictive effect of the ITC recommendation was set at (or above) the maximum amount necessary under Article 5.1. The restrictive effect of the recommendation could have been set below the maximum amount necessary, and still the ITC's assertion (that the recommended action "will not exceed the amount necessary") would be accurate. . . . Since it is theoretically possible that the line pipe measure could be more restrictive of imports than the ITC recommendation, and yet still not exceed the maximum amount "necessary" under the first sentence of Article 5.1, an assertion that the line pipe measure is more restrictive of imports than the ITC recommendation is not indicative of a violation of the first sentence of Article 5.1.[285]

As in the *Line Pipe* case, the ITC explained in its steel determinations that its remedy recommendations did not exceed the amount necessary to remedy serious injury.[286] Accordingly, the fact that the safeguard measures imposed by the President differed from the ITC's recommended remedies does not prove any inconsistency with Article 5.1.

205. Some Complainants agree with this view.[287] However, some also assert that the ITC "explicitly stated that a more restrictive remedy would not be necessary to address the injury it has found to be caused by increased imports."[288] This is incorrect. The ITC actually stated that "[w]e do not agree with the domestic industry, however, that an additional 35, 40, or 50 percent *ad valorem* tariff is necessary to achieve the desired result, or is otherwise appropriate."[289] The exclusion of a 30 percent tariff from this enumeration suggests that the ITC did not find a

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[285] *US – Line Pipe*, Panel Report, para. 7.94 (footnotes omitted). When the Panel refers to the term "necessary," in this quote, it is referring to the maximum extent "necessary to remedy the serious injury."

[286] ITC Report, pp. 359, 370, 380, & 394.

[287] EC, response to questions from the panel, question 108 ("No, a 'deviation' from a less restrictive safeguard measure that has been recommended does not necessarily imply a violation of Article 5.1."). Korea and Norway make similar points in response to this question.

[288] EC, response to questions from the Panel, question 108.

[289] ITC Report, p. 363.

measure at that level to be excessive.[290] And, in any event, the ITC was evaluating *four-year* measures, while the President applied remedies for only three years.[291] Therefore, Complainants' analysis of the ITC recommendations does not suggest any inconsistency with Article 5.1.

b. The Fact that the United States Excluded Products from the Measures Does Not Establish a *Prima Facie* Case that the Safeguard Measures Are Inconsistent with Article 5.1

206. Article 5.1 clearly allows a Member to apply a safeguard measure less than the extent necessary to remedy or prevent serious injury, as long as it complies with the MFN obligation under Article 2.2. No Complainant disagrees with this formulation, and six strongly support it.[292] Thus, a Member has discretion to exclude particular items entirely from the measure or to grant a limited quantity exclusion with regard to particular items. Complainants adopt a variety of positions on this question, contradicting each other and frequently themselves. However, nothing in this welter of arguments demonstrates that the United States was prohibited from excluding products from the safeguard measures.

207. As an initial point, several Complainants agree with the U.S. view that exclusion of particular items is permitted. Japan states that "if the products covered by the injury determination are broader than the products covered by the measure itself, we view the measure as less restrictive and therefore consistent with Article 5.1 of the Agreement on Safeguards."[293] Korea and Brazil also find exclusions to be consistent with the Safeguards Agreement.[294]

208. Only New Zealand argues that exclusions are forbidden, on the grounds that parallelism requires the application of any safeguard measure to each and every one of the items included in the product subject to a finding of serious injury.[295] (We refer to this concept as "scope parallelism.") New Zealand recognizes that parallelism, as described in *US – Wheat Gluten* and *US – Line Pipe*, "was, on the facts, restricted to imports by source."[296] (We refer to this as

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[290] Korea asserts that the ITC's explanation of its recommendation for other welded pipe is inconsistent with the measure established by the President. Korea, response to questions from the Panel, question 108. We showed in our first written submission that the ITC's findings were not relevant to a consideration of consistency with Article 5.1. U.S. first written submission, paras. 1205 through 1210. These same points fully rebut the arguments make by Korea in response to question 108 from the Panel.

