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

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

United States Responses
to the Panel's Questions for the Parties

November 12, 2002

I. UNFORESEEN DEVELOPMENTS

A. TO ALL PARTIES

1. The argument has been made by some complaining parties that views were not sought by the ITC from interested parties in relation to the issue of unforeseen developments. Could the complaining parties explain why other Members should be consulted on the impact of such events on the United States and could the United States explain the process according to which, and the basis upon which, the ITC made its determination in relation to unforeseen developments?

1. The ITC identified the unforeseen developments which resulted in increased imports in the same manner in which it made all its findings in the course of the steel investigation. The ITC sought information on unforeseen developments through its questionnaires[1] and sought information from participants by directly soliciting such information.[2] Parties submitted both legal arguments and factual information on the subject of unforeseen developments. The ITC weighed all the evidence submitted by the various parties and explained its findings.

2. The Appellate Body in *US – Wheat Gluten* considered the extent of the "investigation" required by Article 3.1 of the Safeguards Agreement. The Appellate Body found that the

> focus of the investigative steps mentioned in Article 3.1 is on "interested parties", who must be notified of the investigation, and who must be given an opportunity to submit "evidence", as well as their "views", to the competent authorities. The interested parties are also to be given an opportunity to "respond" to the presentation of other parties.[3]

3. In this investigation, the ITC gave public notice of its institution of the steel investigation.[4] The ITC invited public comments and suggestions regarding the content of its questionnaires, which included a question regarding unforeseen developments.[5] The ITC received extensive responses to that public request, including one 110-page submission from respondents from a variety of countries, including Japan, Korea, Brazil, and New Zealand.[6] The ITC accepted prehearing written submissions with no page limits, and several of those initial written submissions discussed unforeseen developments.[7] The ITC's prehearing Staff Report

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[1] Producers' Questionnaire at question I-7, Exhibit US-41; Importers' Questionnaire at question I-6, Exhibit US-42; Purchasers' Questionnaire at question I-6, Exhibit US-43.

[2] Transcript of the ITC hearing., pp. 326-327 (Chairman Koplan) (Exhibit US-44); 343 (Commissioner Hillman) (Exhibit US-45); 1445 (Vice Chairman Okun) (Exhibit US-46); and 2626 (Vice Chairman Okun) (Exhibit US-47).

[3] *US – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001, para. 54 ("*US – Wheat Gluten*").

[4] 66 Fed. Reg. 35267 (July 3, 2001).

[5] 66 Fed. Reg. 34717 (June 29, 2001).

[6] Joint Comments of Respondents on Draft Questionnaires, July 2, 2001, Exhibit US-67.

[7] *E.g.*, Respondents' Joint Prehearing Framework Brief, Sept. 12, 2001 (Joint filing from 40 companies in 25 countries, including Japan, Brazil, Thailand, Korea, the European Communities, Venezuela, Norway, India, New Zealand, and China), pp. 106-109 (Exhibit US-68); Prehearing Submission of the European Commission, Sep. 10,

included information on the Asian economic crisis, continuing post-dissolution difficulties in the former USSR republics, and the appreciation of the U.S. dollar.[8] The ITC held a series of public hearings at which various Commissioners directly solicited comments from the parties on unforeseen developments.[9] The ITC accepted post-hearing written submissions with no page limits, several of which also discussed the issue of unforeseen developments.[10]

4. The ITC provided multiple opportunities for the submission of evidence and views, and parties also had opportunities to respond to the representations of other parties. Facts and arguments regarding unforeseen developments were presented in the first written submissions to the ITC, leaving parties further opportunities not only to present their own evidence but also to comment on the evidence and views presented by other parties.[11] Those opportunities were widely utilized by producers and exporters from countries who now complain that their views were not sought.

2. Complaining parties argue that there need be a "linkage" between unforeseen developments and increased imports. Contrary to this argument, the United States argue that there need not be any causal link between unforeseen developments and increased imports. In Argentina - Footwear (para. 92), the Appellate Body held

> *that there is a logical connection between the circumstances described in the first clause - "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ... " - and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure. (emphasis added)*

What exactly is the meaning of "as a result of ... " and of the "logical connection" the Appellate Body mentions? How do the respective approaches of the complainants and the United States sit with Appellate Body jurisprudence on this point?

2001, pp. 4-5 (Exhibit US-69); AK Steel Prehearing Brief, Sep. 11, 2001, pp. 60-63 (Exhibit US-70); Prehearing Brief of United Steelworkers of America, Sep. 11, 2001, pp. 129-131 (Exhibit US-71); Prehearing Brief of Domestic Carbon Flat Steel Producers, Sep. 11, 2001, pp. 31-36 (Exhibit US-72); Respondents' Joint Prehearing Brief for Product #18, Seamless Tubular Products other than OCTG, Sep. 10, 2001, pp. 11-13 (Exhibit US-73); Minimill Coalition (Long Products) Prehearing Brief, Sep. 11, 2001, pp. 18-22 (Exhibit US-74).

[8] Prehearing Staff Report at OVERVIEW-22-24 and OVERVIEW-70-71 (Exhibit US-75).

[9] Tr., pp. 326-327 (Chairman Koplan) (Exhibit US-44); 343 (Commissioner Hillman) (Exhibit US-45); 1445 (Vice Chairman Okun) (Exhibit US-46); and 2626 (Vice Chairman Okun) (Exhibit US-47).

[10] *See, e.g.*, Joint Respondents' Posthearing Brief: Flat-Rolled Steel, Vol. II, Answers to Chairman Koplan, pp. 20-23, Oct. 1, 2001 (Exhibit US-75); AK Steel Posthearing Brief, Oct. 1, 2001, pp. 42-44 (Exhibit US-76).

[11] *E.g.*, AK Steel Prehearing Brief, Sep. 11, 2001, pp. 60-63 (Exhibit US-70); Prehearing Brief of United Steelworkers of America, Sep. 11, 2001, pp. 129-131 (Exhibit US-71); Prehearing Brief of Domestic Carbon Flat Steel Producers, Sep. 11, 2001, pp. 31-36, (Exhibit US-72); Respondents' Joint Prehearing Brief for Product #18, Seamless Tubular Products other than OCTG, Sep. 10, 2001, pp. 11-13 (Exhibit US-73); Minimill Coalition (Long Products) Prehearing Brief, Sep. 11, 2001, pp. 18-22 (Exhibit US-74).

5. The ordinary meaning of "result" is the "effect, consequence, issue, or outcome of some action, process, or design."[12] Thus, the use of "as a result of" indicates that one thing is the "effect, consequence, issue, or outcome" of another. In the case of Article XIX:1, these words indicate that importation of a product in such quantities and under such conditions as to cause serious injury must be the effect, consequence, issue or outcome of unforeseen developments.

6. A showing that a product is being imported in such quantities and under such conditions as to cause serious injury *as a result of* unforeseen developments by itself establishes a logical connection between the first and second clauses of Article XIX:1 (a). In other words, "as a result of" describes the link between unforeseen developments on the one hand and, on the other hand, imports in such quantities and under such conditions as to cause serious injury. There is no need for a further demonstration or explanation.

7. This approach conforms more closely to the text of Article XIX:1 and the reports of the Appellate Body than does the EC's alternative view that "as a result of" indicates that there must be a "causal link" between unforeseen developments and the increase in imports.[13] As we noted in our first written submission (paragraphs 931 and 932) Article XIX:1 requires that serious injury be "caused" by imports in such increased quantities and under such conditions, but that these conditions be "as a result of" of unforeseen developments. The use of different terms for these relationships indicates that the drafters of the GATT 1994 intended that the relationships be different. However, the EC interpretation would treat them as the same – "causal link" is the term used in Article 4.2(b) of the Safeguards Agreement to describe the relationship between increased imports and serious injury.

8. In addition, the Appellate Body has recognized that the first and second clauses of Article XIX:1 have different meanings. It characterized "as a result of unforeseen developments" as a "circumstance" that must be "demonstrated." In contrast, it characterized the requirement to establish that imports in such quantities and under such conditions as to cause serious injury, as "contain[ing] the three conditions for the application of safeguard measures."[14] The EC's view that there must be a "causal link" between unforeseen developments and imports in such quantities and under such conditions as to cause serious injury disregards the differences that the Appellate Body noted in the text.

9. In this case, the "logical connection" between the unforeseen developments identified by the ITC and the imports in such increased quantities and under such conditions as to cause serious injury is clear. The ITC determined that, after the beginning of the Asian and Russian financial crises, unusually large volumes of foreign steel production were displaced, and the U.S.

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

[13] EC first written submission, para. 120.

[14] *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 92 ("*Argentina – Footwear*").

market – in which demand remained strong – became the destination for a significant portion of the displaced foreign production.

3. Chinese Taipei has claimed that a "logical connection" is needed between unforeseen developments and all three conditions that need to be fulfilled for the imposition of a safeguard measure as set out in GATT Article XIX:1(a) and Article 2.1 of then Agreement on Safeguards. What are the parties' views in this respect?

10. Chinese Taipei's point appears to be that the unforeseen developments must be demonstrated at the same time and as part of the same analysis that leads to the conclusion that a product is being imported in such quantities and under such conditions as to cause serious injury.[15] It does not appear to be suggesting that there must be a logical connection between unforeseen developments and each of the three "conditions" for imposition of a safeguard measure. Chinese Taipei argues that a separate consideration of unforeseen developments would elevate this factor to an "independent condition" for imposition of a safeguard measure, rather than following the Appellate Body's finding that unforeseen developments is a mere "circumstance" to be "demonstrated."[16]

11. However, this approach would make the consideration of unforeseen developments a part of the analysis of the three "conditions" for imposing a measure, which would be directly contrary to the Appellate Body's treatment of these two concepts as different. Indeed, panels and the Appellate Body have uniformly analyzed unforeseen developments separate from increased imports, serious injury, and causation, evincing a clear understanding that this analysis is separate and distinct from the other obligations.[17]

12. If we have misread Chinese Taipei's argument, and it actually proposes that competent authorities must relate unforeseen developments to each of the three conditions for applying a safeguard measure, it is clearly mistaken. As the panel noted in *US – Lamb Meat*:

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

[15] Chinese Taipei third party submission, p. 8.
[16] *Argentina – Footwear*, para. 92.
[17] *E.g.*, *Argentina – Footwear*, paras. 76-147.

> enter "under such conditions" and to such an extent as to cause serious injury or threat thereof.[18]

This analysis recognizes that "in such increased quantities" and "under such conditions" are independent conditions, either or both of which may be the result of unforeseen developments. The fact that one of them results from unforeseen developments would not change if the other were unrelated to those developments. For example, if only the "increased quantities" of imports were "a result of" unforeseen developments, it would necessarily be true that imports "in such increased quantities and under such conditions as to cause increased imports" were "a result of" unforeseen developments. The same logic holds true if only the "conditions" under which imports occurred were "a result of" increased imports.

B. TO ALL COMPLAINANTS

5. Do only developments occurring after the conclusion of the Uruguay Round qualify as unforeseen developments?

13. No. As a general matter, unforeseen developments may refer to developments that occurred after other negotiating rounds.

14. The Appellate Body found that an unforeseen development is one that was "unexpected."[19] The working party in *Felt Hats* concluded that

> the term "unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[20]

Thus, an unforeseen development must occur "after" the "relevant tariff concession" or, presumably, other obligation was incurred by a Member under GATT 1994. Nothing in Article XIX restricts a Member contemplating a safeguard measure to consider only obligations or tariff concessions incurred during the Uruguay Round.

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[18] *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 Report of the Appellate Body, WT/DSD177/AB/R, para. 7.16 ("*US – Lamb Meat*").

[19] *Korea –Definitive Safeguard Measure on Imports of Dairy Products*, Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, para. 84 ("*Korea – Dairy*"); *Argentina – Footwear, para. 91.*

[20] *Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement on Tariffs and Trade*, Working Party Report, GATT/CP/106, adopted 22 October 1951, para. 9 ("*Felt Hats*").

15. A Member may conclude that an obligation or concession from the Tokyo Round, or before, is "relevant" to the analysis under the Safeguards Agreement. In that case, a development after the relevant obligation or concession, but before the conclusion of the Uruguay Round, could qualify as an unforeseen development withing the meaning of Article XIX.

16. This point is of largely academic interest in the *Steel* investigations, as the ITC found that U.S. Uruguay Round tariff concessions were the relevant concessions for its analysis of unforeseen developments. As we have shown in our written submissions and in the written responses to these questions, the developments identified by the ITC all occurred after the conclusion of the Uruguay Round.

6. Is the Russian crisis relevant only with regard to imports entering the United States from Russia or would it be relevant if the Russian crisis has resulted in steel exports to other countries which in turn and as a consequence exported more steel to the United States?

17. The Russian crisis is relevant because of both the increase in direct imports from Russian and the displacement of third-country shipments into the U.S. market. Both the Russian crisis and the Asian financial crisis had similar, relevant effects. Both sets of events resulted in steel production being displaced from a wide variety of other markets into the U.S. market.[21]

7. How specific must the effects of unforeseen developments on increased imports be and why?

18. The only requirement under Article XIX:1(a) is that the imports in such increased quantities and under such conditions as to cause serious injury must be "as a result of" increased imports. The text does not require any degree of specificity. Thus, as long as the increased quantity of an imported product or the conditions under which it is imported are the result of an unforeseen development, it is irrelevant whether that development had other effects.

19. Furthermore, the unforeseen developments do not have to be developments that affect only one economic sector. During the first meeting of the panel, the EC representative argued that unforeseen developments that affected multiple economic sectors might not be sufficient to meet the Article XIX standard. However, there is nothing in Article XIX that requires that unforeseen developments solely or primarily impact a single sector. The implication of the EC's proposed rule would be that Members would have greater flexibility to deal with narrow economic disruptions but limited or no authority to deal with truly dramatic economic events, such as the Asian financial crisis. This cannot be the case.

20. Complainants object to the fact that the unforeseen developments identified by the ITC might have changed the volume of imports of other products not subject to the steel

[21] ITC Second Supplemental Report at 3-4.

investigation. As a factual matter, the unforeseen developments identified by the ITC did result in a wide variety of steel products being imported into the U.S. market in increased quantities and under such conditions as to cause serious injury to the relevant domestic industries. However, nothing in Article XIX requires that unforeseen developments *only* result in increased imports of one particular product. By this line of reasoning the change in fashion cited in *Felt Hats* might not have been an unforeseen event, since increased demand for a particular style of hat might have also increased demand for a particular style of glove or a particular shade of lipstick.

9. Does the fact that crises occur regularly and in many places mean that a particular crisis or is not unforeseen?

21. A particular crisis could be unforeseen. In *Felt Hats*, the working party found that hat styles changed frequently, and that the likelihood of changes in hat styles was foreseeable. Nonetheless, the working party found that the negotiators did not foresee the degree of the particular change or its effect on the domestic industry, and thus that particular fashion change was an unforeseen development. Under Article XIX it is not relevant whether unrelated, but similar developments, were foreseen. The issue is explained further in the next question.

10. Why and in what sense are exchange-rate developments foreseeable?

22. That exchange rates change over time could be described as foreseeable; economies grow at different rates and at different times, which affects the relative value of their currencies. However, the relevant test under Article XIX is not what is foreseeable, but what is foreseen.[22] Under that test, particular exchange rate developments, such as an unusually rapid or severe change in exchange rates, are not likely to have been foreseen, or even foreseeable, at the time of a particular concession.

23. Complainants have presented no evidence that the currency disruptions that occurred prior to the import surges were in fact foreseen by anyone, much less that those events were foreseen by any negotiator from the United States during the Uruguay Round. Information cited by the ITC indicated that these crises were in fact unforeseen, not only by negotiators, but also by professional economic forecasters right up until the time they began, and the severity of these crises was not fully appreciated even after events had begun to unfold. Economic forecasts prepared as late as October 1997 still projected "robust growth trends in most of the developing world," including most of Asia and Russia and other former USSR republics.[23]

24. Economic data from that time period indicates that there was little reason to expect significant economic contraction in either Southeast Asia or the former USSR republics. Prior to

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[22] *Korea – Dairy* para. 87; *US – Lamb Meat*, Panel Report, para. 7.22..

[23] Minimill Coalition (Long Products) Prehearing Brief, Exhibit 19 (World Economic Outlook, Oct. 1997, p. 1) (Exhibit US-74).

the onset of these currency crises, the economies of Southeast Asia had experienced a period of consistent growth[24] and moderate inflation and had fairly disciplined macroeconomic policies.[25] Most of the former USSR republics had achieved positive growth rates in 1996 and in 1997.[26] Nonetheless, by late 1997 markets in these countries had been seriously destabilized, growth had contracted sharply, growth forecasts were downgraded, and steel production was being displaced into other markets, notably the United States.

11. Must the entirety of the unforeseen development have occurred after the concession in the sense of Article XIX of the GATT has been made?

25. As we noted in our first written submission, Article XIX implies a sequencing of an obligation or tariff concession, followed by an unforeseen development, followed by imports in such increased quantities and under such conditions as to cause serious injury.[27] The working party reached a similar conclusion in *Felt Hats*, finding that the "development" must occur after the relevant tariff concession (or, presumably, some other obligation).[28]

26. These sources do not address whether the entirety of a development must occur after the obligation or concession. The ordinary meaning of "development" is "a result of developing; a change in a course of action or events or in conditions . . . an addition, an elaboration."[29] Thus, a development is best understood as a change of some kind, which is "unforeseen" if a Member's negotiators did not expect it to occur at the time they undertook the relevant obligation or concession.[30] Since *Felt Hats* indicates that the "development" must occur after the obligation or concession, we conclude that the change in question should begin after that time.

27. *Felt Hats* provides a good example of how this analysis works. The working party found that hat styles changed continually, and that the likelihood of change was entirely foreseeable. However, it found that the negotiators did not foresee the degree of a particular change or its effect on the competitive situation faced by the domestic industry, and that these represented an unforeseen development. Thus, the existence of a particular condition at the time of an obligation or tariff concession (the continual evolution of hat styles) does not prevent a change in that condition (a large and sustained shift in style) from being treated as an unforeseen development.

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[24] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Oct. 1996, p. 26) (Exhibit US-74).

[25] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Dec. 1997, p. 3) (Exhibit US-74).

[26] Minimill Coalition (Long Products) Prehearing Brief at Exh. 19 (World Economic Outlook, Oct. 1997, p. 27), Exhibit US-15.

[27] U.S. first written submission, para. 934.

[28] *Felt Hats*, para. 9.

[29] The New Shorter Oxford English Dictionary, p. 634.

[30] *Argentina – Footwear*, AB Report, para. 91.

28. In the *Steel* investigation, each of the unforeseen developments began after the Uruguay Round negotiations. The East Asian financial crisis began in mid-1997,[31] and the particular financial disruptions and currency fluctuations cited by the ITC began in 1997, also after the Uruguay Round negotiations.[32] Thus, while the Soviet Union may have collapsed in 1989, with resulting dislocations in the successor states, these are not the developments that the ITC found to be unforeseen. Rather, the development in question was that those countries' condition changed after 1996 from the condition prevalent at the time of the Uruguay Round negotiations.

12. What reference period must be used for the assessment of unforeseen developments? Does there have to be a coincidence with the period examined with regard to increased imports and serious injury and if so why?

29. The reference period for assessing unforeseen developments could be any period after the relevant tariff concession was made. In addition, Article XIX implies that the unforeseen developments begin prior to the increase in imports. Thus, the time when injury caused by increased imports occurred could begin after the period when the unforeseen developments occurred. This does not necessarily mean that a longer period of investigation would be required for the assessment of unforeseen developments than for injury, since the period examined in the investigation of serious injury needs to be "sufficiently long to allow conclusions to be drawn."[33] Therefore, any reference period used for the determination of increased imports and serious injury should include some period of time before the import surge began so that the increase in imports and the effects of that increase could be determined.

13. Is there an objective standard of what is unforeseen, or is it a subjective standard to be applied from the perspective of the Member applying a safeguard measure?

30. The United States notes in this regard the finding of the panel in *US – Lamb Meat* that:

> We find the distinction drawn by the Appellate Body between unforeseen and unforeseeable to be important. In our view, the former term implies a lesser threshold than the latter one. That is, what may be unforeseen, as a matter of fact, within the meaning of unexpected by a particular individual or entity and in a particular situation, may nonetheless be foreseeable or predictable in the theoretical sense of capable of being anticipated from a general, scientific perspective. We believe that a panel's review of a Member's safeguard determination must be specific to the factual circumstances of the particular case

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[31] US first written submission, para. 961.

[32] U.S. first written submission, para. 968.

[33] *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Pipe from Korea*, Panel Report, WT/DS202/R, adopted 8 March 2002, para. 7.200.

at hand, that is, we must consider what was and was not actually "foreseen", rather than what might or might not have been theoretically "foreseeable".[34]

14. Must unforeseen developments continue to have an effect up until the recent past?

31. No. In the course of the steel investigation, producers and exporters from various complainants admitted as much, stating that "[t]here can be a reasonable time lag in between the unforeseen development and the increase in imports leading to serious injury.... [T]he time it takes for market participants to react to certain forces may be much longer. Beyond the simple supply and demand forces at play, various business cycles may influence business decisions and either exacerbate or dampen the change in trade flows."[35] In fact, there is no requirement that unforeseen developments be "recent." As long as they occurred after the relevant tariff concession and resulted in increased imports, that is sufficient to meet Article XIX requirements. When the development ended of if it did is not relevant.

15. Switzerland argues that the unforeseen development was considered and reported on after the initial ITC determination but that it does not feature in the original report. What is the "report" for the purposes of the Agreement on Safeguards? What constitutes a "determination" for the purposes of Article 2 and 4 of that Agreement? When was the US determination, within the meaning of Articles 2 and 4 of the Safeguards Agreement made?

32. Complainants have provided no basis to conclude that presenting the report of the competent authorities in stages is inconsistent with the Safeguards Agreement. They cannot. Although Article 3.1 requires a certain content for the report and specifies that it be published promptly, it does not require a specific format. In fact, the *Chile – Price Band Systems* panel has already accepted a multi-stage document (the Minutes for periodic meetings of Chile's Competition Committee) as the report of the competent authorities for purposes of Article 3.1. Thus, Members retain the discretion to decide whether to issue the report all at once or in components.[36]

33. The determination for purposes of Articles 2 and 4 of the Safeguards Agreement is the legal conclusion of the competent authorities as to whether a product is being imported in such increased quantities and under such conditions as to cause serious injury. The U.S. determination in this sense was made on October 22, 2001.

C. TO THE UNITED STATES

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[34] *US – Lamb Meat*, Panel Report, para. 7.22.

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

[36] *Chile – Price Band System*, Panel Report, WT/DS207/R, adopted 23 October 2002, para. 7.131.

16. Can the United States further explain what the ITC considered the "logical connection" to be between decreased consumption of steel products in Asia and the former Soviet Union during their respective crises and increased imports into the United States at the time the ITC made its determination on unforeseen developments?

34. The contraction in steel consumption was symptomatic of the dislocations in the respective steel industries in Southeast Asia and the former USSR republics as a result of the currency crises that beset those economies. These significant changes in consumption indicated both an increased pressure to export domestic production that could not be consumed in the domestic market and foregone import consumption; those foregone imports were also displaced into the world steel market.

35. Below are the figures which were used to create Figure OVERVIEW-7, cited in the ITC's Second Supplemental Report.

Apparent Consumption of Finished Steel Products
(in thousands of short tons)

	1991	1992	1993	1994	1995	1996	1997	1998	1999
Indonesia	4,524	4,588	5,063	5,819	7,020	7,632	7,567	3,165	3,500
Korea	26,956	24,052	27,829	33,632	39,164	41,428	42,049	27,568	37,517
Malaysia	4,020	4,394	5,275	4,579	8,413	8,541	8,897	3,643	5,368
Philippines	2,087	2,241	2,739	2,724	3,771	5,028	4,646	3,298	3,645
Thailand	6,881	8,353	8,572	8,853	10,072	9,915	8,449	4,314	6,453

Source: IISI Steel Statistical Yearbook 2000, cited in ITC Report Figure OVERVIEW-7.

Change in Apparent Consumption from Previous Year
(in thousands of short tons)

	1991	1992	1993	1994	1995	1996	1997	1998	1999
Indonesia	(86)	64	475	756	1,200	613	(65)	(4,403)	335
Korea	4,850	(2,903)	3,777	5,803	5,532	2,264	621	(14,481)	9,949
Malaysia	1,142	374	881	(696)	3,834	128	356	(5,254)	1,725
Philippines	237	154	498	(15)	1,047	1,257	(381)	(1,348)	347
Thailand	287	1,473	218	281	1,219	(157)	(1,466)	(4,135)	2,138

Source: IISI Steel Statistical Yearbook 2000, cited in ITC Report Figure OVERVIEW-7.

36. As these figures show, the degree of dislocation experienced by these economies was severe. The first graph in Exhibit US-78 show more clearly the shortfall in the recovery that occurred in 1999. Although consumption expanded somewhat after the sharp contraction experienced in 1998, consumption remained well below 1995-1997 levels.

37. Complainants have taken issue with this interpretation, arguing that the steep declines in consumption might have been caused by disruptions in production, leaving no excess, unconsumed steel production to be exported into other markets. However, Complainants point to no evidence in the record indicating that any such disruptions occurred. Furthermore, Complainants' argument overlooks the fact that imports *into* those countries also were affected by the sharp contraction in consumption. Even if production in the affected countries had declined, leaving no excess for export–and there is no evidence in the record to indicate that this occurred–imports that otherwise would have been consumed in those countries still would have been displaced out into the world market.

38. The second graph in Exhibit US-78 shows the increasing discrepancy between production and consumption in the former USSR republics. The domestic markets of the former USSR republics were unable to absorb significant portions of local production. In 1994, steel production was approximately 2.28 times greater than consumption; this ratio peaked in 1998, when steel production was more than 2.58 times greater than consumption. This indicates that these industries were under constant, and increasing, pressure to find export markets for this excess production. The pressure to find additional export markets was exacerbated by the Asian financial crises that began in 1997, insofar as Asia had been an important export market for steel produced in the former USSR. Furthermore, the Asian currency crises spilled over and placed greater pressure on the currencies of the former USSR republics and curtailed growth there as well.[37]

17. Did the ITC consider the effect of the Russian crisis on countries other than the United States? Did the United States impose trade restrictions on imports from Russia before or during the period of investigation?

39. The ITC found that the currency crises in the Southeast Asian countries and the former USSR republics displaced steel from those markets into the world market.[38] To that extent, the ITC considered the effect of these financial crises on other markets. The ITC did not attempt to more fully document the effects of that displaced steel consumption on other economies, and nothing in Article XIX or the Safeguards Agreement imposed a responsibility on the ITC to conduct such an analysis.

40. The United States reached an agreement with Russia limiting the importation of certain steel products in July, 1999. The existence of the agreement was specifically noted in the ITC Report.[39] That agreement did not limit Russian exports to other countries, nor could it prevent steel in other markets from being displaced by Russian exports into the U.S. market. Nor was the agreement sufficient to halt the flow of imports in increased quantities into the U.S. market.

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[37] Minimill Coalition (Long Products) Prehearing Brief, Exh. 19 (World Economic Outlook, Dec. 1997, pp. 20 and 30) (Exhibit US-74).

[38] ITC Second Supplemental Report at 3-4.

[39] ITC Report at 35 n.57 and 58 n.259.

18. Are you relying/did the ITC rely on the robustness of the United States Dollar as an unforeseen development?

41. The robustness of the United States dollar was a development which combined with the other developments, namely, the currency crises in Southeast Asia and the former USSR countries and the continued growth in steel demand in the U.S. market as other markets declined, to produce the increased volume of imports.

II. "SUCH PRODUCT" (ARTICLE 2.1) OR THE "IMPORTS" SUBJECT TO THE INVESTIGATION

A. TO ALL PARTIES

19. What is a product? Are there any criteria for assessing the parameters of "such product" in "such product being imported into its territory…"

42. 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 Safeguards Agreement does not establish any parameters for defining "such product."

43. The ordinary meaning of product indicates that it is a flexible term: "[a] thing produced by an action, operation, or natural process; a result, a consequence; *spec[ifically]* that which is produced commercially for sale."[40]

44. The examples of usage in the *Oxford English Dictionary* illustrate the flexibility of the term "product", recognizing that it may mean

- something abstract ("Universal education was a product of the democratic movement.");
- a particular item made by a producer ("How many different products this firm made."); or
- a "collective" encompassing many items ("Not a . . wonderful year for albums; too many disappointments, too much product.").

[40] The New Shorter Oxford English Dictionary, p. 1367.

Thus, the dictionary definition affirms that the meaning of the term "product" depends on the context in which it is used. In almost every situation in which items may be referred to as a "product," it is possible to discern both a broader "product" of which that product is a subset, and a subset of that product that itself may be referred to as a "product."[41] This definition incorporates the very types of inquiries that the ITC performs in the application of its five-factor standard.

45. The following discussion sets forth U.S. practice generally in safeguard investigations regarding defining the domestic product that is like the imported product, and thus identifying such product for purposes of Article 2.1. The ITC's practice is consistent with the ordinary meaning and consistent with U.S. obligations under the Safeguards Agreement.

46. First, the request or petition identifies the universe of imports subject to investigation (*i.e.*, it identifies the subject imports).

47. These subject imports are the starting point for the ITC's analysis.[42] The ITC has no authority, under U.S. safeguards law to exclude imports that have been identified in the request or petition as subject to investigation, from its injury analysis and determination(s).[43]

48. Second, the ITC considers whether there are domestic products that are like the subject imports. This analysis considers whether subject imports and domestic products generally share similar physical properties, uses, production processes and marketing channels. This comparison shows whether domestic and imported products are similar and whether they are interchangeable, and as such whether they compete with each other.

49. Third, the ITC applies its long established factors to the domestic products corresponding to the subject imports to consider whether there are clear dividing lines among domestic products in order to define like products.[44] 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.

50. Fourth, based on the above analysis, the ITC defines its like product or products and defines its domestic industry or industries as the producers of the defined like product(s). The ITC identifies the subject imports (or specific imported product) that corresponds or matches up to each of its like product definitions in order to conduct each of its analyses of whether

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[41] For example, depending on context, each of the following could be considered a "product": a disposable, retractable blue ball point pen; all disposable blue ball point pens together; all disposable ball point pens together; all ball point pens together; all disposable pens together; or all pens together.

[42] *See also* U.S. first written submission, paras. 94-102.

[43] Even assuming that the ITC had authority to expand the scope of a proceeding, it has never done so.

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

increased imports of the product have caused serious injury to the domestic producers of the like product.

51. Thus, the ITC has identified a product within the meaning of Article 2.1 of the Safeguards Agreement for its increased imports, serious injury, and causation analyses. 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. methodology is inconsistent with the Safeguards Agreement.

20. Does each tariff line correspond to a distinct or specific product?

52. Generally, no. As discussed in response to question 19, the process of defining the domestic like product and the corresponding specific imported product is based on an analysis of the facts in each particular case. While consideration of customs treatment may be a relevant factor in such an analysis depending on the facts of a particular case, it still is one of a number of criteria.[45] The Appellate Body in *Japan-Alcohol* 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 factor.[46] Moreover, 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.[47] Defining the domestic product like or directly competitive with the imported product must be based on the evidence gathered during the investigation and an analysis conducted weighing each factor, as appropriate for the facts of and context of each particular investigation.

21. New Zealand suggested during its oral statement that the likeness criteria should be applied in defining the boundaries of the "imported product". Is New Zealand arguing that there is an inherent likeness requirement in the concept of product? Do parties agree with this approach?

53. New Zealand appears to argue in its oral statement regarding the likeness criteria that specific imported products should be identified or subdivided prior to defining the like product. However, it is not clear how subdividing or explicitly defining the imports as separate products

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[45] *See also* U.S. first written submission, paras. 86-89.

[46] *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, para. 5.6.

[47] Moreover, a number of prior safeguard disputes have involved single like products covering multiple tariff classifications. *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.

prior to defining corresponding domestic like products would have necessarily resulted in different like product definitions.

54. As discussed in response to question 19, the ITC considers what domestic products are like or directly competitive with the subject imports as identified in the request or petition. In this case, 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 is like corresponding domestic steel. Complainants have not disputed that the imports and domestic products are generally the same types of steel. The Safeguards Agreement uses the term "like or directly competitive products" to describe the relationship between the imported and domestic products, i.e., the domestic products must be like or directly competitive with the imported product. It does not use the term "like or directly competitive" to describe the relationship among imported products or among domestic products.

55. Part of the confusion on this issue may relate to the fact that the ITC uses the "like" in two contexts. First, it identifies the universe of domestic products that are like the universe of imported products covered by the request for the investigation or petition. This is essentially how the Safeguards Agreement uses the term "like" product.

56. Second, the ITC then applies its long established factors to the domestic products corresponding to the subject imports to consider whether there are clear dividing lines among domestic products in order to define the like products. If there are multiple domestic like products corresponding to the subject imports, the ITC identifies the subject imports (or specific imported product) that corresponds or matches up to each of its like product definitions in order to conduct each of its analyses of increased imports, serious injury, and causation.

22. Why is the imposition of a different remedy for one specific product (slab for instance)) considered to be an indication that it is a distinct like product? Isn't it always possible to reduce a product to another sub-product?

57. For the reasons we discuss in response to question 59, the Safeguards Agreement permits the application of a safeguard measure at different levels to different items covered by that measure, and the complete nonapplication of the measure to some items.

58. With regard to the second part of the question, the term "product" is quite flexible. It can apply to one particular item sold, to a group of items, or to a class of items. For example, depending on context, each of the following could be considered a separate "product":

- a disposable, retractable blue ball point pen;
- all disposable blue ball point pens together;
- all disposable ball point pens together;

- all ball point pens together;
- all disposable pens together;
- all pens together.

In almost every situation in which there is a "product" it is possible to discern both a larger "product" of which that product is a subset, and a subset of that product that is itself a "product."

23. Is it acceptable under the Safeguards Agreement for competent authorities to first identify the domestic industries (domestic product) that have been injured and then secondly to identify the specific imported products that are considered to have caused the injury?

59. Yes. Article 4.2(a) sets out the requirements for the competent authorities' determination whether increased imports have caused or are threatening serious injury to a domestic industry – they must evaluate certain factors, establish a causal link, and ensure nonattribution. Although the text indicates *what* the competent authorities must do before reaching a determination, it does not require them to perform these tasks in a particular order.

60. Thus, it would be permissible for the competent authorities to first identify whether a domestic industry was injured, and then analyze whether increased imports were a cause of that injury. There is even some logic in using injury as a threshold condition, as an analysis of the condition of the industry would facilitate the analysis of whether products were imported in *such* quantities and under *such* conditions as to cause serious injury.

61. However, this is not what the ITC did. It first considered the merchandise subject to investigation, identified the identical domestically produced steel, divided the domestic steel into discrete like products, and divided imports into the same categories. The ITC then considered whether data pertaining to the entire period of investigation demonstrated that those imports had increased. Its analysis of serious injury and causation then evaluated whether these were such increases and under such conditions as to cause serious injury. In so doing, it demonstrated that the increases in question were recent enough, sudden enough, sharp enough, and significant enough to cause serious injury.

B. TO THE UNITED STATES

24. Could the United States explain the process by which and the criteria that were applied in finally deciding upon 27 like products as the subject of its investigations given that data had originally been collected on 33 imported products?

62. In this safeguard investigation, the President's request identified the universe of imports subject to investigation, *i.e.*, the subject imports.[48] The President's request grouped the wide array of steel imports into four general categories: (1) certain carbon and alloy flat products, (2) certain carbon and alloy long products, (3) certain carbon and alloy pipe and tube products, and (4) certain stainless steel and alloy tool steel products. While the ITC was not bound in any way by these groupings, it found that they provided a useful starting point for its analysis. The ITC found that the broad array of products in each of the four groupings tended to share some common properties and uses, and share distinct differences from products in the other groupings.

63. Thus, the ITC used each of these four general categories as the starting point for conducting its further analysis. The ITC considered whether there were domestic products like subject imports and found that domestic and imported steel consisted mainly of the same types of steel and generally were interchangeable; Complainants have not disputed that the imports and domestic products are generally the same types of steel. The ITC applied its traditional like product factors as discussed above to the domestic products corresponding to the subject imports in each of the four general categories and looked for clear dividing lines among domestic products in order to define the like products.

64. Based on its analysis, the ITC determined that there were 27 separate like products and defined 27 domestic industries consisting of producers of each of the defined like products. The ITC then conducted its injury analysis with respect to specific subject imports that corresponded or matched up to each of its like product definitions. As discussed in response to question 25 below, the 33 data collection categories were not the starting point for the Commissioners' like product analysis. Rather these staff-generated categories were used to collect data in the most detailed manner reasonably anticipated by staff, with advice from the parties, to provide useful information.

25. What were the criteria for delineating 33 products as the starting-point for the investigation?

65. The 33 data collection categories were generated by ITC staff as the most reasonably detailed break-outs of the steel subject to investigation for which the ITC staff, with advice from the parties to the proceedings,[49] anticipated that it would be able to obtain useful information from questionnaire responses and other sources. These data collection categories were not delineated by the competent authorities, i.e., the Commissioners. The Commissioners conducted no analysis and made no findings in order to generate these categories. The starting point for the Commissioners' like product analysis was the imports subject to investigation as identified in the request.

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[48] *See* U.S. first written submission, paras. 84, 113-115, and n. 143.

[49] *See* 66 Fed. Reg. 34717 (June 29, 2001). The ITC received at least 50 sets of comments in response to this opportunity to comment on the draft questionnaires.

26. What criteria did the ITC use in determining that the carbon steel flat rolled product was a single imported product and a single domestic like product?

66. The ITC applied its traditional factors as listed in response to question 24 above in determining that there was no clear dividing line between types of certain carbon flat-rolled steel ("CCFRS") and defining it as a single like product, corresponding to a single imported product.

67. 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).[50]

68. 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.[51] For example, slab is feedstock for hot-rolled steel (sheet, strip, and plate);[52] hot-rolled steel is feedstock for cold-rolled steel and cut-to-length plate; and cold-rolled steel is feedstock for coated steel.[53] 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.[54] Substantial quantities of earlier processed steel are internally transferred for production of further processed steel.[55] The ITC

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

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

[52] 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.

[53] 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.

[54] Moreover, the evidence shows that advances in technology have blurred the former differences in hot-rolled production processes for sheet/strip and plate. The Steckel mills permit rolling to thinner gauges than a traditional reversing mill thus permitting a producer to switch production between sheet and plate. Steckel mills also allow steelmakers to coil the finished plate, as on a hot-strip mill. Moreover, the addition of temper mills to CTL lines has made heavy gauge hot-rolled interchangeable with discretely produced plate. Without the temper mill process, coils cut into lengths tend to retain memory and "snap back" or bend after the initial flattening. While plate in coils can only be produced in thicknesses up to 3/4 inch and thus can only be substituted for CTL plate up to 3/4 inch thick, this portion of the CTL plate market is large. There is evidence that some mills can produce plate in coils in gauges up to one inch. Thus, the share of the CTL plate market which can be, and is being, supplied with plates cut from coil is substantial. ITC Report, p. 40-41.

[55] 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.

found that this tends to blur product distinctions until the processing reaches its final stages since earlier stages of steel simply are feedstock for the next stage.[56]

27. On what basis did the ITC decide that tin mill was a distinct imported product rather than a CCFRS product?

69. In applying the traditional like product factors to the general category of carbon and alloy flat steel, four Commissioners found a clear dividing line between CCFRS and tin mill products.[57] In particular, they found that cold-rolled feedstock used to make tin mill products was further processed than required to make CCFRS steel. In addition, tin mill is used, for example, for the production of containers, packaging, and shipping materials. In contrast, CCFRS was used primarily in production for the automotive and construction industries. Tin mill steel was overwhelmingly sold directly to end users, almost exclusively under long-term contracts, whereas the majority of CCFRS was internally transferred for use in later stages of processing CCFRS.

28. What are the key defining characteristics of tin mill products?

(a) Are there specific sub-products within this alleged 'category' of products'?

(b) If so, on what basis did the ITC decide to treat tin-mill products as a single product for the purposes of its investigation?

70. Tin mill is made of cold-rolled steel that has been coated with tin or chromium or chromium oxides. The like product, "tin mill", consists of a continuum of tin or chromium coated products that, similar to most "like product" definitions, includes a range of varying sizes, coatings, grades, etc. As discussed in response to question 27, the four Commissioners found that the continuum of tin mill shared similar physical properties or characteristics, uses, manufacturing processes, and marketing channels.[58]

29. Why was slab treated as part of the CCFRS product for the purposes of the injury determination but was singled out for a separate remedy?

71. In determining that there was no clear dividing line between slab and other CCFRS, the ITC recognized that slab is dedicated for use in producing the next stage of steel, hot-rolled steel.[59] Moreover, slab shares common metallurgical properties with CCFRS. Such properties

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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.

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

[57] *See* U.S. first written submission, paras. 143-144; ITC Report, pp. 48-49.

[58] *See* U.S. first written submission, paras. 143-144; ITC Report, pp. 48-49.

[59] *See* U.S. first written submission, paras. 119-121; ITC Report, pp. 37-40.

and essential characteristics are embodied in the steel prior to the casting into slab. Slab also shares common manufacturing processes with all CCFRS at the initial stage since all CCFRS is derived from slab.