[291] The panel in *US – Line Pipe* found that the duration of a measure was a valid factor in considering whether it was applied to a lesser extent than a proposed measure with a longer duration. *US – Line Pipe*, Panel Report, paras. 7.96-7.97.

[292] EC, Japan, Korea, Norway, New Zealand, and Brazil, responses to questions from the Panel, question 100.

[293] Japan, response to questions from the Panel, question 92.

[294] Korea, response to questions from the Panel, question 100 ("By excluding those products from the remedy, the United States is choosing not to impose relief. Such action is not only permitted but contemplated by the terms of Article 5.1, first sentence."); Brazil, response to questions from the Panel, questions 92 and 100.

[295] New Zealand, response to questions from the Panel, question 92.

[296] New Zealand, response to questions from the panel, para. 92.

"source parallelism.") However, New Zealand argues that those reports also stand for the "broad principle" of scope parallelism. We demonstrated in the first written submission that no such principle exists.[297] New Zealand has not rebutted our analysis and, therefore, has not established a *prima facie* case that the Safeguards Agreement requires scope parallelism.[298]

209. Thus, either complete exclusion (or reduced application of a safeguard measure, as described below) to particular items within the like product is consistent with the Safeguards Agreement. That does not suggest that exclusion or reduced application is required. Complainants essentially accept that exclusions are not mandatory.[299]

210. The exclusions (or reductions in application) are a factor that the Panel should consider in evaluating whether the steel safeguard measures are consistent with Article 5.1. These adjustments to the steel safeguard measures lessen their effect on the domestic industries, and thus lessen the extent to which they prevent or remedy serious injury.

c. The Fact that the United States Imposed a TRQ on Slab Does Not Establish a *Prima Facie* Case that the Safeguard Measures Are Inconsistent with Article 5.1

211. The Safeguards Agreement also allows a Member to reduce the extent of application of a measure to certain items within the imported product. For a tariff-based safeguard measure, such a reduction could take the form of a lower rate of duty for a particular item, or a zero-rate for a limited quantity of imports of that item. Just as with a complete exclusion, either of these measures would lessen the overall application of the measure. The exclusions endorsed by Japan, Korea, and Brazil contain several examples of quantitative exclusions for particular items.

212. Even so, almost all Complainants object to the application of a TRQ on slab as part of the overall measure on certain carbon flat-rolled steel. For the most part, they adopt different variations of an argument made by Japan – that "[i]f these products are the same and compete with each other, why should they be subjected to different remedies with different effects?"[300] New Zealand contends that the adoption of the TRQ on slab proves that the measure on all

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[297] U.S. first written submission, paras. 763-766

[298] We also note that, as a systemic matter, New Zealand's understanding of the *US – Wheat Gluten* and *US – Line Pipe* reports is troubling. In New Zealand's view, general comments by the Appellate Body in those reports are dispositive as to an issue – scope parallelism – that the parties did not raise and that the Appellate Body did not address. Thus, the Appellate Body did not have the chance to fully consider the implications of scope parallelism and the consistency of that concept with the Safeguards Agreement. Its statements regarding source parallelism should accordingly be understood as being inapplicable to scope parallelism.

[299] EC, response to questions from the Panel, question 101. In their responses to this question, Korea, Norway, and New Zealand also take the view that exclusions are not mandatory, while Japan and Brazil take no position.

[300] Japan, response to questions from the panel, question 103.

certain carbon flat-rolled steel was too high.[301] Many of the Complainants contend that the differential application of the safeguard measure "proves that the products were inappropriately grouped together within that category."[302]

213. Complainants misunderstand the basis for the application of a TRQ to slab. The ITC found that slab was part of the certain carbon flat rolled like product and affected the sale of that product in the United States. Specifically, the ITC noted that "slab prices are solely a function of downstream prices for hot-rolled steel and cold-rolled steel, which would suggest a strong cross-price effect between these types of steel."[303] The President did not revise or modify these conclusions, or the overall finding that slab imports were injurious. Instead, he found that a TRQ for slab was appropriate based on the various statutory factors that he was required to consider, even if the remedy was less than the maximum remedy permitted under the Safeguards Agreement.