72. The ITC recognized in the present case that there had been a number of technological changes in the steel industry since its *1984 Steel* case, which had treated all such semi-finished products as slabs and billets as a separate like product.[60] The ITC found that the advent of the continuous casting process for the production of slab rather than the ingot teeming process for ingots, billets, and blooms had resulted in less similarity among these semifinished products and processes and more continuity in the production processes between slab and hot-rolled products.[61] Moreover, the evidence demonstrated that the distinction between the production of a semifinished and hot-rolled product had been further blurred due to the increased use of electric arc furnaces that produce "thin slabs" that continue immediately into hot-rolled production, *i.e.*, minimill production. Complainants' attempts to distinguish slab from CCFRS in other stages of processing fails to recognize that hot-rolled steel and cold-rolled steel also are primarily feedstocks or "semi-finished products" and the fact that technological advances have resulted in less similarity among such "semi-finished products" as slab, billets, ingots, and blooms than at the time of *1984 Steel*. The fact is slab production is less distinct with more continuity in the processing to the next hot-rolling stage due to both the continuous casting and the electric arc furnaces than at the time of the *1984 Steel* safeguards case.

73. With regard to the slab remedy, as we have explained in response to question 100, the Safeguards Agreement does not require the application of a measure at the same level for every item encompassed by the imported product. Rather, each safeguard measure must be crafted to achieve the purpose of the Safeguards Agreement – to provide an effective remedy to serious injury caused by increased imports and an opportunity for an industry to adjust to those imports. In the case of slab, the President decided that application of the 30 percent safeguard tariff to imports below recent levels would was not part of the package that would "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[62]

30. Is the assertion made by the United States that "traditionally, the ITC has looked for clear dividing lines among possible products, and has disregarded minor variation" also relevant to the determination of imported product?

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[60] *See* U.S. first written submission, para. 133; ITC Report, p. 45.

[61] In continuous casting, the molten steel is poured into a mold that has cross-sectional shape of the desired semifinished form. The steel is poured continuously into the mold and solidifies as it passes through and out the bottom portion of the mold. The solidified steel is cut off below the mold into the desired lengths for further processing. In the ingot process, molten steel is poured into an ingot mold where it solidifies. After solidification, the ingot is removed from the mold and placed into a furnace to bring the ingot to a uniformly high temperature throughout. The ingot is then placed into a mill that shapes the ingot into a semifinished form. *See* ITC Report, pp. OVERVIEW-8-10.

[62] Proclamation 7529, recital 14.

74. Yes, in effect it would be relevant since each of the like products corresponds and is coextensive with each imported product to which the ITC conducted its increased import, serious injury, and causation analyses.

C. TO THE COMPLAINANTS

31. In its oral statement, Japan states that in grouping fittings and flanges the ITC did not mention the fact that fittings and flanges are subject to different tariff classifications at the 6-digit level. Do parties consider that tariff classifications should be used as a basis for defining the imported product?

75. See U.S. response to question 20.

III. INCREASED IMPORTS

A. TO ALL PARTIES

36. The Appellate Body has stated that not any increase in imports is sufficient for the purposes of the Agreement on Safeguards. Does this mean that there is an absolute standard? In other words does it mean that there is a threshold that must be met irrespective of the question of causation of serious injury by the increased imports or rather this mean that only increases that cause serious injury in specific cases suffice and that this determination can only be done on a case by case basis?

76. The Appellate Body was clear in *Argentina–Footwear* (para. 131) that there is <u>not</u> an absolute standard for an increase in imports:

> Again, and it bears repeating, not just any increase in imports will suffice. There must be "such increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language on both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports much have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury."

Because the increase must be recent, sudden, sharp, and significant <u>enough</u> to cause or threaten serious injury; and because the circumstances affecting each industry at any given time will be unique; this determination of necessity can only be made on a case-by-case basis. There is no language in the Safeguards Agreement from which an absolute standard (either as to the amount of the increase in imports or the period in which the increase occurs) can be derived. This question is addressed in paragraph 177 of the U.S. first written submission.

37. You argue that the increase in imports must be sharp and significant. Are these attributes derived from the requirement of increased imports, and if so, on what basis, or are they derived from the requirement of causation of serious injury? Does this requirement arise from a contextual interpretation of "increased imports" (in the context of the requirement of "is being," causation of serious injury or threat thereof)?

77. There is no support in the language of the Safeguards Agreement for concluding that the attributes "sharp and significant" arise solely from the requirement of increased imports. The attributes of "sharp and significant" arise from the interpretation of "increased imports" in context, i.e., due to the relationship of this term to the causation requirements in Article 2.1. The Appellate Body was very clear – the increase in imports must be recent *enough*, sudden *enough*, sharp *enough*, and significant *enough* to cause or threaten serious injury.[63]

38. What is the relevance of data pertaining to the full year of 2001? Does it matter that these data became available only after the date of the ITC determination?

78. Data pertaining to the full year of 2001 have no relevance to the ITC's injury determination. As explained in the U.S. first written submission (paras. 201-207), the ITC gathered data for the most recent period that was possible in light of when its investigation began, that is, for the first six months of 2001. Data pertaining to the full year of 2001 also have no relevance to the President's decision regarding safeguard measures. For the President to take into account import data that were not available to the ITC would amount to severing the connection between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure. This would be inconsistent with the fundamental premise of the Safeguards Agreement that a measure should only be taken following a proper investigation by a Member's competent authorities.

79. Moreover, safeguard proceedings are proceedings on a record, and there is no data on the record concerning the third and fourth quarters of 2001.

39. What is the relevance of the fact that the Presidential decision was taken after the ITC determination?

80. Because the President took his decision to apply safeguard measures after the ITC completed its investigation, made its determination, and issued its report pursuant to Articles 3.1 and 4.2(c), the President was able to base the measures on the injury attributable to increased imports, as identified by the ITC.

81. The timing of the President's decision does not create an obligation to update the data upon which the ITC relied, or to revisit the ITC determination to decide whether it was valid in

[63] *Argentina–Footwear*, AB Report, para. 131.

light of subsequent events. As the United States noted in its oral statement, such an obligation would turn safeguards proceedings into perpetual investigations, with the certainty that new data is always available preventing any final decision.

40. If the competent authorities must focus on the recent past, does this mean that an importing Member may have to act quickly, lest it should forego the right to take a safeguard measure?

82. If a panel or the Appellate Body were to find that the Safeguards Agreement prevented application of a safeguard measure any time that imports abated, however slightly, after an increase, Members would have to commence safeguard proceedings immediately after detecting an increase in imports. Otherwise, they would risk losing their right to apply a safeguard measure, regardless of how seriously the increased level of imports was injuring their domestic industry. This likelihood would create a major disincentive against waiting to see whether the domestic industry could cope on its own with heightened levels of imports. The number of safeguard investigations would probably grow, because Members seeking to preserve their rights would have to commence investigations before full data was available. Of course, they could terminate the proceedings if serious injury did not materialize, but only after having pointlessly expended administrative resources.

41. How accurate is the self-defense analogy, given that the criteria relevant in a safeguard investigation are mostly threshold criteria (increased, serious injury, causation), so that there may be continued effects arising from imports even where a required threshold would be no longer met?

83. The EU's first written submission (para. 327) states: "[t]aking a safeguard measure despite a significant decrease in imports would be tantamount to claiming self-defense when shooting at an aggressor who is already running away, i.e., when the danger is no longer imminent."

84. The United States believes that the self-defense analogy used by the EU is inaccurate, for the reasons alluded to by the question: the effects of increased imports on the domestic industry may continue to be felt – or even become most intense – after a surge in imports has subsided. The problem with the EU's analogy is that it analogizes taking a safeguard measure to shooting an aggressor. It might be more accurate, in this context, to say that taking a safeguard measure is akin to protecting the victim of aggression to ensure that the aggressor does not return while the victim is still hurt and vulnerable.

42. You argue that a steady increase of imports is not sufficient under the Agreement on Safeguards because "such an increase is adjustable". Is this statement always valid or does it rather depend on whether serious injury has been caused by these imports?

85. Neither the Agreement on Safeguards nor Article XIX of GATT 1994 contemplates that safeguard relief will be available only if imports increase in a particular pattern. The effect of any particular increase in imports must be judged by the competent authority as part of its causation analysis. This is a factual determination that must be made on a case-by-case basis. Clearly there are circumstances where a steady increase in imports will cause, or threaten, serious injury.

86. Furthermore, there may be limits to an industry's ability to adjust; by the time the industry has adjusted to a certain increase, imports may have risen further, requiring a further adjustment, and so on.

87. In addition, whether an industry could have adjusted is irrelevant to the question of whether the industry is seriously injured. The ability of the industry to adjust is a factor that should be taken into account when assessing the type of safeguard measure to impose, but not in assessing whether the industry has or could have adjusted while the increase in imports was occurring.

88. The entire point of Articles 2, 3 and 4 of the Safeguards Agreement is that the decision of whether serious injury has been caused by imports cannot be made in the abstract, but must be based on the facts associated with the imports and industry in question.

43. Are import increases irrelevant if they are due to a business decision of a (previous) domestic producer? Why? Is it not normal that trade involves, and depends upon, business decisions?

89. The Safeguards Agreement does not treat imports that are attributable to the business decisions of domestic producers any differently than other imports. Moreover, safeguards proceedings involve decisions about entire industries, not about individual producers; and industries do not make such business decisions.

44. Is an increase that is preceded by a decrease irrelevant as such or does this depend on the location of the beginning and of the end of the period of investigation, and on the question of causation of injury?

90. One cannot generalize that an increase that was preceded by a decrease is irrelevant. Once again, this is a fact-specific issue to be addressed by the competent authority on a case-by-case basis. Clearly, this type of increase – *i.e.*, one that follows a decrease in imports – can be injurious under many circumstances. For example, let us suppose that a domestic industry is operating in a market in which demand fell by 10 percent in Year 1, and that, in Year 1, the domestic industry's shipments and imports both also fell by 10 percent. Let us suppose that, in Year 2, demand fell by an additional 10 percent, but imports actually rose, thereby causing the domestic industry's shipments to fall by more than 10 percent. Under those circumstances, all

else being equal, the increase in imports may well be found to have been injurious. Another factor that might be relevant is the relative magnitude of the decrease and increase in imports.

45. China argues that

> *the USITC did not address the right question when it stated that imports showed dramatic and rapid increase in 2000, since "rapid and dramatic" was not the vocabulary chosen by the Appellate Body.*

Are the Members bound by the wording used by the Appellate Body?

91. As the United States explained in its first written submission (para. 242 n.288), competent authorities are not required to recite specific terminology, particularly where such terms are entirely absent from the Safeguards Agreement. Since under Article 3.2 of the Dispute Settlement Understanding, a dispute settlement report cannot add to a Member's obligations under the covered agreement, the Appellate Body's use of a particular phrase cannot obligate competent authorities to use the same phrase.

46. Is an increase in imports that occurred 18 months ago insignificant, and if so, why? Is China arguing that the United States should have acted more swiftly in order not to lose its right to apply safeguard measures?

92. An increase that occurred 18 months ago is not *per se* insignificant. For the reasons described above, the Safeguards Agreement cannot be read to create a *per se* rule as to the timing of an increase in imports. As a factual matter, the effects of an increase 18 months ago may only manifest themselves, continue to be felt, or be felt most intensely, more recently – all depending on the particular industry and market involved. Indeed, in some industries (for example, those involving capital goods) it may take even longer than 18 months for the effects of imports to be felt. Also, it should be noted that, although the increase lies some ways back in time, imports may remain at relatively high levels more recently.

47. Does the absence of questionnaire responses from particular producers mean that certain facts may not be used in the safeguard investigation?

93. No. The Safeguards Agreement permits competent authorities to base their determinations on data sets obtained from less than all domestic producers. Article 4.1(c) permits the domestic industry to be defined as "those [producers] whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products." (This definition shows that the drafters of the Safeguards Agreement understood that it may be difficult, or even impossible, for competent authorities to obtain data for every domestic producer.) Thus, when Article 4.2 requires a determination of whether increased imports caused serious injury to the "domestic industry," that analysis may be based on data from less than all producers. In the investigations at issue here, the data collected

by the ITC for each product covered producers whose output constituted a major proportion of domestic production.

C. TO THE UNITED STATES

49. Why did the ITC choose a period of investigation of 5 years? What criteria did the ITC use in deciding when the period should start and when it should end (vis-à-vis the commencement of the investigation)?

94. In its safeguards investigations the ITC has consistently used a period of investigation of five years plus whatever interim period for which data is available, depending upon when the investigation was commenced. It followed that practice in this case. The ITC has used a five-year period of investigation in virtually all of its safeguards cases for at least 20 years. In this case, the ITC's investigation was instituted in June 2001. Thus, the period of investigation covered the five full preceding years (1996 through 2000), and the interim period consisted of the first six months of 2001. The United States notes that the panel in *US-Line Pipe* approved of the ITC's use of a period of investigation of this duration. The panel explained:

> We are of the view that by choosing a period of investigation that extends over 5 years and six months, the ITC did not act inconsistently with Article 2.1 and Article XIX. This conclusion is based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC allows it to focus on the most 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.[64]

The use of a standard period from case to case helps to ensure objectivity.

50. Given that the interim 2001 data could not be compared with full-year data for the rest of the period of investigation from a statistical point of view, how was that data treated and assessed by the ITC?

95. In general, interim 2001 data were compared to data for the first six months of 2000. The ITC's practice with respect to interim periods is discussed in paragraph 197 of the U.S. first written submission, which explains:

> The ITC gathers partial year data for any interim period occurring at the end of the investigatory period so that it will have information available to it on the most current period possible (consistent with the need to close the record). The

[64] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Panel Report, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body, WT/DS202/AB/R, para. 7.201 ("*US – Line Pipe*").

availability of data for the latest interim period is useful for analysis, however, only if the ITC also has available data of a comparable kind for a comparable earlier period. To ensure the availability of such data, information is also collected by the ITC for the same calendar year segment in the last full year of the investigatory period that corresponds to the calendar segment included in the interim period, i.e.. one, two, or three calendar quarters as the timing of the investigation permits. The selection and consideration of data for these corresponding interim periods are predicated on two reasonable principles. First, the use of a uniform analytical approach in all investigations establishes an objective and predictable methodology that is not susceptible to manipulation or distortion. Second, the reliance on comparable time periods in each year ensures to the extent possible that any variation in industry data that might be occasioned by sales or production cycles, or other conditions unique to a particular industry, would not result in a distortion in the analysis conducted by the competent authorities.

IV. LIKE PRODUCTS - DOMESTIC INDUSTRY

A. TO THE COMPLAINANTS

59. Why does a separate remedy (slab) imply that there is a separate like product? Can a safeguard measure not be applied with variations within one like product?

96. A separate remedy does not imply a separate like product. As the U.S. first written submission explained, in paragraphs 1021 through 1031, Article 5.1 sets the outer limit for application of a safeguard measure. It does not prevent, or require, application of a safeguard measure to a lesser extent. Thus, as long as a Member applies the measure regardless of source, as required by Article 2.2, it may apply a lower rate to some types of a product than to other types, or exclude some types of products altogether.

B. TO THE UNITED STATES

60. On what basis did the ITC come to the conclusion that the imported CCFRS product was "like" the domestic CCFRS product? Was it a simple "match"?

97. The ITC found that the evidence showed that imported certain carbon flat-rolled steel consists mainly of the same range of carbon steel as the domestic certain carbon flat-rolled steel.[65] The ITC found that imported and domestic certain carbon flat-rolled steel share the same basic physical attributes and are generally interchangeable, have similar uses with the same

[65] Complainants do not take issue with the ITC's findings regarding this comparison nor that the evidence showed that domestic and imported CCFRS consisted mainly of the same range of carbon steel. *E.g.*, EC first written submission, paras. 223-233.

metallurgic composition, thickness, width, and amount of processing, generally do not employ significantly different production processes, and have an overlap in the marketing channels for domestic and imported certain carbon flat-rolled steel. The domestic like product, certain carbon flat-rolled steel, is like and coextensive with the imported certain carbon flat-rolled steel used in the ITC's injury analysis.

61. Do the goods entering the importing Member under all the tariffs lines considered to form one "imported product", taken together, have to be like or directly competitive with the domestic product as a whole, or must every single item produced by that domestic industry be like every single item of the imported products?

98. No, every single item produced by a domestic industry does not need to be like every single item of the imported products.

99. Within most any defined like product and the corresponding specific imported product consist a range of goods of different sizes, grades, or stages of processing. While goods along the continuum share similar or like factors, individual items at the end of the continuum may not be as similar.[66] For example, is a size 6 skirt like a size 10 skirt? Or size number 3 rebar like size number 18 rebar? Or calves like cattle at other stages of development (*i.e.*, yearling or stocker cattle, feeder cattle, or fed cattle ready for immediate slaughter)?

100. As discussed particularly in response to question 19, the starting point for the ITC analysis is the imports subject to investigation. In defining the domestic like product that corresponds to subject imports, the ITC uses its traditional factors and looks for clear dividing lines between the products subject to investigation. Allegations that the ITC should compare predetermined products with each other are based on the erroneous underlying premise that there are universally accepted definitions of what constitutes a specific steel product.

101. In looking for clear dividing lines in defining the domestic like product in other safeguard investigations, the ITC has defined a continuum of items as a single like product.[67] For example,

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[66] 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.

[67] In looking for clear dividing lines in defining the domestic like product in other trade remedy actions, albeit pursuant to different purposes and factors, the ITC also has defined a continuum of items as a single like product. *See, e.g.*, *Uranium from Russia, Ukraine, and Uzbekistan*, Investigation Nos. 731-TA-539-C, E and F (Review), USITC Publication 3334, pp. 6-13 (August 2000) (ITC defined a single domestic like product coextensive with the subject imports, which included uranium at four stages of processing ranging from uranium concentrate to natural uranium hexafluoride, enriched uranium hexafluoride or low-enriched uranium, and uranium dioxide); *Stainless Steel Bar from Brazil, India, Japan, and Spain*, Investigation Nos. 731-TA-678-682 (Final), USITC Publication 2856, pp. I-5 - I-9 (February 1995)(single domestic like product coextensive with subject imports consisting of stainless steel bar at different stages of processing ranging from hot-rolled or black bar to cold-finished bar); *Steel Concrete Reinforcing Bars from Turkey*, Investigation No. 731-TA-745 (Final), USITC Publication 3034, pp. 4-8 (April 1997) (single domestic like product consisting of rebar ranging from size numbers 3 to 18); *Live*

the *1984 Steel* safeguards case involved carbon flat steel at various stages of processing similar to those in this investigation.[68] The ITC defined like products in a manner similar in many respects to the present safeguards case and different from contemporaneous antidumping and countervailing duty decisions. Specifically, in *1984 Steel*, the ITC defined nine like products, each as discrete categories of closely-related products, that were like or directly competitive with the imported articles. One of these categories covered carbon flat sheet and strip, which included hot-rolled, cold-rolled and coated steel.[69] As discussed in response to question 29, technological advances such as the use of continuous casting and electric arc furnaces make less of a distinction and more continuity between production of slab and the next stage of processing, hot-rolling.

102. As discussed in the U.S. first written submission,[70] the Appellate Body in *US-Lamb Meat* also has recognized that a like product definition may include both input products and end-products.[71] 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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Cattle from Canada and Mexico, Investigation No. 731-TA-812-813 (Preliminary), USITC Publication 3155, pp. 4-7 (February 1999)(a single domestic like product corresponding to the subject imports of cattle at four stages of development from calf stage at five to ten months and weighing 400 to 650 pounds to yearling/stocker stage at 12 to 20 months to feeder stage weighing 750 to 1,300 pounds to the fed cattle stage ready for immediate slaughter at about 1,300 pounds); *Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea*, USITC Publication 2383, pp. 8 and 10 (May 1991)("a continuum product without clear dividing lines between the multiple like products . . . [a]lthough there are many distinct end uses for different types of PET film . . . . essential characteristics common to all PET Film"); *Professional Electric Cutting and Sanding/Grinding Tools from Japan*, Investigation No. 731-TA-571 (Final), USITC Publication 2658, pp. 8-10, and 49-51 (July 1993)(Commission found two like products based on operating element -- cutting tool and sanding/grinding tool -- refusing to further subdivide more narrowly into 28 families of tools).

[68] The *1984 Steel* investigation included such carbon flat products as slab, hot-rolled, plate, as well as billets/blooms, wire rod, wire, railway-type products, bars, structural shapes, and pipes and tubes. USITC Publication 1553 at 10 (US-24).

[69] USITC Publication 1553, pp. 10 and 15-23 (US-24) (each of these types of steel had been defined as separate domestic like products in AD/CVD investigations).

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

[71] *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, WT/DS178/AB/R, adopted 16 May 2001, para. 90 ("*US-Lamb Meat*") ("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.[72] Thus, the Appellate Body has recognized that a continuum of items can be defined as a single like product.[73]

62. You argue that the criteria used to define "like products" in Article III of the GATT 1994 cannot simply be transferred to Article 2.1 of the Agreement on Safeguards, because the two Articles serve different purposes.

> *(a) Is the purpose of the two Articles the only relevant interpretative criterion or does the purpose of the concept of "like products" in the two provisions also play a role?*
>
> *(b) What is the respective purpose of the concept of "like products" in the two provisions? In what way is the function of defining the relevant domestic product different in the two cases?*

103. The Appellate Body 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"[74] and that such interpretation for one context cannot be automatically transposed to other provisions or agreements where the phrase "like products" is used.[75] [76] Specifically, the Appellate Body in *Japan-Alcohol* stated:

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[72] 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. . . ."

Report of the Panel on *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, dated 13 October 1987, not adopted, 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.

[73] See also *Argentine-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).

[74] 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." *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, para. 88 ("*EC-Asbestos*").

[75] *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.").

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

> 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 "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.[77]

104. The term "like products" is not defined in the Safeguards Agreement or GATT 1994. Moreover, it has not been at issue in dispute settlement proceedings involving the Safeguards Agreement. Rather it only has been addressed in the context of provisions with distinct and different purposes from those of the Safeguards Agreement.[78] For instance, the interpretation of the term "like products" in the context of provisions, such as Article III of GATT 1994, whose purpose is to avoid protectionism and protect an equal and competitive relationship between products, should not be identical to the Safeguards Agreement, which has the purpose of permitting the temporary protection of a domestic industry under certain circumstances.[79] Thus,

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

[78] In particular, 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.

[79] The appropriateness of this approach is reinforced by the fact that a comparison of the "general principles" for Article III of GATT 1994 to those for the Safeguards Agreement demonstrates that they have different purposes. The Appellate Body has indicated regarding the purpose of Article III 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).

Conversely, the Appellate Body in *US – Line Pipe* set forth 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 Circular Welded Carbon Quality Line Pipe from Korea, Panel 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. . . .").

while protecting the competitive relationship between imports and domestic products is a purpose of Article III,[80] it is not the purpose of the Safeguards Agreement.

105. The Panel should recognize the clear distinction between purposes and reject, in accordance with the Appellate Body's findings, Complainants' proposals to automatically transpose interpretations made in another context to the Safeguards Agreement. Therefore, the relevant context, specifically the purpose and objective, of the provision and agreement at issue should be the starting point to resolving the issue of interpretation of "like products" in this dispute, rather than attempting to apply an interpretation made in a different context.

106. The Appellate Body has found 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."[81] Moreover, resorting to the "ordinary" or "plain" meaning of the term "like" provided by the dictionary "leave[s] many interpretative questions open."[82] The Appellate Body in *EC-Asbestos* 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.[83] Thus, reliance on the dictionary definition for the plain or ordinary meaning of "like," as proposed by Complainants, leaves many issues unresolved.

107. The Working Party in *Border Tax Adjustments* indicated that the three criteria that it set forth were suggested for the "similar product" analysis and stated, as the Appellate Body has reiterated, that "interpretation of the term [like] should be examined on a case-by-case basis."[84] [85] The Appellate Body in *Japan-Alcohol* recognized that the basic approach for interpreting "like or similar products" set out in *Border Tax Adjustments*[86] was "helpful in identifying on a case-by-

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[80] 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.

[81] *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.").

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

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

[84] *Border Tax Adjustments*, Report of Working Party, L/3464, adopted 2 Dec. 1970, BISD 18S/97, para. 18 ("*Border Tax Adjustments*"); *Japan-Alcohol*, AB Report, pp. 20-21; *EC-Asbestos*, para. 101.

[85] *Accord Japan-Alcohol*, AB Report, p. 20 ("In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are "like".).

[86] The Report of the Working Party on *Border Tax Adjustments* suggested the following basic approach for interpreting "like or similar products":

> . . . problems arising from the **interpretation of the term should be examined on a case-by-case basis**. This would allow a fair assessment in each case of the different elements that constitute a "similar" product.

case basis the range of 'like products' that fall within the narrow limits of Article III:2, first sentence in the GATT 1994."[87] However, the Appellate Body explicitly cautioned that:

> this approach will be most helpful **if decision makers keep ever in mind how narrow the range of "like products" in Article III:2**, first sentence **is meant to be as opposed to the range of "like" products contemplated in some other provisions** of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement*.[88]

108. Despite the differences in purposes for the covered agreements, the ITC's like product factors in a safeguard investigation resemble three (physical properties, uses, and customs treatment) of the four factors attributed to *Border Tax Adjustments*. Since the purpose of the Safeguards Agreement is to permit protection of a domestic industry under certain circumstances,[89] the ITC has also focused on such other objective factors in its traditional analysis of like products as the product's marketing channels and manufacturing process.[90]

109. Finally, each like product definition is based on the facts of the particular case and as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[91]

63. Could the United States explain why it considers that the term "like product" in the Safeguards Agreement has a broader scope than in Article III?

> **Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar"**: the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality. It was observed, however, that the term ". . . like or similar products . . ." caused some uncertainty and that it would be desirable to improve on it; however, no improved term was arrived at.

Border Tax Adjustments, para. 18 emphasis added); *quoted in part* in *Japan-Alcohol*, AB Report, p. 20.

[87] *Japan-Alcohol*, AB Report, p. 20.

[88] *Japan – Alcohol*, AB Report, p. 20 (emphasis added). The Appellate Body in *EC-Asbestos* reviewed the meaning attributed to the term "like products" in *Japan – Alcohol*, which concerned Article III:2 of the GATT 1994, and stated that: "the interpretation of 'like products' in Article III:4 need not be identical, in all respects, to those other meanings." *EC – Asbestos*, AB Report, para. 89.

[89] *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."); *see also* ITC Report, p. 9 ("The purpose of section 201 either is to prevent or remedy serious injury to domestic productive resources from all imports.").

[90] *Accord Japan – Alcoholic Beverages 1987*, Panel Report, L/6216 (BISD 34S/116-117), adopted 10 November 1987, para. 5.7 ("*Japan – Alcoholic Beverages 1987*") (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)).

[91] *EC – Asbestos*, AB Report, para. 102.

110. As discussed in response to question 62, the United States has stated that the term "like product" must be interpreted in light of the context of the Safeguards Agreement and not the context of Article III. Article III of GATT 1994 and the Safeguards Agreement have clearly distinct and different purposes and thus an interpretation of the term "like products" in the context of Article III should not automatically be transposed to an interpretation of "like products" in the context of the Safeguards Agreement. Thus, the United States considers that the term "like product" in the Safeguard Agreement may have a different scope than in Article III.

111. The Appellate Body explicitly cautioned that:

> this approach will be most helpful **if decision makers keep ever in mind how narrow the range of "like products" in Article III:2**, first sentence **is meant to be as opposed to the range of "like" products contemplated in some other provisions** of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement.*[92]

112. Moreover, the ITC's like product factors in a safeguard investigation resemble (physical properties, uses, and customs treatment) factors attributed to *Border Tax Adjustments*, as well as focus on such other objective factors as the product's marketing channels and manufacturing process.[93] In addition, each like product definition in a safeguards investigation is based on the imports subject to investigation and the particular facts of the investigation.

64. You argue that criteria of a competitive relationship between imports and domestic products should play no role in defining "like products". Are you suggesting that there need not be competition between increased imports and the like domestic products?

113. No. As discussed in response to question 19, the ITC determines whether the subject imports and domestic products consist of similar products and whether they are interchangeable. Thus, if the imported and domestic product are like and interchangeable, there would be a competitive relationship between the imported and domestic products, and it would be appropriate for consideration as part of the injury analysis, including increased imports. The United States' position is that competition is not a separate factor that it considers in conducting its analysis to define the domestic like product; this position is in line with dispute settlement proceedings regarding like product in contexts other than the Safeguards Agreement, such *Border Tax Adjustments* or *Japan – Alcohol*, which also have not included competition as one of the criteria for the like product analysis.

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[92] *Japan – Alcohol*, AB Report, p. 20 (emphasis added). The Appellate Body in *EC-Asbestos* reviewed the meaning attributed to the term "like products" in *Japan-Alcohol*, which concerned Article III:2 of the GATT 1994, and stated that: "the interpretation of 'like products' in Article III:4 need not be identical, in all respects, to those other meanings." *EC – Asbestos*, AB Report, para. 89.

[93] Manufacturing process has been considered as an appropriate like product criteria in the context of Article III of GATT as well. *Accord Japan – Alcoholic Beverages, 1987*, Panel Report, para. 5.7

65. You argue that the concept of "directly competitive products" should play no role in the present dispute, given that the ITC did not rely on it. Did the ITC directly apply concepts of WTO law, and if not, what happens if the ITC's definition of "like products" is, from a WTO law perspective, too broad, but within the broader notion of "directly competitive products"?

114. The issue of the interpretation and application of the term "like product" has not been before any dispute settlement proceedings in the context of the Safeguards Agreement. Therefore, while the ITC's like product findings 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 like product. As discussed in response to question 62, the Appellate Body has stated that the interpretation of the term like product should be in the context of the covered agreement. Thus, any guidance gleaned from construction of the term outside the context of the Safeguards Agreement should recognize the limitations of transposing an interpretation from one context to another. The ITC applied a like product analysis in this investigation consistent with U.S. obligations under the Safeguard Agreement. Despite the U.S. analysis, if the Panel finds the U.S. findings are consistent with a directly competitive product analysis, it cannot find that the ITC's findings are inconsistent with the Safeguards Agreement.

66. You also argue that substitutability should be rejected by the panel as a criterion for defining "like products". Are "like products" not always substitutable?

115. Domestic like products generally have some degree of interchangeability or substitutability with the coextensive imported products. Thus, domestic "like products" would be substitutable with corresponding imported products. However, 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).[94] 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.[95] As discussed in response to question 61, within most any defined like product and the corresponding specific imported product consist a range or continuum of goods of different sizes, grades, or stages of processing.

67. Are you arguing that imported CCFRS is not competing or substitutable to domestic CCFRS?

116. No. In finding that the domestic like product, CCFRS, was like and coextensive with the imported CCFRS, the ITC found that imported CCFRS and domestic CCFRS consisted of mainly the same range of steel and generally were interchangeable. Thus, imported CCFRS and domestic CCFRS generally would be substitutable and as such compete with each other at similar stages of processing. As discussed in response to question 66, the ITC considers

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[94] 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.

[95] *E.g.*, *Border Tax Adjustments*, para. 18; *quoted in part in Japan – Alcohol*, AB Report, p. 20.

substitutability to be a factor in conducting a directly competitive product analysis, but not in conducting a like product analysis.

68. You argue that consumers' tastes and habits should play no role in defining "like products". Are the subjective perceptions of the interchangeability of products not relevant for the degree of competition involved and, as a consequence, for the need for, and legitimacy of, protection through safeguard measures?

117. As discussed in response to questions 64, 66 and 67, the ITC considered and found the imported and domestic products in this investigation generally were interchangeable; the Complainants have not disputed this finding. The ITC's traditional practice does not include consumer tastes as a criteria in analyzing whether there are clear dividing lines for its definition of the domestic like product. The ITC has focused on more objective factors such as the marketing channels and manufacturing processes, in addition to physical properties, uses, and customs treatment. Consideration of consumers' tastes and habits, is less appropriate for a safeguards investigation, whose purpose focuses on permitting protection of a domestic industry under certain circumstances.[96] 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."[97] Thus, a focus on the subjective consumers' views of the product or market rather than those of the domestic producers would seem to be the wrong perspective for the purpose of the safeguards investigation. 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.[98]

69. Why are the manufacturing processes a relevant factor for determining likeness? Does this element relate to the substitutability of supply?

118. One of the factors considered by the ITC in examining the evidence in order to make its like product definitions 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.

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[96] *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."); *see also* ITC Report, p. 9 ("The purpose of section 201 either is to prevent or remedy serious injury to domestic productive resources from all imports.").

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

[98] *See Japan – Alcoholic Beverages 1987*, Panel Report, L/6216 (BISD 34S/116-117), adopted 10 November 1987, para. 5.7 ("*Japan – Alcoholic Beverages 1987*") (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.").

119. 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. Specifically, the Appellate Body in *US – Lamb Meat* stated:

> We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.[99]

In the present case, the ITC was looking for clear dividing lines in defining the domestic products like the broad range of steel imports subject to investigation. Consideration of such an objective product-related factor as production processes for the products was as relevant for the ITC's analysis as physical properties.

120. Consideration of manufacturing or production processes may be particularly relevant where the inquiry involves a product at different stages of processing, such as CCFRS. The interrelationship of the manufacturing processes for a product at different stages of processing may be informative in finding clear dividing lines between the stages of processing. For example, since earlier processed carbon flat-rolled steel is the feedstock for further processed steel, such steel is produced using essentially the same production processes at least at the initial stages. 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.[100] 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.[101] Substantial quantities of earlier processed steel are internally transferred for production of further processed steel.[102] This tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage.

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[99] *US – Lamb Meat*, AB Report, para. 94, n. 55. *See also Japan – Alcoholic Beverages 1987*, Panel Report (BISD 34S/116-117), 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.).

[100] ITC Report, p. OVERVIEW-7.

[101] ITC Report, p. 40-41.

[102] 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.

121. As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the ITC also recognized that there is commonality of facilities and substantial vertical integration in the industry. 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 types of certain carbon flat-rolled steel.

122. Consideration of manufacturing processes demonstrates the interrelationship between CCFRS at different stages of processing. This interrelationship between CCFRS at different stages, as evident in considering manufacturing processes, is "product-oriented" rather than "producer-oriented" and clearly was an important factor in the ITC's analysis and finding that CCFRS is a single domestic like product.[103]

V. SERIOUS INJURY

A. TO ALL PARTIES

70. Article 4.1(c) states that in determining injury or threat, a "domestic industry" shall be understood to mean the producers as a whole whose collective output constitutes a major proportion of the total domestic production of the like or directly competitive products. New Zealand argues in its oral statement that "serious injury must be assessed in respect of the whole industry, not just convenient parts of it". How can New Zealand's statement be reconciled with Article 4.1(c) of the Agreement on Safeguards?

123. As the United States explained in its First Written Submission, Articles 4.1(a), 4.1(c), and 4.2(a) of the Safeguards Agreement require that an investigating authority's finding of serious injury pertain to the entire domestic industry. While an analysis of discrete segments of the industry is permissible, that analysis must relate to the industry as a whole. Consequently, an investigating authority cannot discuss the Article 4.2(a) factors for only one segment of the industry without explaining how the factors are significant for the industry as a whole.[104] By the same token, an investigating authority cannot be compelled to conduct a segmented analysis focusing only on one segment of the industry in isolation, particularly when that segment is not representative of or significant for the industry as a whole. Thus, an examination of the CCFRS industry could not have encompassed only minimills, when the industry contained both minimill producers and the much larger integrated producers.

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[103] *Accord US – Cotton Yarn*, AB Report, para. 86.

[104] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Panel Report, WT/DS98/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, para. 7.58 ("*Korea – Dairy*"). *See also Mexico – Antidumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132/R, adopted 24 Feb. 2000, paras. 7.155-7.157 (elaborating on *Korea – Dairy* analysis in context of Antidumping Agreement).

124. The obligation to evaluate the industry as a whole, however, does not require an investigating authority to obtain information concerning every producer, or on 100 percent of industry production. The panel in *US – Lamb Meat* observed that the "as a whole" and "major proportion" clauses in Article 4.1(c) were grammatically linked and relate "to the representativeness of the data pertaining to the condition of the industry."[105] Thus data must be "representative;" they need not cover every single producer. The *Lamb Meat* panel further indicated that the reference in Article 4.1(c) to the "producers as a whole" favors use of the most comprehensive data possible.[106]

125. The ITC collected and used the most comprehensive data possible concerning each of the ten domestic industries on which it made an affirmative finding of serious injury or threat of serious injury. As explained in the U.S. first written submission, the ITC collected questionnaire data from U.S. producers representing a clear majority of production in each of these industries.[107]

C. TO THE UNITED STATES

73. Does the United States acknowledge that sales for internal consumption were not taken into account in the ITC's injury analysis? If so, can the United States explain in the ITC report as to why internal consumption was excluded from its consideration?

126. There is an important distinction between transfers for internal consumption, on the one hand, and transactions in the commercial or merchant market, on the other. In the commercial market, a producer sells product to a purchaser in an arm's-length transaction. By contrast, the internal transfers of an individual producer are not the result of such transactions and thus should not be considered "sales."

127. Because product that is internally transferred is not sold, the ITC could not generate objective and consistently-derived data concerning the valuation of such transfers that could be used in financial analysis.[108] Consequently, the ITC's financial analysis was based on the one type of objective industry-wide data available in the record: that pertaining to commercial sales.

128. The unreliability of transfer value data was a particular problem for the domestic industry producing CCFRS. Including data on internal transfers would have resulted in double or triple counting of the same unit of production. This is because all internal transfers of hot-rolled steel

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[105] *US – Lamb Meat*, Panel Report, para. 7.73.

[106] *US – Lamb Meat*, Panel Report, para. 7.217.

[107] United States first written submission, paras. 319-20.

[108] Although the ITC did collect data from producers concerning the valuation of internal transfers, the data reflected particular producers' individual transfer valuation methods. These methods were not necessarily consistent between producers or with generally accepted accounting principles. Consequently, the ITC used such data only for purposes of ascertaining year-to-year trends.

are ultimately reported as cold-rolled or corrosion-resistant steel when sold in their final processed form. Thus, to have included in the CCFRS financial analysis data concerning both internal transfers of hot-rolled steel and commercial sales of cold-rolled or coated steel would have counted the same ton of steel twice. By using commercial sales value, the ITC was able to avoid problems relating to double-counting of product.

129. By contrast, the ITC could and did generate objective quantity-based information on internal transfers. It used and relied on such data in its report in calculating the quantity of production, total U.S. shipments, and U.S. apparent consumption.

74. What is the United States' responses to the assertion by Chinese Taipei that while Article 4.1(c) requires consideration of the total production, the ITC referred to total shipments in its analysis?

130. Chinese Taipei is incorrect. The ITC collected data on both production and shipments. It relied on both sets of data in its report.[109]

75. What is the United States' response to the assertion by Chinese Taipei that percentages in respect of several products, including plate, hot-rolled, coated steel and tin mill exceed 100%?

131. The ITC based its estimates of the proportion of industry production accounted for by the producer questionnaire responses it received by comparing the production reported in the questionnaire responses, on the one hand, with publicly available data prepared by the U.S. Census Bureau or industry sources such as the American Iron and Steel Institute (AISI) providing information concerning production for the product at issue, on the other.[110] The ITC, AISI, and the Census Bureau each collected data in a different manner. The ITC sent questionnaires to all known U.S. steel producers. By contrast, AISI, a steel industry association, collected information regarding commercial shipments only from its members, which did not encompass all domestic producers. The U.S. Census Bureau collected information through a survey sent out to a sample of domestic producers, which was not necessarily coextensive with the AISI membership. Consequently, the publicly available data from AISI and the Census Bureau that ITC used as a baseline cannot be viewed as authoritative and it is not surprising that the production reported in ITC questionnaires may exceed production reported in publicly available databases for a particular product during a particular year.

76. The United States stated that the industries in which both integrated producers and minimills compete are those pertaining flat-rolled and hot-rolled bar

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[109] *E.g.*, ITC Report at 92-93 (hot-rolled bar); 160-61 (certain welded pipe); 206-08 (stainless steel bar).
[110] *E.g.*, ITC Report at LONG-4.

(a) Could data be provided to indicate the domestic market share held by minimills in each of the industries investigated, if relevant, as compared to integrated producers?

132. We can now make a more refined calculation of the percentage of CCFRS production attributable to minimills. Based on the data concerning CCFRS minimill production furnished in footnote 668 of the U.S. first written submission and the data concerning total CCFRS production in US-33, minimills account for less than 15 percent of total U.S. CCFRS production in 2000.

133. We stated in paragraph 10 of our Opening Statement that both integrated producers and minimills "overlap" in the hot-rolled bar industry. This is correct, but the degree of overlap is quite small. A "minimill" produces steel by using steel scrap as an input and melting it in an electric arc furnace. The vast majority of hot-rolled bar produced in the United States is produced through this process.[111] Of the 26 U.S. hot-rolled bar producers from which the ITC obtained data, only one producer of specialty products produces hot-rolled bar through an "integrated," or basic oxygen furnace, process. The other 25 produce hot-rolled bar at minimills.[112]

(b) To what extent were minimills injured by the imports during the period of investigation?