214. The treatment of slab does not call into question the ITC's like product definition for certain carbon flat-rolled steel. The President did not find that slab was not "like" other steel products. Rather, the President included slab in the safeguard measure precisely because slab imports are like domestic certain carbon flat-rolled steel, and have an effect on the domestic industry producing that product. He then applied the measure to slab in the form of a TRQ because the long-term remedial effect of applying the safeguard tariff to all slab was outweighed by the short-term disruption such action would cause to the broader U.S. economy.

3. The United States Has Rebutted Any Presumption of Inconsistency with Article 5.1 Arising Out of Any Alleged Violation of Article 4.2(b)

215. Some Complainants assert that a violation of Article 4.2(b) not only establishes a *prima facie* case of inconsistency with Article 5.1 but also heightens the Respondent's burden of proof. Relying on the Appellate Body's reasoning in *US – Line Pipe*, these Complainants argue that "a violation of Article 4.2(b) necessarily means a violation of Article 5.1, absent a *compelling explanation* of why the remedy has been appropriately limited."[304]

216. As we have shown throughout this dispute, the ITC determinations complied fully with the Safeguards Agreement, including Article 4.2, meaning that Complainants have not satisfied the *US – Line Pipe* criteria for a *prima facie* case.

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[301] New Zealand, response to questions from the panel, question 103. The EC makes a similar point in response to question 103.

[302] Japan, response to questions from the panel, question 103. Korea, Norway, and Brazil make a similar point in response to question 22

[303] ITC Report, p. 43.

[304] Brazil, answers to questions from the panel, question 99 (emphasis added). Japan makes a similar point in its response to question 105 from the Panel.

217. Furthermore, The Appellate Body's reasoning in *US – Line Pipe* does not support Complainants' view. In that report, the Appellate Body found that "by establishing that the United States violated Article 4.2(b) of the *Agreement on Safeguards*, Korea has made a *prima facie* case that the application of the line pipe measure was not limited to the extent permissible under Article 5.1."[305] The Appellate Body further explained that:

> We note that, had the Panel found differently, the United States might have attempted to rebut the presumption raised by Korea in successfully establishing a violation of Article 4.2(b) of the *Agreement on Safeguards*, that the United States had also violated Article 5.1. Even if the ITC failed to separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors, it is still possible that the safeguard measure may have been 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.[306]

218. In recognizing that a Member may "rebut" the presumption created by an inconsistency with Article 4.2(b), the Appellate Body did not suggest that the Member bore a burden any greater than a defending party normally bears under the DSU – to counter or rebut a *prima facie* case established by the complaining party.[307] The Appellate Body has found that a defending party satisfies this burden if it "bring[s] forward evidence and argument to disprove the claim."[308] Thus, the burden on the defending party is not to present a "compelling" case, but to refute the evidence and argument behind any *prima facie* case presented by the complaining party.

219. It is also relevant to consider the nature of the *prima facie* case created by a finding of inconsistency with Article 4.2(b). The Appellate Body recognized that a breach of that provision does not actually *prove* that a subsequent measure was applied more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[309] This observation is plainly correct. Even if a Panel were to conclude that the competent authorities' findings did not separate and distinguish with sufficient specificity, the Member may still have selected and applied its measure less than the extent necessary to remedy the injurious effects of increased imports. The most that an inconsistency with Article 4.2(b) can establish is uncertainty – it cannot by itself prove that a safeguard measure is inconsistent with Article 5.1.

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[305] *US – Line Pipe*, AB Report, para. 261.

[306] *US – Line Pipe*, AB Report, para. 262.

[307] *EC Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, adopted 13 February 1998, para. 98.

[308] *US – Wool Shirts*, AB Report, p. 20.

[309] *US – Line Pipe*, AB Report, para. 262 ("it is still possible that the safeguard measure may have been 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.").

220. Thus, the *prima facie* case referenced by the Appellate Body is that the failure to adequately "separate and distinguish" injurious effects prevented a showing that the safeguard measure addressed only the effects attributable to increased imports. Since such a *prima facie* case will only have established uncertainty as to the appropriate level of the safeguard measure, the rebuttal would need only to show that the measure was commensurate with the injurious effects attributable to increased imports.