134. The Safeguards Agreement requires an investigating authority to decide whether a domestic industry is seriously injured by increased imports. This is what the ITC did. Having determined that there were discrete domestic industries producing CCFRS and hot-rolled bar, the ITC determined whether each of these industries was seriously injured by the increased imports. In making these determination, the ITC considered all data pertaining to these industries, including both data submitted by minimills and data submitted by integrated producers.

135. As we explained in our First Written Submission, numerous manifestations of serious injury to the CCFRS industry were applicable to minimill producers. Minimill producers' prices went down and their profitability declined during the period of investigation.[113]

136. Because nearly all U.S. hot-rolled bar producers are minimills, essentially all of the serious industry incurred by that domestic industry was incurred by minimill producers.

(c) Please elaborate on the role minimills play in causing injury to the industries investigated?

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[111] The precise figure is confidential.

[112] One of these 25 producers also operated an integrated facility that produced CCFRS during the ITC's period of investigation.

[113] U.S. first written submission, paras. 506-14.

137. The ITC, in its analysis of causation, discussed arguments that intra-industry competition, spurred by the increasing presence of minimills, had caused injury to the domestic industry producing CCFRS. As previously stated, minimills were part of the domestic CCFRS industry, and the ITC found both that the CCFRS industry as a whole was seriously injured and that minimills, as well as integrated producers, had been adversely affected by the increased imports. The ITC acknowledged that minimills had cost advantages over integrated producers, and had some effect on price levels. It concluded, however, that the imports, not the minimills, led to the price pressure that typically drove prices downwards.[114]

138. Because nearly all U.S. hot-rolled bar producers are minimills, "minimills" per se could not have been a source of injury to the domestic hot-rolled bar industry.

77. What is the relationship between the requirement to provide reasoned and adequate explanations and the right to protect business confidential information? In what circumstances would it no longer be impossible to provide a reasoned and adequate explanation without divulging confidential information?

139. We do not believe that the Article 3.1 requirement to provide a reasoned and adequate explanation and the Article 3.2 requirement to protect confidential information are in conflict. An authority's obligation to protect confidential information under Article 3.2 is not conditioned in any way. The first sentence of Article 3.2 states that confidential information "*shall*, upon cause being shown, be treated as such by competent authorities" (emphasis). Article 3.2 does not state that the authority may release such information if it is particularly central to its decision, or if its disclosure would aid in understanding the reasons for its findings and conclusions. Instead, the authority's obligation not to disclose confidential information is absolute.

140. Consequently, the findings and reasoned conclusions that an authority provides under Article 3.1 must be findings and conclusions that do not disclose confidential information. Indeed, because maintaining confidentiality is an obligation, a Panel cannot take an adverse inference against a Member because the Member's competent authority did not disclose confidential information. Instead, the Panel must judge the adequacy of the authority's explanation on the basis of the information the authority could properly disclose.

141. When an investigation involves substantial amounts of confidential information, there are several means by which the authority can satisfy both its Article 3.1 obligation to provide findings and reasoned conclusions and its Article 3.2 obligation not to disclose confidential information. One is to provide a non-confidential narrative discussion of the confidential information. This is an approach the ITC repeatedly took in its report. For example, in the discussion of price declines for cold-finished bar, the ITC had to redact certain numbers quantifying price declines that appear on page 105 of its report. Instead, it characterized the

[114] ITC Report, p. 65. *See also* U.S. first written submission, paras. 506-14.

declines as "dramatic." Consequently, the nature of its discussion is clearly discernible. Even for stainless steel rod, where virtually all data concerning the domestic industry was confidential, the ITC still was able to discuss trends in the industry data in general, but descriptive, terms that enable the Panel to discern the reasons for the ITC's conclusions. In this manner the ITC provided findings and conclusions that did not disclose confidential information.

78. In a case where there are two determinations of threat of serious injury, one determination of serious injury, one being based on a separate like product, the other two on a different like product, what is the "determination of the competent authorities" in the sense of Articles 2.1, 3.1 of the Agreement on Safeguards that is to be reviewed under Articles 2, 3 and 4 of that agreement?

142. We assume that the Panel is referring to the ITC's determination regarding stainless steel wire, in which Chairman Koplan found threat of serious injury based on a like product of stainless steel wire, Commissioner Bragg found threat of serious injury based on a like product of "stainless steel wire products" (including both stainless steel wire and stainless steel wire rope), Commissioner Devaney found serious injury based on a like product of stainless steel wire products, and the other three ITC Commissioners made negative determinations with respect to stainless steel wire.

143. For purposes of determining whether increased imports are causing serious injury to a domestic industry, the "determination of the competent authorities" is a matter of the Member's domestic law. There is a well-established practice under U.S. law that when ITC Commissioners disagree with respect to the like product definition, the ITC determination is based on the overlap of the determinations of the individual Commissioners. Here, the six Commissioners produced three affirmative and three negative individual determinations concerning stainless steel wire. Under U.S. domestic law, the President may treat the ITC's equally divided determination as an affirmative determination. An overlap of decisions is acceptable as long as each decisionmaker addressed the goods in question and found that the increased imports caused serious injury or threat of serious injury.

144. There is also the separate question of whether the competent authority has presented the "findings and reasoned conclusions reached on all pertinent issues of fact and law" for its determination required by Article 3.1. U.S. law differentiates between the determination, which is the ITC's conclusion, and the explanation of the determination. When an authority such as the ITC has multiple members and these members do not issue a collective opinion in support of their determination, the Panel should refer to the opinion for each individual member of the authority whose vote was necessary for the authority to reach its determination. The Article 3.1 requirement is satisfied when each member has provided findings and reasoned conclusions that support the ultimate conclusion he or she reached with respect to the goods in question.

79. Could the United States please comment on paragraphs 22-26 of Turkey's oral statement?

145. In the referenced paragraphs, Turkey criticizes the ITC's conclusion that the domestic rebar industry was seriously injured. Turkey's arguments largely parallel those of China, which we addressed at paras. 369-373 of the U.S. first written submission. For the Panel's convenience, we summarize that discussion below.

146. Turkey's discussion overlooks a pertinent condition of competition of the U.S. rebar market emphasized by the ITC: the strongly growing demand for rebar during the ITC's period of investigation. The increases in certain Article 4.2(a) factors referenced by Turkey did not take place in a static market. Instead, apparent U.S. consumption of rebar rose by 48.1 percent during 1996 to 2000 and was also 2.0 percent higher in interim 2001 than in interim 2000. In light of these conditions of competition, the fact that the U.S. rebar industry expanded capacity and employment and was able to increase its output during the period of investigation was not surprising.

147. As the ITC observed, however, the rebar industry was not able to benefit from increasing demand. Its share of the U.S. market fell significantly (10 percentage points) from 1996 to 2000. Moreover, notwithstanding increases in factors such as production and employment, its financial condition deteriorated sharply. The industry had an operating loss in 2000, and was only marginally profitable during interim 2001. The ITC also noted that the industry's capital expenses declined over the period of investigation. The ITC properly evaluated both the industry's improvements and declines with respect to each of the Article 4.2(a) factors, and fully explained why the factors as a whole supported its conclusion of serious injury.

VI. CAUSATION

B. TO NORWAY (AND OTHER COMPLAINANTS)

85. Although it did so in the context of its discussion of Article 5.1, Norway states in its first oral statement to the Panel that the complainants are of the strong opinion that even if the text of the Agreement on Safeguards does not explicitly use the word "quantify" this obligation exists. The United States claims, however, that it is not physically possible to quantify the effects of different factors. Could Norway explain in technical terms how such a quantification could be undertaken to identify and isolate accurately the injury attributable to increased imports only?

148. We question whether Norway's position accurately reflects the views of other complainants. Norway states that "[i]t is therefore clear to us that only by appropriately quantifying the injury, and apportioning correctly the amount of injury caused by each factor, and thereafter quantifying the remedy can the requirements of Article 5.1 be met."[115] However, in its oral statement on causation, Brazil states that "no one has argued that competent authorities

[115] Norway first oral statement, para. 18.

must, or even could, quantify every causal factor involved in every safeguards investigation."[116] It goes on to state that a "quantitative analysis" is "appropriate" in a "well developed" and "well documented" industry like the U.S. steel industry.[117] It is not clear what Brazil means by this. Quantification is not simply a matter of data collection – it is means of analyzing data, and Brazil has not explained how this analysis could be dome. In fact, Brazil carefully avoids stating that such an analysis is "required," either as a general rule or for the steel industry in particular.

149. We also refer the Panel to our responses to questions 88 and 116, which address related issues.

D. TO THE UNITED STATES

88. Is the United States arguing that it is not physically possible to quantify the effects of different injury factors, albeit approximately? If so, how does it reconcile this with the fact that the United States, in its written submission, undertakes a quantification in relation to Article 5.1? For example, would a regression/correlation analysis involving the isolation of the role of factors on a particular situation be a suitable tool for the purposes of meeting the non-attribution requirement under Article 4.2(b). Is this feasible?

Limitations inherent in "quantification"

150. The United States did not state that it was "physically impossible" to quantify the injurious effects of "different" injury factors. On the contrary, the United States itself has developed economic models in antidumping and countervailing duty proceedings that estimate the effects of imports on one to three separate indicia of an industry's condition.[118] In its submission, however, the United States pointed out that economic models have a number of limitations that make them no more precise or accurate an assessment of the "quantum" of injury being caused by imports than the ITC's current approach, which relies primarily on a more qualitative but nonetheless quantitative assessment of the impact of imports on the various indicia of industry condition.[119]

151. In particular, the United States emphasized that prior panels had a sound basis for not requiring competent authorities to "quantify" the actual effects of imports and other factors on the industry's overall condition.[120] The United States noted that the Safeguards Agreement requires the ITC to consider a variety of industry indicia and the effect of imports and other factors on those criteria in its safeguards analysis. The United States added that the ITC collects and analyzes a large amount of quantitative data relating to the effects of imports and other

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[116] Brazil first oral statement, para. 34.
[117] Brazil first oral statement, para. 34.
[118] US first written submission, para. 414.
[119] US first written submission, paras. 410-415.
[120] US first written submission, paras. 410-415.

factors on the industry's condition. The United States also noted that it had developed a variety of economic models to provide economic estimates of the impact of imports on one to three indicia in antidumping/countervailing duty and safeguards actions. However, the United States stated, the ITC has yet to develop or have presented to it by any party an economic model that is sufficiently complex or comprehensive to provide a quantification of the effect of imports and other factors on all of the factors required to be considered by the Safeguards Agreement and the U.S. statute.[121]

152. Nonetheless, the United States did not state that it was "physically" or "theoretically" impossible to develop an economic model that would quantify the effects of imports in some approximate fashion. For example, as indicated in the United States first submission,[122] it might be theoretically possible to develop a series of economic models that could be used to estimate the injurious effects of imports and other factors on individual indicia of an industry's condition. Similarly, as the ITC has done in the past, one could develop an economic model that focuses on the impact of imports on one to three particular indicia of industry condition, such as revenues, prices or market share.[123]

153. However, the United States notes that each of these modeling exercises would have significant limitations from the perspective of the Safeguards Agreement. The development and use of a series of related models suffers from the flaw that the individual models would be generated using different inputs, thus limiting the extent to which the models reflected the same set of factual assumptions. Similarly, a model that focused on one or two specific factors would, by definition, not take account of all of the factors required under the Safeguards Agreement. Thus, while such a model might accurately reflect the impact of imports on particular indicia of injury, it would only imperfectly reflect the complex economic relationships of factors required to be considered by the Safeguards Agreement.[124] As the United States pointed out in its first written submission, the use of economic models, with their inherent imprecisions, are no more precise, accurate or "quantitative" an assessment of the injurious effects of imports than the analysis performed by the ITC.

The numeric exercises presented in relation to Article 5.1

154. In contrast to the type of quantification as envisioned by some complainants, the numeric exercises in the U.S. first written submission did not purport to measure injury as a whole, or even the actual effect of imports on a particular factor or factors. The United States recognized that the calculations would reflect the underlying qualitative assumptions or qualitative inputs and, as a result, would at best estimate the magnitude of effects, rather than their actual values. However, within these confines, the U.S. calculations provide a useful confirmation of the

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[121] US first written submission, paras. 410-415.
[122] US first written submission, paras. 413 & n. 464.
[123] US first written submission, para. 416.
[124] US first written submission, paras. 415-416.

qualitative conclusion reached by the United States that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy the injury attributable to imports.

155. The concerns we have outlined are endemic to any effort to assign a numeric value to the effects of imports (or any other causal factor), and not merely to the two calculations that we conducted. These limitations were of lesser concern in evaluating the extent of application of the safeguard measures because, as the working party in *Felt Hats* recognized, that exercise is at best a rough estimate. However, neither these exercises nor any other numeric calculation or computer model of which the ITC is aware would provide the level of precision that proponents of quantification argue is required to determine causation and non-attribution. In our view, only a qualitative evaluation of the effects of imports and other factors of the sort used by the ITC would provide the necessary level of certainty.

156. It was with this understanding that we embarked on the numeric analyses in the first written submission. The United States specifically stated that "the Safeguards Agreement does not require a quantification analysis demonstrating that a safeguard remedy is consistent with Article 5.1, nor is such a numerical demonstration possible given the analytical framework under the agreement."[125] As the United States made clear, it submitted those analyses for the limited purpose of showing that,

> [w]hile numerical estimates are necessarily limited in their ability to precisely quantify and isolate the full effect of imports and the appropriateness of remedial measures, they do fully support the decision made by the President regarding the appropriate safeguard measures to apply in response to the ITC's *Steel* determinations.[126]

Regression analysis

157. With regard to the second part of the question, while it might be possible to use a form of regression/correlation analysis to calculate the relationship of imports and other factors to changes in various indicia of the industry's condition, regression models – like other economic models – have inherent limitations. First, regression models are, in general, only statistically useful for examining the relationship between the dependant and independent variables used in the models when a large number of observations are available for each of those variables. In the context of a safeguard investigations, the five years of available data will generally not provide a sufficient set of observations (i.e., data points) for each variable to make the results of a regression model useful.

[125] U.S. first written submission, para. 1059.
[126] U.S. first written submission, para. 1062.

158. Second, regression models involving multiple variables are only able to estimate the effects of these individual variables to the extent that those effects are attributable solely to that independent variable. A multiple variable regression analysis would not include in this estimate the effects attributable to such a variable to the extent those effects move in tandem with, and cannot be disentangled from, the effects of other independent variables. Thus, in a situation in which various factors combine to increase (or decrease) the injury suffered by the industry, a multiple variable regression model would underestimate (or overestimate) the injurious effects of imports because it would not provide an estimate for the effects that imports have in common with other injury factors.[127] This limitation is problematic not only because it indicates imprecision in the results of the model, but also because it indicates that the model does not fully consider the conditions under which the product is imported, as required by Article 2.1.

159. Third, the data requirements prohibit a regression analysis. In order to isolate the role of imports versus other factors in assessing injury, the injury factor would be estimated as a function of a several variables. For example, a simple regression analysis might look like this:

$$\text{Injury proxy} = \text{constant} + \beta_1 * \text{subject imports} + \beta_2 * X_2 + \beta_3 * X_3 + \ldots + \beta_k * X_k + \text{error term}$$

In the above equation, the left hand side variable "injury proxy" is the dependent variable, and the right hand side variables include a constant and the independent variables. The independent variables are the determinant factors of the injury proxy, i.e., "subject imports" and other factors (X_2, X_3, …, X_k). The estimated coefficient of interest is β_1, which indicates the relationship between subject imports and the injury proxy, holding all else constant. Each coefficient estimate has a standard error that is used to construct a test statistic, which is then used to test the statistical significance of the coefficient (i.e., whether the value of the coefficient is different from zero). The statistical significance of the value of the coefficient indicates whether or not subject imports, holding all else constant, contributed to injury in a statistically significant way.[128]

160. Technically, one needs at least as many data points as the number of right hand side variables in order for the regression analysis to be computationally feasible. With time series analysis a number of lagged variables are typically included in the analysis to account for time series properties of the data, such as serial correlation.[129] That is, the variables may be correlated over time such that the price in one period may be influenced by the price in the previous period(s). Another factor in time series analysis is the stationarity of the data (the statistical

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

[128] Chapter 2, "The Classical Multiple Linear Regression Model," in William H. Greene, *Econometric Analysis*, Fifth Edition (Prentice Hall, 2003).

[129] See Chapter 12, "Serial Correlation," in William H. Greene, *Econometric Analysis*, Fifth Edition, Prentice Hall, 2003.

properties such as the mean and the variance are invariant with respect to time). If the data series are nonstationary then appropriate techniques must be applied such as first-differencing the data to reflect that the structural relationship is changing over time. Adjusting for serial correlation and nonstationarity requires additional data points. As a result, many econometricians typically strive for at least 30 data points in time series econometrics, depending on the number of parameters to be estimated and the estimation technique.

161. In sum, the number of data points is fundamentally important for credible analysis. A sufficient number of degrees of freedom (the difference between the sample size and the number of parameters being estimated) is necessary for computational reasons as well generally robust results and valid interpretation. Typically, economists seek out the largest available sample size to ensure that the maximum degrees of freedom, since the variances of the estimates are usually smaller the larger the number of degrees of freedom.[130] The idea behind regression analysis is to minimize the distance between the fitted values and the actual values of the dependent variable. This corresponds to minimizing the variance and improving the overall fit of the regression model. That said, even if there was a sufficient number of data points, because there is no one variable that represents injury one could not definitively measure the role of subject imports in contributing to injury.

162. Given these limitations, a regression model would be no more useful as a means of satisfying the requirements of the Safeguards Agreement than any other economic model, or the analysis conducted by the ITC in this proceeding.

163. We also refer the Panel to our responses to questions 85 and 116, which address related issues.

89. Are non-existent imports always irrelevant? Can there be an effect of potential imports on the domestic price level?

164. Presuming that this question is directed at excess capacity, as opposed to documented sales that have not yet resulted in shipments, to the extent that this question asks whether imports can have an impact on pricing, even in the absence of actual shipments into the U.S. market, the United States believes that there is always the possibility that purchasers can use non-existent shipments to attempt to negotiate prices downward during price negotiations for a sale. However, as a matter of economic reality, producers, importers and distributors are much more inclined to take a purchaser's attempt to leverage prices by referencing the prices of imports when there are actual, significant, and increasing levels of imports in the market. Moreover, to the extent that actual imports are sold into the market at a specific price, information about the price of actual shipments is always more directly and effectively communicated to the market than hypothetical prices of potential shipments. As a result, actual imports shipments are much

[130] Peter Kennedy, *A Guide to Econometrics,* Fourth Edition, MIT Press, 1998.

more likely to have a direct and adverse impact on pricing in a market than "hypothetical" or "potential" imports. The United States discussed this aspect of pricing competition in some detail in its first written submission at paragraph 496.

90. In US-Wheat Gluten, the Appellate Body stated that the need to ensure a proper attribution of "injury" under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports as distinguished from the effects of other factors. The Appellate Body in that case also stated that the need to distinguish between the effects caused by increased imports and the effects caused by other factors does not necessarily imply that increased imports on their own must be capable of causing serious injury, nor that injury caused by other factors must be excluded from the determination of serious injury. The Appellate Body in US-Lamb and US-Line Pipe also stated that the competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.

In light of the foregoing, could the United States explain in methodological terms:

> *(a) How it "separated" and "distinguished" the effects of "other factors" when it performed its causation analysis?*
>
> *(b) How it determines whether other factors are equally or more important than increased imports?*
>
> *(c) How it identifies the nature and extent of the injurious effect of the known factors other than increased imports?*

165. The ITC generally conducts a two-step analysis in order to separate and distinguish the effects of imports and other "injury" factors in a safeguards proceeding.[131] As the first step in this process, the ITC conducts a thorough and objective examination of all relevant economic data for the industry in question,[132] focusing on changing trends in the volume and pricing movements of imports and trends in the financial and trade indicia of the industry.[133] By doing so, the ITC is able to assess, as required by the Safeguards Agreement, whether there is an "important" correlation between import trends and declines in the overall condition of the

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[131] The United States described this two-step process in more detail in its first written submission. US first written submission, paras. 419-423. The two-step process follows, of course, the ITC's assessment of whether there have been increased imports during the period of investigation and whether the industry has been seriously injured or threatened with serious injury. *See* ITC Report, pp. 32-34.

[132] *E.g.,* ITC Report, pp. 56-63 (certain carbon flat-rolled steel analysis); *see also* ITC Report, p. 34.

[133] *See, e.g.,* ITC Report, pp. 59-63.

industry.[134] As can be seen from the ITC Report, the ITC clearly conducted such an analysis for each of the steel products for which the President imposed a remedy.[135]

166. As the second step of its causation analysis, the ITC identifies other factors that may be contributing to the serious injury being suffered by the industry. [136] In this step of the analysis, the ITC conducts a thorough and objective examination of the record evidence pertinent to each other factor and assesses whether these other factors are, in fact, causing injury to the industry.[137] If any of these factors are causing injury to the industry, the ITC examines in detail the nature of the injury caused by each factor and assesses the extent to which the factor is contributing to the injury suffered by the industry.[138]

167. The ITC does not attempt to quantify the overall level of injury caused by imports or any other factor.[139] Instead, the ITC closely examines all of the data (quantitative and otherwise) relating to the extent of the injury caused by imports and other factors. It then qualitatively assesses how much of the serious injury being suffered by the industry can be attributed to imports, on the one hand, and to the alternative factors, on the other.[140] Only by doing so can the ITC assess – as required by U.S. law[141] – whether increased imports contributed as importantly to injury as any other factor causing injury.[142]

168. Beyond these basic steps, however, the ITC's non-attribution analysis for individual "injury" factors is dependent upon the nature of each individual "other" factor in question and the manner in which it impacts the industry. In this regard, the ITC's analysis correctly recognizes that individual "injury" factors can impact an industry in significantly different ways. For example, an industry's legacy costs (i.e., the costs incurred to provide pension and other benefits to its retired workers) will primarily affect the level of a company's unit costs during a particular year. Legacy costs would not, however, have a direct and calculable impact on the market share, production levels, or sales revenues of an industry. As a result, in its analysis, the ITC correctly focused on the manner in which legacy costs impacted the industry's overall costs and profitability levels during the period of investigation, not on whether these costs affected other aspects of the industry's performance.[143]

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[134] *See, e.g.,* ITC Report, pp. 59-63.

[135] *E.g.,* ITC Report, pp. 29-35 (description of general analysis); 56-63 (certain carbon flat-rolled steel analysis); 95-99 (hot-rolled bar), 104-107 (cold-finished bar), 111-115 (rebar), 158-166 (welded pipe), 174-178 (fittings, flanges, and tool joints), 208-213 (stainless steel bar), 217-222 (stainless steel rod).

[136] *E.g.,* ITC Report, pp. 63-65.

[137] *E.g.,* ITC Report, pp. 63-65.

[138] *E.g.,* ITC Report, pp. 63-65.

[139] *E.g.,* ITC Report, pp. 59-65.

[140] *E.g.,* ITC Report, pp. 63-65 (certain carbon flat-rolled steel).

[141] ITC Report, p. 34; section 202(b)(1)(B) of the Trade Act of 1974.

[142] *E.g.,* ITC Report, pp. 63-65.

[143] ITC Report, p. 64; US first written submission, paras 502-503.

169. In its first written submission, the United States described in detail the manner in which the ITC performed its non-attribution analysis for each "other" source of injury during the steel investigation.[144] The United States would refer the Panel to these discussions for a more specific analysis of the manner in which the ITC isolated and distinguished the injury caused by imports from that caused by other factors.

170. However, to summarize, the ITC undertakes several basic steps to separate and distinguish the effects of imports and other factors in its analysis:

- It first assesses whether there are correlations between trends in import volume and price and in the indicia of injury to be considered and whether these trends suggest that imports are an "important" cause of serious injury, that is, whether there is a genuine and substantial link between imports and the condition of the industry.[145]

- It then identifies other factors that may be contributed to the decline in the industry's condition. It identifies these factors based upon arguments of the parties and its own review of the record.[146]

- It then examines the manner in which these other factors have (or have not) contributed to the declines in the individual injury indicia of the industry, taking into account the particular record evidence that shows how each factor impacted the industry.[147]

- After assessing whether and to what extent these other factors contributed to the decline in the industry's condition, the ITC then assesses whether these other factors had any impact on the industry at all, and, if so, whether imports had a more significant impact on the injury indicia in question than the non-import factor.[148]

- It is an integral part of this analysis that the ITC separate out the effects of imports and non-import factors. By doing so, the ITC is able to separate and distinguish the effects of those factors from those of imports and to compare the overall effects of imports and non-import factors, as required by the U.S. statute.[149]

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[144] *E.g.,* US first written submission, paras. 481-517.
[145] *E.g.*, ITC Report, pp. 55-62.
[146] ITC Report, pp. 62-65
[147] ITC Report, pp. 63-65.
[148] ITC Report, pp. 63-65.
[149] ITC Report, pp. 63-65.

171. Two final comments are necessary, however. First, the Appellate Body has specifically stated that a competent authority is not required to make separate and clear legal findings for each of the causation "steps" outlined in the *US – Wheat Gluten* report. As the Appellate Body stated in its *US - Lamb Meat* report, "the steps [outlined in Wheat Gluten] are not legal 'tests' mandated by the text of the Agreement on Safeguards nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities."[150]

172. Second, the Appellate Body has not required that a competent authority undertake any specific methodological approach in its analysis.[151] Instead, the Appellate Body has stated that the non-attribution guidelines announced in *US - Wheat Gluten* are satisfied if the competent authority provides a "clear" and "reasoned" explanation of the manner in which it has attributed injury to imports, on the one hand, and other factors, on the other.[152] The United States believes that it has clearly done so for each "other" factor considered in the steel investigation.

VII. PARALLELISM

D. TO THE UNITED STATES

95. The United States claims that the ITC performed an analysis that isolated the effects of non-NAFTA imports from those of NAFTA imports. Could the United States explain in some detail how this isolation of effects was performed and how the ITC could have reached the results it reached?

173. The ITC's methodology for isolating the effects of non-NAFTA imports encompassed several steps. Below we use the ITC's analysis of non-NAFTA imports for hot-rolled bar as an example of how the ITC conducted its analysis. The U.S. first written submission provides a detailed description of the isolation analysis the ITC undertook for each pertinent product.[153]

174. First, in its analysis of non-NAFTA imports, the ITC distinguished import volumes from non-NAFTA sources from import volumes from Canada and Mexico. Thus, for hot-rolled bar, the ITC specifically discussed the volume of imports from non-NAFTA sources, the rate of increase of that volume, and the ratio of that volume to U.S. production.[154]

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[150] *US - Lamb Meat*, AB Report, para. 178.

[151] *US - Lamb Meat*, AB Report, para. 178. Indeed, the Appellate Body has recognized that the broad analytical guidelines announced in its *US - Wheat Gluten* report – which have formed the foundation of its causation analysis since – are not even "legal tests" required by the Safeguards Agreement. *US - Lamb Meat*, AB Report, para. 178.

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

[153] U.S. first written submission, paras. 788-924.

[154] ITC Second Supplemental Response, pp. 5-6.

175. Second, in its analysis of all imports, the ITC made findings concerning the conditions of competition in the pertinent domestic industry. This analysis reflected conditions pertaining to the entire U.S. marketplace for a particular product. For example, the findings on conditions of competition for hot-rolled bar encompassed issues such as the uses and demand patterns for the product in the United States, and the importance of price in purchasing decisions.[155] These findings were not related to either the characteristics or the data relating to imports from specific countries, so no further isolation of imports from particular sources was necessary.

176. Third, the ITC made findings, in its analysis of all imports, concerning the condition of the pertinent domestic industry. The ITC's finding that the U.S. hot-rolled bar industry was seriously injured was the result of its analysis of factors pertinent to the industry's condition. This analysis did not concern *why* the industry was seriously injured, but *whether* it was seriously injured. Consequently, no further isolation or discussion was necessary for the non-NAFTA imports.

177. Fourth, the ITC conducted a particularized causation analysis for the non-NAFTA imports. The ITC's causation analysis for all imports for each of the pertinent products reflected findings concerning five factors. These were: (1) import volume patterns; (2) the conditions of competition; (3) the domestic industry's condition; (4) import volume and pricing patterns; and (5) other alleged causes of serious injury. For each product, the ITC analyzed the particularized data for non-NAFTA import volume and non-NAFTA import pricing. Thus, for hot-rolled bar, the ITC found that average unit values of non-NAFTA imports declined from 1996 to 2000 and that this decline was greater than that for imports from all sources. It engaged in a particularized examination of pricing data for 1998 and the first half of 2000. These periods were of particular significance to its causation analysis because they were periods when both non-NAFTA imports and all imports surged and the domestic industry lost market share. The ITC found that during these periods the non-NAFTA imports undersold domestically produced hot-rolled bar by substantial margins. Consequently, based on its analysis of the particularized non-NAFTA import data, the ITC concluded that the same considerations that supported a finding of causal link for all imports – namely, that through price-based competition increased imports caused the domestic industry to lose market share while prices were falling – supported a finding of causal link for non-NAFTA imports.[156]

178. Again, by considering only non-NAFTA imports, the ITC isolated the volume and pricing effects of non-NAFTA imports from those for the NAFTA imports. As explained above, an isolation analysis was not necessary with respect to conditions of competition or the condition of the domestic industry. As we explained in detail in our first written submission with respect to each pertinent product, an isolation analysis also was not necessary for the other alleged causes of serious injury. For example, with respect to hot-rolled bar, three of the four alleged other

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[155] ITC Report, pp. 95-96.
[156] ITC Second Supplemental Response, p. 6.

causes were not in fact causes of serious injury and the fourth (relating to changes in the domestic industry's input costs) pertained exclusively to domestic industry data.[157]

179. Consequently, the ITC conducted a causation analysis that isolated for non-NAFTA imports those factors it needed to isolate, and incorporated from the all imports analysis those factors that were unchanged regardless of which imports were analyzed. Based on these factors, it explained why its conclusions on causation for all imports were also applicable to non-NAFTA imports viewed in isolation.

96. Is the finding that non-FTA imports are a substantial cause of serious injury tantamount to a finding that non-FTA imports, alone (i.e. as separate from FTA imports), satisfy the requirements of increased imports and causation of serious injury?

180. In concluding that non-FTA imports are a substantial cause of serious injury, the ITC made findings that non-FTA imports, viewed alone, satisfied the increased imports and causation requirements. This point is explained in the answer to question 95.

181. The ITC's analysis of non-NAFTA imports was not limited to those factors, however. As further explained in the answer to question 95, the ITC's analysis of non-NAFTA imports incorporated findings concerning the condition of the industry and conditions of competition made in the analysis of all imports.

97. With regard to the ITC finding that imports from Israel were "small and sporadic", while there were "virtually no imports" from Jordan, what is the legal basis under the Agreement on Safeguards, for the ITC's conclusion that the exclusion of imports from these FTA partners would not change the ITC's findings?

182. As we explained in our first written submission, the legal basis for that conclusion is that imports from Israel and Jordan are so small that they could not have affected any of the data the ITC used.[158] Because the ITC's data could not have been affected by exclusion of the imports from Israel and Jordan, the ITC's findings, which were based on the data the ITC collected, could not have been affected either.

183. Article 3.1 of the Safeguards Agreement requires that a competent authority set forth findings and reasoned conclusions on all issues of fact and law. The ITC set forth such findings and reasoned conclusions – both for all imports and for non-NAFTA imports. Because exclusion of imports from Israel and Jordan could not have affected the data on which the ITC relied to make its findings and conclusions, it could not have affected the findings and conclusions themselves with respect to either all imports or non-NAFTA imports. In other words, the

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[157] *E.g.*, U.S. first written submission, para. 834.
[158] U.S. first written submission, paras. 755-56.

findings and conclusions the ITC reached were equally applicable if imports from Israel and Jordan were excluded.

184. Additionally, Article 3.1 requires an authority to address all "pertinent" issues in its report. Consequently, the report need not address issues that are not "pertinent," which would be the case if that issue did not affect the underlying data on which the authority relied to make its findings and conclusions.

98. Could the United States provide a breakdown on the proportion of imports from Canada and Mexico for all the products that are the subject of the safeguards measures?

185. The Panel can find this information in the following places in the record:

CCFRS – US-33 (ITC Memorandum INV-Y-209, Table FLAT-ALT-7)

Tin mill – ITC Report, Table FLAT-C-8

Hot-rolled bar – ITC Report, Table LONG-C-3

Cold-finished bar – ITC Report, Table LONG-C-4

Rebar – ITC Report, Table LONG-C-5

Certain welded pipe – ITC Report, Table TUBULAR-C-4

FFTJ – ITC Report, Table TUBULAR-C-6

Stainless steel bar – ITC Report, Table STAINLESS-C-4

Stainless steel rod – ITC Report, Table STAINLESS-7

Stainless steel wire – ITC Report, Table STAINLESS-C-7

VIII. ARTICLE 5.1 OF THE AGREEMENT ON SAFEGUARDS

A. TO ALL PARTIES

99. In US-Line Pipe, the Appellate Body stated that one of the objectives of the non-attribution language under Article 4.2(b) is that it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. The Appellate Body also stated that a violation of Article 4.2(b) means that a prima facie case is made that the application of the measures was not limited to the extent permissible under Article 5.1.

What relationship do complaining parties consider exists, if any, between the non-attribution requirement under Article 4.2(b) and that required under Article 5.1?

186. Nonattribution relates to the identification of the causal link between imports and serious injury to the domestic industry by distinguishing the injurious effects of imports from the injurious effects of other factors. It is not a requirement of Article 5.1 and, therefore, is not a requirement for deciding the proper safeguard measure to apply.

187. The Appellate Body's analysis of Article 5.1 compels this conclusion. In *US – Line Pipe*, the Appellate Body found that one objective of the nonattribution language in Article 4.2(b) is to provide

> a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence.[159]

Thus, the competent authorities must complete the nonattribution analysis under Article 4.2(b) *before* the Member's decision as to the permissible extent of a safeguard measure. Nonattribution is part of the process of identifying the injury attributable to increased imports, which in turn sets the "benchmark" for application of the measure.

188. Therefore, under the Appellate Body's reasoning, there is a relationship between nonattribution analysis under Article 4.2(b) and the selection of the level of a safeguard measure under Article 5.1. The former informs the latter. Since the injury attributed to imports, which incorporates the nonattribution analysis, is the benchmark for the extent of application of a safeguard measure, a second nonattribution analysis is redundant. If the measure falls below that benchmark, there need be no concern that it is being applied to remedy injury caused by factors other than increased imports.

189. This conclusion is confirmed by the Appellate Body's description of the analytical framework under the Safeguards Agreement:

> These two basic inquiries are: *first*, is there a right to apply a safeguard measure? And, *second*, if so, has that right been exercized, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other.[160]

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[159] *US – Line Pipe*, AB Report, para. 252.
[160] *US – Line Pipe*, AB Report, para. 84.

Nonattribution is part of the first basic inquiry, which the Appellate Body described as being the determination by the competent authorities pursuant to Articles 3 and 4 as to whether increased imports are causing or threaten to cause serious injury.[161]

100. Can one say that Article 5.1 of the Agreement on Safeguards only imposes parameters for what is the permitted maximum level of protection? If so, what does this mean with regard to legality of specific product exclusions (in particular, in the absence of de jure or de facto discrimination between WTO Members)?

190. Yes. The use of "no more than the extent necessary" indicates that Article 5.1 establishes a maximum for the application of a safeguard measure. "No more than" means that the measure may be applied up to, but not beyond, that level. Since Article 5.1 places no constraint on a Member's ability to apply a measure *less than* necessary, a Member has discretion to do so.

191. Accordingly, a Member remains free to exclude a type of the product or apply the measure at lower levels to that type of the product as long as it complies with the other requirements of the Safeguards Agreement, including the Article 2.2 requirement to apply the measure regardless of source.

101. Does Article 5.1 of the Agreement on Safeguards oblige a Member to exclude from the safeguard measure individual specific products, which are part of a broader category of an imported product satisfying all the conditions of Articles 2 and 4 of the Agreement on Safeguards, but, taken in isolation, do not cause injury to the domestic industry?

192. No. A Member is *permitted* to exclude particular items from a safeguard measure, but is not *required* to do so. Articles 2 and 4 require only one determination regarding serious injury, with regard to an imported product and producers of the corresponding domestic like product. Those provisions do not require a competent authority or a Member applying a safeguard measure to make injury findings for a subcategory of that imported product. Moreover, Article 5.1 allows application of a safeguard measure no more than the extent necessary, but does not require application of the measure to any particular extent or to any particular products within that boundary. Thus, there is no obligation to exclude particular items.

193. As a practical matter, many products (including steel) are composed of hundreds or even thousands of particular types of product. It would be impossible to examine each particular product type to determine whether it was injurious. It is not reasonable to read the Safeguards Agreement as foreclosing a practical remedy for any product that has multiple variants.

102. Chinese Taipei argues that when applying Article 5.1 the importing Member is obliged to examine the same factors as those considered during the serious injury assessment?

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[161] *Ibid.*, para. 84.

194. The Appellate Body has found that the injury attributed to increased imports forms the benchmark for application of a safeguard measure. This injury is identified through the causal link and nonattribution analyses under Article 4.2(b), and informs the selection of a safeguard measure. While one analysis leads to the other, the Appellate Body has emphasized that the injury assessment under Articles 3 and 4 is "separate and distinct" from the evaluation of the permissible extent for applying a safeguard measure, and that these two inquiries "must not be confused by the treaty interpreter."[162] Thus, there is no requirement to consider the Article 4.2(a) factors a second time in the application of Article 5.1.

195. To the extent that Chinese Taipei is concerned that the quantitative analysis submitted by the United States in support of the safeguard measures did not measure all of the factors referenced in Article 4.2(a),[163] it misunderstands the nature of the exercise. The United States made clear that these quantitative analyses provided additional support for the proposition that the safeguard measures were not applied beyond the extent necessary to prevent or remedy injury attributable to increased imports, in rebuttal to the possibility that Complainants might be considered to have raised a *prima facie* case of inconsistency with Article 4.2(b).[164]

B. THE COMPLAINANTS

106. Does the argument that a straight tariff as opposed to a tariff rate quota unduly affects non-injurious imports mean that a safeguard measure may never take the form of a straight tariff increase?

196. This is a necessary implication of Complainants' interpretation of Article 5.1. In this regard, the Appellate Body stated in *Korea – Dairy* that Article 5.1

> applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.[165]

Thus, the Appellate Body clear envisaged use of a tariff as a safeguard measure, and that such a measure could be consistent with Article 5.1.

109. Does it matter, from the perspective of the Agreement on Safeguards, whether a competent authority limits itself to the determination stipulated in Article 2.1 of the Agreement on Safeguards and makes no recommendation as to the form of a safeguard measure, or, whether it makes such a recommendation and it is not followed?

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[162] *US – Line Pipe*, para. 84.
[163] Chinese Taipei third party submission, para. 35.
[164] U.S. first written submission, para. 1062.
[165] *Korea – Dairy*, para. 96.

197. No. The Safeguards Agreement does not require a competent authority to make a recommendation, and does not require the Member to adopt such a recommendation if one is made.

110. Is there a legal requirement under the Agreement on Safeguards to explain the departure from a recommendation that a domestic competent authority has made in addition to a determination under Articles 2 to 4 of the Agreement on Safeguards?

198. No. Since a recommendation has no status under the Safeguards Agreement, there can be no obligation to explain a departure from a recommendation.

111. Does the omission of a discussion as to how the safeguard measure is limited to the extent necessary to remedy or prevent serious injury and to facilitate adjustment mean that the measure surpasses that extent?

199. No. The absence of an explanation of how a measure is applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment signifies only that the explanation has not been published. It does not indicate anything about whether the explanation would establish consistency with Article 5.1.

112. Does it mean that Article 5.1 of the Agreement on Safeguards has been violated if an imposed remedy is intended to significantly improve profitability of the domestic industry?

200. No. As just one example, if imports are responsible for a sharp decrease in the domestic industry's profitability, Article 5.1 would permit a Member to apply a measure that increased profitability to its previous levels or beyond, if necessary to prevent or remedy the serious injury and to facilitate adjustment.

C. TO NORWAY AND OTHER COMPLAINANTS

113. The Appellate Body in Korea - Dairy stated that:

> *... the wording of this provision leaves no room for doubt that it imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. We also agree that this obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1" (point 96, we added emphasis).*
>
> *However, we reverse the Panel's broad finding, in paragraph 7.109 of its Report, that Article 5.1 requires a Member to explain, at the time it makes its*

> *recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is not a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. (emphasis added).*

The Appellate Body further held in US-Line Pipe (para 236) that:

> *This does not imply, as Korea seems to assert, that the measure may be devoid of justification … The Member imposing a safeguard measure must, in any event, meet several obligations under the Agreement on Safeguards. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards should have the incidental effect of providing sufficient "justification" for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined. (emphasis added)*

What does "should" mean in the above quote? Is it descriptive or prescriptive?

114. Who do you believe has the burden of quantifying the injurious effects of imports? When is a prima facie case made under Article 5.1 of the Agreement on Safeguards?

201. As we noted above, quantifying the injurious effects of imports in any objective and reliable fashion is not possible. However, if Complainants' position is that quantification is (1) possible and (2) required under the Safeguards Agreement, they would be the party asserting the affirmative of a proposition and, as such, would bear the burden of quantifying injurious effects and demonstrating that such a quantification was reliable and consistent with the Safeguards Agreement.