221. The findings and reasoned conclusions in the ITC Report unquestionably allow such a showing. In *US – Lamb Meat*, the Appellate Body recognized that "[b]y examining the *relative* causal importance of the different causal factors, the USITC clearly engaged in some kind of process to separate out, and identify, the effects of the different factors, including increased imports."[310] Even if the Panel finds that the ITC did not provide a sufficiently detailed analysis of injurious effects attributable to imports, the findings in the ITC Report clearly provided a high degree of certainty as to the injurious effects of imports. The ITC identified specifically which indicators of injury were affected by each factor that it found to cause injury, and described the interplay among those factors.

222. In this regard, it is clear that the Safeguards Agreement does not require mathematical proof as to the injury attributable to increased imports or the degree to which a safeguard measure could remedy that injury. As the Working Party recognized in *Felt Hats*, "it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market."[311] No matter how sophisticated the model, economists and social scientists simply cannot predict the future and cannot measure with any certainty the effects of increased imports or of a safeguard measure. The most that any analysis can provide is an estimate of the magnitude of certain of the effects of imports and of a measure responsive to those effects alone. In fact, the Appellate Body has characterized Article 5.1 as requiring that the application of a safeguard measure be "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."[312] It has never required exactitude.

223. In line with these principles, the U.S. numerical exercises reflected the fact that an economic model typically produces a range of possible results, no one of them more likely than the others. Since precision in these exercises is inherently impossible, we treated these ranges as indicating the appropriate magnitude of a safeguard measure. The estimated effects of some of the steel safeguard measures fell within the range of estimated effects of increased imports. The estimated effects of other measures were lower than the range of estimated effects of increased imports. In either case, the exercise confirmed that the safeguard measures were commensurate

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[310] *US – Lamb Meat*, AB Report, para. 184.
[311] *Felt Hats*, Working Party Report, para. 35.
[312] *Korea – Dairy*, AB Report, para. 96.

with the injury caused by increased imports.[313] These were conservative exercises focused on certain specific factors, based on evidence from the ITC record or conservative estimates based on that information. The exercises did not take into account the possibility that the objective of facilitating the industry's adjustment to increased imports might require application of a measure beyond that level.[314]

224. Japan argues that when an economic model produces a range of estimated effects of imports, Article 5.1 allows the safeguard measure to address only the lowest estimated effect because "the possibility that the 14% tariff might over compensate renders that tariff level WTO inconsistent."[315] This argument rests on three fallacies. First, it incorrectly views "no more than the extent necessary" in Article 5.1 as requiring a Member to ensure from the outset that a measure will never exceed the extent necessary. As noted above, the GATT Contracting Parties recognized in *Felt Hats* that such certainty is impossible. Moreover, the chance that a safeguard measure consistent with Article 5.1 may need modification in the course of events is built into the requirement under Article 7.4 for a Member to "review the situation" at the mid-term of a safeguard measure and "if appropriate, withdraw it or increase the pace of liberalization." This provision would be unnecessary if Article 5.1 required a Member to apply a safeguard measure less than the lowest possible effect of increased imports.

225. Second, Japan fails to account for progressive liberalization of safeguard measures under Article 7.4. Automatic reductions in the extent of application of the measure lessen any uncertainty over whether the overall effect of the measure over its lifetime is consistent with Article 5.1. In this regard, it is noteworthy that an aggressive rate of liberalization is built into the steel safeguard measures – six percent per year for the 30 percent tariffs.

226. Third, Japan mistakenly views the range of outputs of an economic model as actual effects of a measure and actual effects of increased imports that can be compared with pinpoint accuracy. Again, they are not. At most, they indicate the general magnitudes of injurious and remedial effects. The Appellate Body recognized the inherent uncertainty of such a comparison when it described Article 5.1 as requiring that a safeguard measure be "commensurate" with – not equivalent or equal to – "the goals of preventing or remedying serious injury and facilitating adjustment."[316] That is what the United States did, and the reason the Panel should find the measures to be consistent with Article 5.1.

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[313] *Korea – Dairy*, AB Report, para. 96 (Article 5.1 imposes an obligation that "the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.").

[314] U.S. first written submission, para. 1079. Thus, Korea is plainly wrong in its claim that the United States "has not . . . pointed to any evidence that would demonstrate that in fact its measure is limited to repairing the injury from imports alone." Korea, response to questions from the Panel, question 105.

[315] Japan, response to questions from the Panel, question 115.

[316] *Korea – Dairy*, AB Report, para. 96.

I. The U.S. Decisionmaking Process in Safeguard Proceedings is Consistent With the Safeguards Agreement.

227. The U.S. decisionmaking process tracks the structure of the Safeguards Agreement. The competent authorities first investigate imported products to determine whether they cause serious injury to the domestic industry producing a like or directly competitive product. They issue a report on their investigation, including explanations of their findings. Based on that report, the President decides whether to apply a safeguard measure. As the Appellate Body has recognized, Articles 3 and 4 involve a separate and distinct inquiry from Article 5.1.[317] The U.S. system reflects this division in its bifurcated system, in which the ITC handles the investigation and determination of serious injury, after which the President decides whether and to what extent to apply a safeguard measure.

1. The Safeguards Agreement Does Not Require That a Competent Authority Composed of Multiple Decisionmakers Achieve Consensus as to the Rationale For an Affirmative Determination.

228. Within the framework established under the Safeguards Agreement, a Member clearly has the discretion to structure its competent authorities as it sees fit, including through the use of multiple decision-makers.[318] As the Appellate Body made clear in *US – Line Pipe*:

> The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination [of serious injury]. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member.[319]

There are numerous examples of international tribunals – including WTO panels and the Appellate Body – that employ multiple decision-makers, any of whom may publish separate concurring or dissenting opinions.[320] Moreover, it is not uncommon for judges in multi-member

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[317] *US – Line Pipe*, AB Report, para. 84.

[318] Japan, response to questions from the Panel, question 128 ("We agree with the Appellate Body that the Agreement on Safeguards is silent regarding how a Member must undertake its decision-making process. Nothing requires a six-member commission, nor a majority decision of those members").

[319] *US – Line Pipe*, AB Report, para. 158.

[320] *E.g.*, *International Court of Justice*, (United Nations, Rules of Court, Articles 95(2) and Article 107; *International Criminal Court*, (United Nations, Rome Statute of the International Criminal Court, Articles 74(3) and 74(5); *International Criminal Tribunal for Rwanda*, (United Nations, Statute of the International Tribunal for Rwanda, Article 22(2); *International Criminal Tribunal for the former Yugoslavia*, (United Nations, Amended Statute of the International Tribunal, Article 23; *International Tribunal for the Law of the Sea*, (United Nations, Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law

tribunals to render concurring views offering alternative rationales for the result reached by the majority.[321] That individual decisionmakers discern different bases for reaching their conclusions does not mean that the individual conclusions or the majority outcome is somehow unreasonable or inadequate.

229. Nevertheless, Japan and Korea argue that, where a decision is based upon two or more concurring opinions based on divergent rationales, the decision cannot satisfy the requirements of Articles 3.1 and 4.2(c) of the Agreement.[322] This argument is entirely without merit.

230. Articles 3.1 and 4.2(c) provide only that "the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" and containing a "detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." There is no requirement that individual decisionmakers agree on all aspects of the rationale supporting the competent authority's conclusions.

231. The Appellate Body in *US – Line Pipe* confirmed that individual decisionmakers need not agree as to the rationale underpinning the decision to apply a safeguard measure. In that report, the Appellate Body found that it does not matter whether the decision to apply safeguards is based on findings of "serious injury" or "threat." In particular, it stated:

> we do not see that it matters – for the purpose of determining whether there is a right to apply a safeguard measure under the Agreement on Safeguards – whether a domestic authority finds that there is "serious injury," "threat of serious injury," or, as the USITC found here, "serious injury or threat of serious injury." In any of those events, the right to apply a safeguard is, in our view, established.[323]

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of the Sea), Article 30(3); *The Court of Conciliation and Arbitration*, (Organization for Security and Co-operation in Europe, Rules of the Court of Conciliation and Arbitration within the OSCE of 1 February 1997, Article 34(2); *European Court of Human Rights*, (Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 46(2) and 49(2), and Rules of Court, Rule 74(2); *African Court of Human and Peoples' Rights*, (Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Article 28); *Inter-American Court of Human Rights*, (Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," Article 66; *North American Free Trade Agreement ("NAFTA") Binational Panel*, (NAFTA, Rules of Procedure for Article 1904 Binational Panel Reviews, Rule 72; *Iran-United States Claims Tribunal*, (Tribunal Rules of Procedure, Article 32 (Exhibit US-91).