D. TO THE UNITED STATES

116. Can the United States explain how the quantification analysis it performed in relation to Article 5.1 differs from the quantification that some complaining parties suggest is necessary under Article 4.2(b)?

202. The United States does not assert that the analysis performed for Article 5.1 is a quantification of injury, for the reasons we described in the response to question 88. The United

States cannot discern exactly what the proponents of quantification would have the ITC do differently. Only a few of the complaining parties have raised this issue and, to date, they have not indicated exactly how the ITC should have quantified injury. Norway states repeatedly that quantification is required, but does not indicate how quantification is possible.[166] Brazil in its written submission faulted the economic model that the ITC used in its remedy recommendation, but in its oral statement suggests that the ITC should actually have relied upon economic modeling, particularly upon a computer model submitted on behalf of foreign producers, which the ITC rejected.[167] Japan also faults the ITC for not relying on the foreign producers' computer model.[168]

203. Proponents of quantification have not explained what they mean by this term, or how a competent authority would quantify injury or the effects of imports on all of the indicators of injury that the Safeguards Agreement requires to be considered. Therefore, we cannot tell how our numeric exercise differed from any suggestions they might have. The closest they have come to a proposal is Japan's and Brazil's reference to particular models submitted to the ITC, so we will base our response, at least for now, on those models.

204. The most important difference between the Japanese/Brazilian and U.S. approaches lies in how models are used. Japan and Brazil argued to the ITC, and now argue to the panel, that particular models can calculate the effect of imports and other factors on the domestic industry and that the calculated results should inform the competent authorities analysis of causal link and non-attribution. As a general matter, this view ignores the limitations in computer models. A model designed to estimate the impact of one market participant's sales on the prices and quantities of other market participants will probably reflect the effect of other factors with less accuracy. Although one could theoretically design models for all potential causes of injury, they would require different underlying assumptions and qualitative and quantitative inputs, which would make any comparison of the outputs highly suspect. In short, the best computer models available provide a type of "quantification" that would not satisfy the obligation under the Safeguards Agreement to demonstrate a causal link or to ensure nonattribution.

205. Specifically with regard to the models referenced by Japan and Brazil – which were developed for purposes of the *Steel* proceedings – the ITC staff concluded that they did not provide "statistical evidence that the effect from import competition on domestic price was significantly greater than the effect of the other factors included in their analysis."[169] Moreover, the models did *not* assess the magnitude of the effects of imports as opposed to the effects of other factors "in a statistical manner." The models measured the effect of domestic competition either "weakly" or "not . . . at all."[170] Nor did the models purport to consider and weigh all of the

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[166] Norway first oral statement on Article 5.1, paras. 12-18.
[167] Brazil first oral statement, para. 35.
[168] Japan first written submission, paras. 276-281.
[169] ITC Memorandum EC-Y-042, p. 42.
[170] ITC Memorandum EC-Y-042, p. 1.

factors required to be considered in assessing injury and causation. Accordingly, the ITC gave the models little weight because of their "serious limitations."[171]

206. In contrast, the U.S. written submission did not use a new computer model to compare different factors as part of the causation analysis. Instead, it used an established computer model for a discrete inquiry related to one factor – imports – in analyzing the permissible extent of application of the safeguard measure in terms of the volume, price, and revenue for the product sold by the domestic industry. Specifically, we took two scenarios – (1) imports in 2000 remaining at pre-surge levels and (2) application in 2000 of the safeguard measures established by the President – and modeled how prices and volumes of products sold in the United States might have been different. Since we were looking at the volume and price effects of imports in both scenarios and holding all other putative causes of injury constant, we avoided the danger that the model would not accurately compare the volume and price effects of two different causes of injury.

207. Moreover, since it is "impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions . . . ,"[172] the uncertainty inherent in computer modeling is no different from any other available analysis. In contrast, when it comes to analyzing causation, there is an alternative – the type of qualitative analysis employed by the ITC.

208. In closing, as we explained above, no quantification analysis can meet the requirements of Articles 5.1 or 4.2(b). The limited numerical exercises provided in the U.S. first written submission had the limited purpose of providing the Panel with additional evidence that the steel safeguard measures were consistent with Article 5.1. They certainly do not support the notion that either the type of quantification envisaged by some Complainants or a numerical exercise like ours is required. We also refer the Panel to our responses to questions 85 and 116, which address related issues.

IX. ARTICLES I:1/XXIV OF THE GATT 1994

A. TO ALL PARTIES

117. What is the significance of the fact that Article XIX is not mentioned in the brackets of Article XXIV:8(b)? Does it mean that safeguard measures must be excluded, always and unconditionally, in a free-trade agreement?

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[171] ITC Report, p. 59, note 260.
[172] *Felt Hats*, para. 35.

209. No. Formation of an FTA does not rest on the elimination of any single measure. Article XXIV:8(b) defines an FTA as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Thus, formation of an FTA requires the elimination of a *package* of duties and other restrictive regulations of commerce that collectively covers substantially all trade. This standard does not require an analysis of each distinct measure, but rather the group.

210. Article XXIV does not require the elimination of *all* duties and other restrictive regulations of commerce. Some restrictive regulations, if they fall within the enumerated exceptions, may be applied "where necessary." The remaining restrictive regulations must be eliminated on *substantially* all trade. As the Appellate Body explained in *Turkey – Textiles*,

> Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision. It is clear, though, that "substantially all the trade" is not the same as *all* the trade, and also that "substantially all the trade" is something considerably more than merely *some* of the trade.[173]

211. Therefore, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties can achieve the Article XXIV:8 threshold (covering "substantially all trade") without including all duties and other restrictive regulations of commerce, they may retain such duties and regulations. Thus, as with any duty or other restrictive regulation of commerce, retention of safeguard measures, in whole or in part, is consistent with Article XXIV:8(b) as long as those measures that *are* eliminated cover substantially all trade among the parties.

212. The only significance to the absence of Article XIX from the bracketed text in Article XXIV:8(b) is that – unlike the measures described within the brackets – Article XIX measures are not automatically exempt from the requirement to eliminate duties and other restrictive regulations of commerce on substantially all trade. They may still be retained if the parties to an FTA otherwise meet the requirements of Article XXIV:8. As we showed in our first written submission, this was the case for the NAFTA.[174]

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[173] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 48 (22 October 1999).

[174] U.S. first written submission, paras. 1232-1240.

118. Assuming that it applies to the exclusion of FTA partners from safeguard measures, does Article XXIV; permit any such exclusion or only the exclusion which is prescribed under the free-trade agreement?

213. Article XXIV would permit only a safeguard exclusion that is permitted under the terms of the FTA.

X. ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

A. TO CHINA (AND NORWAY)

120. Since Article 9 deals with the application of the measure, does Article 3.1 cover the elements of Article 9.1, and if so, on what basis?

214. No. We direct the Panel to the analysis in paragraphs 1040-1051 and 1282-1286 of the U.S. first written submission. In addition, it is significant that Article 9.1 is an obligation related to how a Member applies a safeguard measure – it presumes that the determination regarding serious injury and the decision to apply a safeguard measure have already been made. Since the Article 3.1 obligation to provide findings and reasoned conclusions applies to the investigation and conclusions of the competent authorities under Articles 3 and 4, that process will be complete before the question of not applying the measure to developing countries is even relevant.

121. Are you arguing that China should have been excluded from the safeguard measures at issue in this dispute pursuant to Article 9.1 of the Agreement on Safeguards?

If so, are you asserting that China qualifies as a developing country for the purposes of Article 9.1 of the Agreement on Safeguards, and if so on the basis of what criteria?

In order to establish a prima facie case under Article 9.1, is it enough for a WTO Member to state that it is a developing country or is it necessary to adduce facts to support such a claim?

215. Given China's Protocol of Accession, China's simple assertion is not sufficient to establish a *prima facie* case that the United States is required to treat it as a developing country for purposes of Article 9.1. This point is discussed more fully in paragraphs 1267 through 1269 of the U.S. first written submission. We note that, since this argument is based on China's Protocol of Accession, it would obviously be inapplicable to other Members.

122. Can China clarify its statement that it has always claimed it is a developing country in light of the United States claim that China's self-designation for certain purposes does not, by itself, establish its entitlement to treatment as a developing country Member in all situations? What conclusion can be drawn from China's Protocol of Accession in this respect?

216. During the first meeting with the Panel, China indicated that the United States had accepted that China should be treated as a developing country as a general rule. This is not a correct characterization of the U.S. position. It has always been the view of the United States that China is not entitled to a presumption of developing country status. Rather, China's treatment under the covered agreements must be decided on an agreement-by-agreement basis, as indicated in China's Protocol of Accession.

B. TO THE UNITED STATES

124. Is the US GSP always the basis upon which the United States identifies developing countries for the purposes of provisions on special and differential treatment contained in other WTO Agreements? Does the GSP list of developing countries correspond to the list of developing countries in the WTO?

217. With regard to the first question, no. For example, the United States uses a different list in determining whether WTO Members are eligible for special *de minimis* and negligibility levels under Article 27 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). This list appears in volume 15 of the Code of Federal Regulations, section 2013. A copy is attached as Exhibit USA-79.

218. With regard to the second question, the GSP list indicates the countries that are eligible for benefits under the U.S. GSP program. Some of the countries on the list – such as Comoros, Equatorial Guinea, and Ethiopia – are not WTO Members. Thus, it cannot be said that the GSP list represents developing countries for WTO purposes. The United States recognized this distinction by treating only GSP eligible countries that are also WTO Members as WTO Member developing countries for purposes of the safeguard measures on steel.

219. Finally, we note that there is no list of developing countries in the WTO against which to compare our GSP list.

125. What is the United States' response to Norway's assertion that 2000-2001 data should have been used to measure developing countries imports for the purposes of Article 9.1 rather than 1996-1997?

220. The Appellate Body has found that the Safeguards Agreement does not indicate how a Member must comply with Article 9.1.[175] There is nothing in the text that requires the use of the most recent period, and certainly nothing that would require the use of that period if it was inappropriate to do so.

[175] *US – Line Pipe*, AB Report, para. 127.

221. The period 2000 through interim 2001 was one in which the ITC found that increased imports caused or were threatening to cause serious injury. The United States considered that, as a general matter, this period did not reflect normal flows of imports and would accordingly lead to an aberrational calculation as to whether developing countries qualified for nonapplication of the safeguard measures under Article 9.1. Indeed, for certain carbon flat-rolled steel, imports from developing countries had reached a level in 2000 at which those countries accounting for less than three percent of total imports collectively accounted for more than nine percent of total imports. If that period were used, no developing country would be eligible for exclusion from the safeguard measure on certain carbon flat-rolled steel.

222. The 1996-1997 period predates the beginning of the increase in imports for most products subject to the steel safeguard measures. Therefore, the United States considered this period particularly appropriate for applying the Article 9.1 criteria.

126. Is it the view of the United States that the United States alone has the prerogative (in this case) to declare any WTO Member eligible to be a developing country? Is it possible, according to the United States for a Member to be a developing country in one case (dispute or under a particular WTO provision) and not another case?

223. The United States does not assert that it can "declare any WTO Member eligible to be a developing country." As we explained in our written submission (paragraphs 1259 through 1265) the text of Article 9.1 charges the Member applying a safeguard measure with identifying the countries that are developing country WTO Members eligible for nonapplication of a safeguard measure. The President used the U.S. GSP list to identify developing countries. Development status factors into the first, second, and third criteria for GSP eligibility under section 502(c) of the Trade Act of 1974. Moreover, under section 502(b)(1) of the Trade Act, specific developed countries – Australia, Canada, EU member states, Iceland, Japan, Monaco, New Zealand, Norway, and Switzerland – may not be designated as GSP beneficiaries.

224. With regard to the second question, yes. As we noted in response to question 124, the United States does not use the GSP list to determine eligibility for special and differential treatment of developing country Members under Article 27 of the SCM Agreement. Thus, a particular Member may be a developing country for purposes of the Safeguards Agreement, even if it is not a developing country for purposes of Article 27 of the SCM Agreement.

225. In fact, Article 27 of the SCM Agreement provides that a particular developing country may be eligible for the special and differential treatment for some products but not for others. Under SCM Agreement Article 27.5, a developing country that has reached "export competitiveness" is no longer entitled to the exception granted to developing countries under Article 27.2 to apply subsidies inconsistent with Article 3.1(a) of the SCM Agreement. Thus, a particular country may be entitled to treatment as a developing country for some disputes under the SCM Agreement, but not for others.

226. China itself has accepted this principle by agreeing in its Protocol of Accession to developing country treatment in some areas, and non-developing country treatment in others.

127. Is it possible that a single Member be considered a developing country by the say the United States and not the EC and others in respect of the same dispute or the same provision?

227. Yes. For example, the United States treated Albania, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Slovakia, Slovenia, Hungary, Poland, and Turkey as developing country Members in the application of its steel safeguard measures.[176] In contrast, the EC treated none of these Members as developing countries when it applied its own safeguard measures on steel.[177]

228. These differences arise from the text of Article 9.1, which does not indicate how a Member must comply with its obligations.[178] Since it is an obligation relating to application of a safeguard measure, it falls to the Member applying a measure to identify, in the first instance, Members eligible for treatment as developing countries for purposes of Article 9.1. Since different Members may apply different procedures, they may reach different results.

XI. DECISION-MAKING PROCESSES

A. TO ALL PARTIES

128. The EC in its oral statement stated that there is nothing in the Agreement on Safeguards that requires a WTO Member to bifurcate its decision-making process. "If the US chooses to do so, it must ensure that both branches satisfy the requirements of the Agreement on Safeguards." How does this complaint sit with the following comments made by the Appellate Body in US - Line Pipe:

> *We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or-as here-six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the*

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[176] Proclamation 7529, Annex, p. 24.

[177] Commission Regulation (EC) No. 1694/2002 of 27 September 2002 imposing definitive safeguard measures against imports of certain steel products, L261/1, 121-123 (Exhibit US-80).

[178] *US – Line Pipe*, AB Report, para. 127.

> *determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards. (emphasis added)*

229. The EC's statement to which the Panel refers was made in the context of the EC's argument that the President was required to explain "the level of the safeguard measures imposed."[179] The EC misconstrues the President's role in the administration of the U.S. safeguards law and the requirements of the Safeguards Agreement.

230. The United States is clearly permitted under the Safeguards Agreement to bifurcate the administration of its safeguards law between the ITC and the President. As the excerpt from the Appellate Body's decision in *US - Line Pipe* indicates, a WTO Member has the discretion to assign responsibility for making determinations under its safeguards law to as many or as few decision-makers as it sees fit, provided that the "singular act", i.e., the injury determination by the competent authorities, complies with the requirements of the Safeguards Agreement. Thus, the United States was free to create a process in which the executive decides the nature and extent of the safeguard measure, but does not participate in the injury determination.

231. Furthermore, all parties agree that the Safeguards Agreement obligates competent authorities, in this case the ITC, to provide certain findings and explanations related to the investigation and injury determination.

232. The parties disagree, however, on whether the Safeguards Agreement requires the President to explain how a safeguard measure prevents or remedies injury and facilitates adjustment. The EC argues that the President must provide such an explanation and asserts that he is not relieved of this responsibility simply because the United States has chosen to bifurcate the administration of its safeguard law. The EC misses the point.

233. The United States has never asserted that the "bifurcation" of the process allows the President to escape responsibility under the Safeguards Agreement. The key point is that the Safeguards Agreement itself divides the process into two stages:

(1) the investigation (Article 3) and the determination of serious injury or threat thereof (Article 4); and

(2) application of the safeguard measure (Article 5).

234. The Appellate Body has also recognized these divisions, stating that there are two basic inquiries under the Safeguard Agreement:

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[179] Oral Statement Presented by the European Communities at the First Meeting of the Panel, para. 23.

> These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. First, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the Agreement on Safeguards and pursuant to the provisions of Articles 3 and 4 of the Agreement on Safeguards, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Second, if this first inquiry leads to the conclusion that there is a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment", as required by Article 5.1, first sentence, of the Agreement on Safeguards.[180]

Thus, it is fully consistent with the Safeguards Agreement to treat the determination of the competent authorities as separate from the selection of a safeguard measure consistent with Article 5.1, and to employ different procedures at each stage.

235. With respect to the investigation, Article 3.1 states that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions." With respect to the determination of serious injury, Article 4.2(c) states that "[t]he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." As the competent authority, the ITC must comply with these requirements.

236. However, there is no analogous provision applicable to step two, i.e., application of the safeguard measure, except with respect to certain types of quantitative restrictions that were not used in the steel case. Neither Article 5 nor any other provision of the Safeguards Agreement contains an obligation to explain at the time of taking a safeguard measure how the measure remedies or prevents serious injury and facilitates adjustment. Thus, the President, who administers this second step, was under no obligation to provide such an explanation.

237. The bifurcation of the proceedings between the ITC and the President is not pertinent. In fact, even if the ITC administered both stages of the process, the Safeguards Agreement still would not require an explanation, at the time a safeguard measure was imposed, of how that measure was only to the extent necessary to remedy or prevent injury and to facilitate adjustment. As stated by the Appellate Boy in *US - Line Pipe*, "[i]t is clear, therefore, that apart from one exception [certain types of quantitative restrictions that were not used in this case] Article 5.1,

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[180] *US – Line Pipe, para. 84.*

including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[181]

129. In the cases of split votes and separate individual determinations of ITC Commissioners, what constitutes the determination of the competent authority for the purposes of a review (by this panel) under the Agreement on Safeguards and what constitutes the report of the competent?

238. Report

In all cases, the report of the competent authority includes the three volumes issued by the ITC in December 2001, plus the first and second supplemental reports.

Determination

239. U.S. law differentiates between the determination, which is the competent authorities' legal conclusion as to whether increased imports are a substantial cause of serious injury, and the explanation of the determination, which consists of the Commissioners' reasons for the particular determinations that they reached. The determinations of the ITC and the underlying determinations by the individual Commissioners are laid out on pages 1 and 17 through 18 of the ITC Report. With respect to the ten products covered by the U.S. safeguard measures, the explanations of the determinations of the ITC are as follows:

- *Certain carbon flat rolled steel, hot-rolled bar, cold-finished bar, rebar, certain tubular steel, carbon and alloy fittings, stainless steel bar, and stainless steel rod*: The explanations of the determinations for these products are set forth on pages 1-253 of the ITC's publication from December 2001, as supplemented by the first and second supplemental reports.

- *Tin mill*: The explanations of the determination for this product are set forth in the ITC's publication from December 2001 on pages 1-67 (as modified by Commissioner Devaney), the views of Commissioner Bragg on pages 269-305; and pages 307-310, as supplemented by the first and second supplemental reports.

- *Stainless steel wire*: The explanations of the determination for this product are set forth in the ITC's publication from December 2001, including the views of Commissioner Koplan at pages 263-268; the views of Commissioner Bragg at pages 269-305; and the views of Commissioner Devaney at pages 332-347. These views are supplemented in the first and second supplemental reports.

[181] *US - Line Pipe*, AB Report, para. 233.

130. Is it possible to satisfy the requirements for reasoned and adequate explanations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards with a report that is comprised of individual determinations of multiple decision-makers that are divergent?

240. Yes. First, as indicated by the quotation from the Appellate Body's decision in *US - Line Pipe* included in Panel question 128, the Safeguards Agreement allows multiple decision-makers to be involved in an investigation and determination of injury.

241. Second, the fact that certain decision-makers may have issued dissenting views is not pertinent. For purposes of determining compliance with the Safeguards Agreement, the Panel need only examine the views of the Commissioners that support the determination of the competent authorities. These determinations and the supporting explanations are specified in response to question 129. The dissenting views that are not part of these determinations are not relevant for determining consistency of the U.S. measures with the Safeguards Agreement.

242. Third, the fact that a single determination may be comprised of the views of multiple concurring decisions does not in itself mean that the determination in its entirety is not reasoned or that it does not provide an adequate explanation. Given the complexity of this case, opinions may reasonably differ as to how the facts and relevant legal requirements should be interpreted and applied.[182] As long as each of the opinions comprising the determination, standing on their own, is consistent with the Safeguards Agreement including Article 3.1 and 4.2(c), then the determination as a whole is consistent with the Agreement.

243. Finally, the mere existence of dissenting or concurring opinions should have no bearing on the question of whether the overall determination of a competent authority was properly reasoned or explained. It is common in domestic and international court systems for judges to render dissenting or concurring views, but this does not in itself call into question the reasoning of the official decision of the court. Dissenting views have even been rendered by WTO panels, but this in itself does not mean that the adopted reports reflecting the conclusions of the majority of the panel did not properly "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations" as required by Article 12.7 of the Dispute Settlement Understanding.