[321] For instance, concurring opinions expressing divergent rationales occur in both the U.S. Supreme Court and the House of Lords of the United Kingdom.

[322] *E.g.*, Japan and Korea, response to questions from the Panel, question 130.

[323] *US – Line Pipe*, AB Report, para. 171.

The important issue, therefore, is whether the right to apply safeguard measures has been established, not whether the individual decisionmakers agree on the reasons why such right has been established.

232. In the *Steel* investigation, the ITC determinations on tin mill steel and stainless steel wire each rest on the individual affirmative determinations of three Commissioners, who each published detailed "findings and reasoned conclusions."[324] Although they did not adopt the same definitions of the domestic like product, each Commissioner voting in the affirmative complied with the Safeguards Agreement mandate to "publish a report setting forth their findings and reasoned conclusions."

233. Japan and Korea argue that the Appellate Body's reasoning in *US – Line Pipe* rested on the fact that the divergent rationales for an affirmative determination – "serious injury" and "threat of serious injury" – were, in fact, consistent with one another. They then assert that this reasoning does not apply to this dispute because the divergent like product rationales for tin mill steel and stainless steel wire were inconsistent with each other.[325]

234. Japan and Korea are incorrect. The Appellate Body in *US – Line Pipe* concluded that findings of "serious injury" and "threat of serious injury" are "two distinct concepts that must be given distinctive meanings in interpreting the Agreement on Safeguards."[326] In particular, these concepts "refer to different moments in time"[327] – "[p]resent serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury."[328] Accordingly, the Appellate Body expressed no disagreement with the *US – Line Pipe* panel's finding that the concepts are "mutually exclusive."[329] Nevertheless, as noted above, the Appellate Body stated that it does not matter whether the decision is based upon "serious injury" or "threat" because either finding supports the right to apply safeguard measures.[330]

235. *US – Line Pipe* clearly establishes that individual decisionmakers within the competent authorities need not agree on whether there is "serious injury" or "threat" – even though these are distinct concepts with distinct meanings – because either finding supports application of a safeguard measure. Together, the decisionmakers need only agree that there is *either* serious injury or threat thereof. By analogy, when the decisionmakers agree that increased imports

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[324] Commissioners Bragg, Miller, and Devaney voted in the affirmative for tin mill steel, while Commissioners Koplan, Bragg, and Devaney voted in the affirmative for stainless steel wire. These findings were noted in the United States' notification to the Committee on Safeguards pursuant to Article 12.1. G/SG/N/8/USA/8/Supp.1, item 2, paras. (9) and (11) (Jan. 7, 2002).

[325] Japan and Korea, response to questions from the Panel, question 130.

[326] *US – Line Pipe*, AB Report, para. 167.

[327] *Ibid.*, para. 166.

[328] *Ibid.*, para. 168.

[329] *Ibid.*, paras. 162 and 164 ("This is not to say that we believe that 'serious injury' and 'threat of serious injury' are the same thing, or that competent authorities may make a finding that both exist at the same time").

[330] *Ibid.*, para. 171.

caused serious injury, but differ on the rationale for that conclusion, the question for the Panel is not whether the individual conclusions are the same, but whether each conclusion supports application of a safeguard measure. As long as the conclusions of each decisionmaker supporting an affirmative determination are consistent with the Safeguards Agreement, as was the case for tin mill steel and stainless steel wire, the overall determination of the competent authorities is valid.

2. The Safeguards Agreement Does Not Require the Competent Authorities or a Member to Use Data That Becomes Available After the End of the Period for Gathering Information.

236. The two-stage process for applying a safeguard measure under the Safeguards Agreement almost guarantees that new information on imports, the condition of the domestic industry, or some other issue will become available after the competent authorities make their determination, but before application of a safeguard measure. In this dispute, some Complainants have focused on the availability in mid-January, 2002, of import data for November 2001 and in mid-February of import data for December 2001.[331] They argue that the ITC or the President should have reopened the analysis of increased imports to take account of this data.

237. The requirements under Article 3.1 to provide an investigation, opportunity to present evidence and views, a determination, and a report containing findings and reasoned conclusions, presuppose that the process regarding serious injury must end at some point. These requirements further presuppose that information gathering will end far enough before issuance of the report for the competent authorities to digest all the information and to make accurate findings and reasoned conclusions.[332] And, of course, the process to decide whether and to what extent to apply a safeguard measure will take additional time after issuance of the report.[333]

238. Nothing in the Safeguards Agreement obligates the competent authorities to reopen their information gathering process or to revise their analysis to account for information that becomes available after they make their determination. In fact, the competent authorities are only obligated to conduct additional proceedings with regard to serious injury at the mid-term of a

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[331] Some Complainants assert that import data for December 2001 was available when the ITC issued its supplemental response on February 4, 2002. EC, response to questions from the Panel, question 38. This is incorrect. Although preliminary data on December 2001 was available before mid-February, such preliminary data is often incorrect and, accordingly, subject to change.

[332] We note, by way of example, that this Panel's own procedures allow submission of new factual evidence only up through the first panel meeting, or in answers to questions or for good cause, and require that other parties be given a period of time for comment, as appropriate. Working Procedures for the Panel, 31 July 2002, para. 11 Thus, the final date envisaged for submission of new information would be approximately six weeks before the scheduled date for issuance of the interim report.

[333] Japan, for one, recognized this point in stating that "[t]he President's remedy decision obviously must be taken after the ITC makes its serious injury decision." Japan, response to questions from the Panel, question 39. Korea makes a similar point in response to this question.

safeguard measure more than three years in duration (Article 7.4) or if they are evaluating extension of a safeguard measure (Article 7.2). The absence of any comparable provision for the period between the determination of serious injury and application of a safeguard measure indicates that there is no obligation to reopen the injury determination during that time.

239. Nor does the Agreement require a government entity other than the competent authorities (such as the U.S. President) to revisit findings made consistent with Articles 3 and 4 to account for information that became available after the end of the information-gathering period. In fact, Complainants' suggestion that the President should have reconsidered the ITC's injury determination based on import data available only in February 2002[334] is inconsistent with the procedural requirements of Article 3.1.

240. Several Complainants argue that the President should have taken newly available import data into account in deciding whether to apply a safeguard measure.[335] However, they fail to recognize that data in a safeguard proceeding must generally be evaluated in the context of data on the relevant domestic industry. No data on the domestic industries, as defined by the ITC, became available after the end of the ITC information-gathering period. Thus, a complete evaluation of full-year 2001 import data was not possible, and was not required by the Safeguards Agreement.

J. Article X:3 Does Not Require Identical Administration of Antidumping and Safeguards Laws.

241. Our responses to the Panel's questions regarding the Article X:3 claims fully rebut the arguments raised by Complainants in their responses to those questions. In addition, we note our concern regarding some Complainants' suggestion that a departure from previous practice could be a "warning signal" of or "highly relevant to" determining whether a Member had breached Article X:3.[336] Even more troubling is Japan's view that a Panel should compare the administration of *different* laws in evaluating consistency with Article X:3.[337]

242. As Japan itself recognizes, Article X:3 only requires the United States to "administer its *safeguard law* in a uniform, impartial and reasonable manner. The same standards must be applied in every instance. When applied to different facts, the outcome may differ."[338] Even so, Japan then asks that the Panel consider differences between the like product definitions under antidumping laws and safeguards laws in its analysis of Article X:3.

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[334] EC, response to questions from the Panel, question 39.

[335] Japan, Korea, and Brazil, response to questions from the Panel, question 39.

[336] EC, response to questions from the Panel, question 55; Japan, response to questions from the Panel, question 136.

[337] Japan, responses to questions from the Panel, question 136.

[338] Japan, response to questions from the Panel, question 134 (emphasis added).

243. Japan was correct in its initial observation that Article X:3 applies only to administration of a particular law. It does not require a Member to administer its safeguards law in the same manner as its antidumping laws, food safety laws, or any other laws, for that matter. Indeed, there are good reasons why the same term may be interpreted and applied differently under different laws, especially if those laws have different objectives. Adoption of Japan's interpretation of Article X:3 would disregard these differences, and commit Panels to a boundless review of Members' entire legal systems to determine whether terms received identical treatment in every law. We see no indication that Article X:3 imposes such a requirement.

K. An Inconsistency With Article 9.1 Does Not Automatically Give Rise to an Inconsistency With Article I:1 or Article 2.2.

244. Our responses to the Panel's questions regarding the Article 9.1 claims fully rebut the arguments raised by Complainants in their responses to those questions. However, we further respond to China's argument that an inconsistency with Article 9.1 automatically gives rise to an inconsistency with Articles I:1 and 2.2. China fails to recognize that Article I:1 and Article 2.2 require most favored nation treatment – the same treatment to all Members. When a Member affords developing country Members the same treatment as developed country Members, it is acting *in conformity with* Article I:1 and Article 2.2. Article 9.1 acts to require differential treatment inconsistent with those Articles, and provides a defense against a claim from developed countries that Article I:1 or Article 2.2 entitles them to the same differential treatment. Therefore, if a Member fails to provide treatment consistent with Article 9.1 to a developing country Member, it has acted inconsistently with Article 9.1, but not with Article I:1 or Article 2.2.

245. We also note that China did not provide the information on its exports of the ten products covered by the steel safeguard measures that the Panel requested. The necessary data was publicly available from the ITC website. For the convenience of the Panel, we have provided the necessary information, for all five full years of the ITC investigation period, in Exhibit US-92.

III. CONCLUSION

246. For the foregoing reasons, the United States requests the Panel to find that the measures that Complainants have challenged are not inconsistent with the U.S. WTO obligations that Complainants have cited.

EXHIBIT LIST

US-84 Testimony of Domestic Industry's Economic Consultant, ITC Hearing, September 19, 2001

US-85 European Communities - Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products, Commission Regulation (EC) No. 1694/2002 of 27 September 2002

US-86 The New Shorter Oxford English Dictionary, p. 1900

US-87 K. Dam, *The GATT: Law and International Economic Organization* 99 (1970).

US-88 A. Sykes, "Protection as a Safeguard: A Positive Analysis of the GATT 'Escape Clause' with Normative Speculations," 58 *U. Chi. L. Rev.* 255, text at notes 75-76 (Winter 1991).

US-89 E. Hizon, "The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection," 15 *NW. J. Int'l L. and Bus.* 105, text at notes 17-19, 21-39 (Fall 1994).

US-90 *The Uruguay Round Agreements Act: Statement of Administrative Action*, p. 286 (1994)

US-91 Documents related to multiple decisionmakers under international agreements

- *International Court of Justice*, (United Nations, Rules of Court, Articles 95(2) and Article 107
- *International Criminal Court*, (United Nations, Rome Statute of the International Criminal Court, Articles 74(3) and 74(5)
- *International Criminal Tribunal for Rwanda*, (United Nations, Statute of the International Tribunal for Rwanda, Article 22(2)
- *International Criminal Tribunal for the former Yugoslavia*, (United Nations, Amended Statute of the International Tribunal, Article 23
- *International Tribunal for the Law of the Sea*, (United Nations, Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea), Article 30(3)
- *The Court of Conciliation and Arbitration*, (Organization for Security and Co-operation in Europe, Rules of the Court of Conciliation and Arbitration within the OSCE of 1 February 1997, Article 34(2)
- *European Court of Human Rights*, (Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 46(2) and 49(2), and Rules of Court, Rule 74(2)
- *African Court of Human and Peoples' Rights*, (Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on

the Establishment of an African Court of Human and Peoples' Rights, Article 28)

- *Inter-American Court of Human Rights*, (Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," Article 66
- *North American Free Trade Agreement ("NAFTA") Binational Panel*, (NAFTA, Rules of Procedure for Article 1904 Binational Panel Reviews, Rule 72
- *Iran-United States Claims Tribunal*, (Tribunal Rules of Procedure, Article 32

US-92 Imports from China as a Percentage of Total Imports