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[182] As stated by the Appellate Body in *US - Lamb Meat*, "panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities. . . ." WT/DS77/AB/R, WT/DS178/AB/R, para. 106. The Appellate Body stated that a panel may find that a determination of the competent authorities is not adequate or reasoned "if some *alternative explanation* of the facts is plausible, and the competent authorities' explanation does not seem adequate in light of that alternative explanation." *Id*. This finding assumes that there may be multiple plausible interpretations in a given case, each of which may be consistent with the Safeguards Agreement. The panel cannot reject the determination of the competent authorities simply because an alternative view exists.

131. In the event of a split vote within a competent national authority such as the ITC, is there a legal requirement to rebut the arguments of the negative determinations? Does it make a difference whether or not a Member publishes separate or dissenting votes?

244. The answer to both questions is no.

245. There is no requirement in the Safeguards Agreement for members of the ITC voting in the affirmative to rebut the arguments raised by other members of the ITC who voted in the negative. As long as the official determination of the ITC includes the findings, reasoned conclusions detailed analysis of the case, and demonstration of the relevance of the factors examined as required by Articles 3 and 4 of the Safeguards Agreement, then the determination is sufficient.

246. This conclusion does not change depending on whether or not a Member publishes separate or dissenting votes. A determination stands on its own, regardless of whether certain decision-makers disagree with that determination. A contrary conclusion would lead to absurd results. It would mean, in effect, that a determination might be consistent with the Safeguards Agreement when the views of dissenting or concurring decision-makers are not published, but an identical determination would be inconsistent when such views are published. Such a rule would lead Members to avoid publishing separate or dissenting votes, which would stifle a full discussion of the issues.

132. Is the question of whether the President's tie-breaking vote was consistent with United States law a matter of WTO law? If so, in what sense?

247. First, the question does not properly characterize the President's role. The President does not cast a "tie-breaking vote". He is not a "competent authority" under Articles 3 and 4 of the Safeguards Agreement and does not vote on whether the increased imports are a substantial cause of serious injury or threat of serious injury. Instead, the President simply identifies which of two evenly supported determinations is the determination of the Commission.[183]

248. Second, the President clearly acted consistently with U.S. law. The U.S. safeguard statute states that when "the commissioners voting are equally divided with respect to such determination, then the determination, agreed upon by either group of commissioners may be considered by the President as the determination of the Commission."[184] The Commissioners were equally divided with respect to the determinations on tin mill and stainless steel wire products. In fact, the U.S. Court of International Trade recently found that the ITC vote on tin

[183] Even in this context, the President does not "vote." For example, if individual Commissioners' affirmative votes are based on different rationales, or even different conclusions as to serious injury versus threat of serious injury, the statute does not authorize the President to decide that one rationale or conclusion is the rationale or conclusion of the ITC.

[184] 19 U.S.C. Sec. 1330(d)(1).

mill was, in fact, evenly divided despite the fact that the Commissioners voting in the affirmative reach different like product findings.[185] Therefore, the President had the authority under the statute to decide which determination was the determination of the ITC.

249. Finally, interpreting U.S. law is not an appropriate function of the Panel in this dispute.[186] In the case at hand, the WTO agreements do not address the question of how a Member may designate which among multiple findings constitutes the determination of the competent authorities under the Safeguards Agreement. Whether the President acted consistently with U.S. law is not relevant to the question of whether the United States complied with its WTO obligations. Consequently, there is no basis for the Panel to engage in an examination of whether the President's actions were consistent with U.S. law.

XII. GATT ARTICLE X:3(A)

A. TO BRAZIL, KOREA, JAPAN

134. With respect to arguments made regarding the failure of the President to treat different instances of "tie votes" consistently under Article X:3(a), are the complaining parties suggesting that Article X:3(a) requires uniformity in outcome in every instance?

250. Complainants appear to be making precisely the argument summarized in the question. In its first written submission, Japan stated that "[t]he decisions here are not uniform for the obvious reason that they are inconsistent: two tie votes are treated as affirmative; two are treated as negative. This is not a uniform administration of U.S. law."[187] Thus, according to Complainants, a tie vote must always be treated as a negative determination, or always be treated as an affirmative determination. As Complainants would have it, the President should not have the flexibility to make decisions based on the unique facts and merits of each particular case. Complainants' position is untenable.

251. In support of their argument, Complainants cite *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R.[188] Yet, the panel in that dispute stated as follows:

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[185] *Corus Group et al. v. George W. Bush et al.*, Slip Op. 02-87 (Aug. 9, 2002).

[186] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Panel Report, WT/DS184/R, adopted 23 August 2001, para. 7.267 ("[i]t is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation"); *United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, Panel Report, WT/DS179/R, adopted 1 February 2001, para. 6.50 (Article X:3(a) "was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform").

[187] Japan first written submission, para. 174.

[188] First Written Submission of the Government of Japan at para. 173.

> We are of the view that this provision [Article X:3(a)] should not be read as a broad anti-discrimination provision. We do not think that this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations. There are many variations in products which might require differential treatment and we do not think this provision should be read as a general invitation for a panel to make such distinctions.[189]

Thus, each tie vote must be judged on its merits. Article X:3(a) cannot require the same outcome in all tie vote situations, just as it could not require, for example, the same injury findings in all safeguards cases or the same dumping margin in all dumping cases.[190] In fact, as the United States stated in its first written submission, Article X:3(a) requires uniform administration of the law, not uniform outcomes, and where the facts of two cases differ, uniform treatment might actually *require* different outcomes.

B. TO JAPAN

136. With respect to Japan's claim regarding the treatment of the CCFRS product in the like product analysis, does differential treatment in the context of antidumping or subsides as compared to safeguards constitute non-uniform administration of laws under GATT Article X? What is the relevance of the fact that this argument relates to the administration of two different laws? Does Article X:3(a) only require the uniform application of the same law or does it also require the uniform application of different laws?

252. The fact that the ITC has reached different like product determinations in different cases does not establish a violation of Article X:3(a).

253. First, the ITC would not violate Article X:3(a) even if it had reached different like product findings in different safeguards cases. In applying the U.S. safeguards law, the ITC has applied the same five factors to define the domestic "like product" as it has applied for decades. Thus, its application of the safeguards law is uniform, in compliance with Article X. If the facts in two different cases differ, or if the scope of the petition in two cases differs, this may lead to two different like product findings. Such an outcome is completely consistent with a uniform application of the law to different facts.

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[189] *Argentina - Bovine Hides*, Panel Report, WT/DS155/R, adopted 16 February 2001, para. 11.84.

[190] *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, para. 6.51 ("the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts").

254. Second, Article X is not violated simply because the interpretation of the term "like product" may differ across different statutes. Article X refers to the *administration* of laws, not the substance of the underlying laws themselves. There is no obligation under Article X to define the same term in the same way in different statutes. Thus, if the underlying laws define the term "like product" differently, then there is no obligation to administer the laws in a way that ignores these differences.[191]

255. In the case at hand, the U.S. unfair trade laws approach the term "like product" differently than the U.S. safeguards law. The ITC explicitly addressed some of these differences in its determination.[192]

256. Third, even if the underlying statutes did not directly address how the term "like product" should be interpreted, Article X would not require the ITC to interpret the term uniformly across different statutes. Requiring uniform interpretation across different laws would ignore essential differences between the laws and the situations in which they are applied. For example, there are fundamental differences in the purposes of the unfair trade laws and the safeguard laws that may affect how the term "like product" should be interpreted in each case.[193] Article X cannot be interpreted to require a Member to ignore such critical differences and apply the term "like product" consistently across all antidumping, countervailing duty and safeguards proceedings.

257. Finally, even if Article X required the ITC to interpret the term "like product" the same way for purposes of the antidumping, countervailing duty, and safeguard statutes, this would not necessarily mean that the ITC would reach the same "like product" findings in all cases. Each case must be judged on its individual facts.[194] The facts of an antidumping or countervailing duty

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[191] The fact that Article X would allow a Member to interpret the term "like product" differently in two different statutes should not be surprising given that the term "like product" is interpreted differently even among different WTO agreements. In *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, the Appellate Body stated:

> No one approach to exercising judgment 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 "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.

[192] ITC Determination at 29-32.

[193] Antidumping and subsidies laws are used to offset the margin of dumping or subsidization, while safeguard actions are used to deal with increased imports that cause injury to a domestic industry and facilitate adjustment. The different focus of safeguard measures calls for a different type of like product analysis.

[194] *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, para. 6.51 ("the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because, in the administration of those laws and

cases may differ significantly from the facts of a safeguard case. For example, the scope of the imported products identified in the petition or request for initiating the investigation might be different in a safeguard case than in previous antidumping and countervailing duty cases. Since the like product analysis begins with the imported products, a different like product definition would merely reflect the different facts.

ADDITIONAL QUESTIONS

To the United States

140. In which order does the ITC conduct its determinations? Once an investigation was initiated, does it, first, assess whether such imports have increased and, then, whether serious injury has been suffered by the domestic industry and, finally, whether there is a causation link between the two?

258. Once a safeguards investigation is initiated, the ITC gathers evidence, holds a hearing, and receives written submissions and questionnaire responses on all relevant issues throughout the investigation. Thus, there are not stages to the injury investigation, whereby findings are made on one issue prior to gathering evidence on the next stage. However, the ITC's analysis of all of the evidence before it in order to make its determination is conducted in the order listed. After defining the domestic like product(s) and domestic industry(ies) that correspond to the subject imports, the ITC assesses whether subject imports have increased, whether serious injury has been suffered by the domestic industry and, finally, whether there is a causal link between the two. Thus, if the ITC reaches a negative determination with respect to increased imports, which it did in the present case regarding billets,[195] it does not continue to address the factors of injury and causation. If the ITC reaches an affirmative finding regarding increased imports but finds that the domestic industry is not seriously injured, or threatened with serious injury, which it did in the present case regarding heavy structural shapes,[196] the ITC does not continue to the issue of substantial cause.

141. New Zealand suggested that since "such imports" will have to be used as the starting-point to identify the like or directly competitive domestic product (pointing to the related domestic industry), "such import" has to be able to lend itself to a determination of competitive relationship, and therefore "such import" must be defined with reference to competitive criteria, such that both the imports and the domestic products covered by the investigation must compete with another in the same market. Therefore, do you think that market parameters must be used for the delineation of the imported products?

Does, for instance, CCFRS represent one sole authentic market?

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regulations, different conclusions were reached based upon differences in the relevant facts").

[195] *See* ITC Report, p. 117.

[196] *See* ITC Report, p. 125.

259. As discussed in response to questions 19, 64, 66, and 67, the ITC considers whether the subject imports identified in the request or petition and domestic products consist of similar products and whether they are interchangeable. Imported products found to have some degree of interchangeability or substitutability with the domestic products would, as such, compete with each other. The ITC then uses its traditional factors to determine whether there are clear dividing lines between the domestic products corresponding to the subject imports in order to define its domestic like product(s). After defining its domestic like product(s), the ITC identifies the subject imports (*i.e.*, "such product," or "specified imported product") that corresponds or matches up to each of the like product definitions in order to conduct each of its analyses of increased imports, serious injury, and causation. Thus, domestic "like products" are substitutable or interchangeable with the corresponding imported products and as such would compete with each other.

260. In their arguments regarding such imports, Complainants, including New Zealand, have suggested a variety of definitions for such imports (tariff lines, product exclusion requests, predetermined definitions that are not universally accepted) with no clearly suggested criteria, other than like product criteria, to actually consider the evidence collected and the facts of the case in making such a finding. The like product criteria (*i.e.*, physical properties, uses, consumer tastes, and tariff classifications) suggested by Complainants does not include a market parameter or competition criteria.

261. Moreover, the ITC first determines whether domestic and imported products generally are similar and interchangeable, and thus whether they compete with each other in the same market, before conducting its domestic like product analysis. The ITC's domestic like products in this investigation were coextensive (*i.e.*, match up) with the corresponding subject imports for its injury analysis. Finally, as discussed in response to question 149 below, the majority of CCFRS is feedstock for the next stage of processing and is captively consumed.

SECOND SET OF ADDITIONAL QUESTIONS

I. UNFORESEEN DEVELOPMENTS

142. Do parties consider that the requirement of "unforeseen developments" relates to a discrete event or does it involve an event and the consequences of that event?

262. Nothing in Article XIX limits "unforeseen developments" to one or the other. The New Shorter Oxford English Dictionary defines "development" as

> 1 the action or process of developing; evolution, growth, maturation; an instance of this; a gradual unfolding, a fuller working-out. 2 a developed form or product; a result of

> developing; a change in a course of action or events or in conditions; a stage of advancement; an addition, an elaboration.[197]

Thus an "unforeseen development" could consist either of a discrete event or the consequences of that discrete event. "Development" implies an evolution of an event over time.

143. What should be the link between the various elements of the developments that are said to be unforeseen?

263. Article XIX indicates that there should be a sequential relationship of trade concessions, followed by unforeseen developments and then serious injury.[198] Article XIX does not require that the unforeseen developments be contemporaneous with the imports, or immediately precede the imports. As noted above and in the U.S. first written submission, Article XIX does not require a "causal link" between the unforeseen developments and increased imports.[199]

264. If more than one unforeseen development has caused increased imports, Article XIX does not require that there be any link between the various unforeseen developments, only that each of the unforeseen developments "result in" increased imports under such conditions as to cause injury to the domestic industry.

II. SUCH PRODUCT

144. Does the ITC advise the President as to how products should be defined for the purposes of identifying the imported products to be investigated?

265. No. The ITC is an independent agency. It did not provide advice as to the content or definition of the list of products covered by the Presidential request of June 22, 2001.

145. Please provide specific and concrete examples to illustrate how the ITC's criteria were applied and how it identified the specific imported products that were the subject of the ITC's investigation?

266. As discussed in response to questions 19 and 141, the starting point for the ITC's analysis are all of the imports subject to investigation as identified in the request or petition ("subject imports"). The ITC next considers whether the subject imports identified in the request or petition and domestic products consist of similar products and whether they are interchangeable. Imported products found to have some degree of interchangeability or substitutability with the domestic products would as such compete with each other.

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[197] The New Shorter Oxford English Dictionary, p. 654.
[198] US first written submission, paras. 934-935; *see also* response to Question 11.
[199] US first written submission, paras. 931-933; *see also* response to Question 2.

267. The ITC then uses its traditional factors to determine whether there are clear dividing lines between the domestic products corresponding to the subject imports in order to define its domestic like product(s). A detailed discussion of the ITC's domestic like product analysis is provided below in response to question 146. After defining its domestic like product(s), the ITC identifies the subject imports (*i.e.*, "such product," or "specified imported product") that corresponds or matches up to each of the like product definitions in order to conduct each of its analyses of increased imports, serious injury, and causation.

III. LIKE PRODUCT AND DOMESTIC INDUSTRY

146. Please provide specific and concrete examples to illustrate how the ITC's criteria were applied and how it identified the like products in the ITC's investigation?

268. As discussed in response to question 24, in this safeguard investigation, the President's request identified the universe of imports subject to investigation, *i.e.*, the subject imports.[200] The President's request grouped the wide array of steel imports into four general categories: (1) certain carbon and alloy flat products, (2) certain carbon and alloy long products, (3) certain carbon and alloy pipe and tube products, and (4) certain stainless steel and alloy tool steel products. While the ITC was not bound in any way by these groupings, they provided a starting point for its analysis. The ITC found that the broad array of products in each of the four groupings tended to share some common properties and uses, and share distinct differences from products in the other groupings.

269. Thus, the ITC used each of these four general categories as its starting points for conducting its further analysis. The ITC considered whether there were domestic products like subject imports and found that domestic and imported steel consisted mainly of the same types of steel and generally were interchangeable; Complainants have not disputed that the imports and domestic products are generally the same types of steel.

270. The ITC applied its traditional like product factors (*i.e.*, 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) to the domestic products corresponding to the subject imports in each of the four general categories and looked for clear dividing lines among domestic products in order to define the like products.

271. Based on its analysis, the ITC determined that there were 27 separate like products and defined 27 domestic industries consisting of producers of each of the defined like products. The ITC then conducted its injury analysis regarding specific subject imports that corresponded or matched up to each of its like product definitions.

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[200] *See* U.S. first written submission, paras. 84, 113-115, and n. 143.

272. In its first written submission, the United States provided the following specific and concrete examples of how the ITC's like product criteria were applied by the ITC, as addressed in the ITC Report, regarding the ITC's definitions of three like products – certain carbon flat-rolled steel ("CCFRS"), tin mill products, and certain welded pipe.

273. **CCFRS:**[201] The ITC started this analysis with the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request. After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy flat products, the ITC found clear dividing lines so as to define three separate like products from this category.[202]

274. In comparing the domestic steel to the imported steel, the evidence indicated that imported certain carbon flat-rolled steel consists mainly of the same range of carbon steel as the domestic certain carbon flat-rolled steel.[203] [204] The ITC found that imported and domestic certain carbon flat-rolled steel share the same basic physical attributes and are generally interchangeable, have similar uses with the same metallurgic composition, thickness, width, and amount of processing, generally do not employ significantly different production processes, and have an overlap in the marketing channels for domestic and imported certain carbon flat-rolled steel. Thus, the ITC found that the domestic product, certain carbon flat-rolled steel, is like the imported certain carbon flat-rolled steel.

275. The ITC then applied its long established factors[205] in considering whether to analyze specific types of certain carbon flat-rolled steel separately or as a whole.[206] The ITC found that certain carbon flat-rolled steel at different stages of processing share certain basic physical

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[201] *See* U.S. first written submission, paras. 116-123.

[202] Four Commissioners found clear dividing lines so as to define three separate like products from this category and two Commissioners determined that this category was a single like product. Commissioners Okun, Hillman, Miller, and Koplan defined the following three separate like products: 1) certain carbon flat-rolled steel ("CCFRS"); 2) grain-oriented electrical steel ("GOES"); and 3) tin mill products. Commissioners Bragg and Devaney defined a single like product, carbon and alloy flat products (including slab, hot-rolled sheet and strip, cut-to-length plate, cold-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products).

[203] ITC Report, pp. 36-37.

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

[205] The ITC traditionally has taken into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (*i.e.*, where and how it is made), its uses, and the marketing channels through which the product is sold in determining what constitutes the like product in a safeguards investigation. These are not statutory criteria and do not limit what factors the ITC may consider in making its determination. *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."). No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the particular case. The decision regarding the like or directly competitive article is a factual determination. The ITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations. ITC Report, p. 30.

[206] ITC Report, pp. 36-45.

properties and are interrelated to a certain degree.[207] 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 casting or semifinished stage.[208] The mix in metallurgy depends on the requirements of the end-use, whether the end-use is at the same or different stages of processing. Thus, the chemical content of such steel essentially is determined at the melt stage of processing with some reductions in carbon content possible through subsequent hydrogen annealing.

276. Certain carbon flat-rolled steel includes steel at any of the following five stages of processing: slab, hot-rolled steel (sheet/strip/plate in coils), cut-to-length ("CTL") plate, cold-rolled steel, and coated steel.[209] An important factor in the ITC's analysis, which Complainants' arguments ignore, was the fact that certain carbon flat-rolled steel at one stage of processing generally is feedstock for the next stage of processing. For example, slab is feedstock for hot-rolled steel (sheet, strip, and plate); hot-rolled steel is feedstock for cold-rolled steel and cut-to-length plate; and cold-rolled steel is feedstock for coated steel. The ITC acknowledged that the interrelationship between the products is most prominent at the earlier stages.[210]

277. Since earlier processed carbon flat-rolled steel is the feedstock for further processed steel, such steel is produced using essentially the same production processes at least at the initial stages, with downstream steel merely employing later stages of processing. The 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.[211] 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.[212] Substantial quantities

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[207] ITC Report, p. 37-38.

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

[209] ITC Report, p. 38.

[210] 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.

[211] ITC Report, p. OVERVIEW-7.

[212] Moreover, the evidence shows that advances in technology have blurred the former differences in hot-rolled production processes for sheet/strip and plate. The Steckel mills permit rolling to thinner gauges than a traditional reversing mill thus permitting a producer to switch production between sheet and plate. Steckel mills also allow steelmakers to coil the finished plate, as on a hot-strip mill. Moreover, the addition of temper mills to CTL lines has made heavy gauge hot-rolled interchangeable with discretely produced plate. Without the temper mill process, coils cut into lengths tend to retain memory and "snap back" or bend after the initial flattening. While plate in coils can only be produced in thicknesses up to 3/4 inch and thus can only be substituted for CTL plate up to 3/4 inch thick, this portion of the CTL plate market is large. There is evidence that some mills can produce plate in coils

of earlier processed steel are internally transferred for production of further processed steel.[213] This tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the ITC also recognized that there is commonality of facilities and substantial vertical integration in the industry.

278. The ITC also considered the marketing channels and uses for certain carbon flat-rolled steel. As discussed above, the majority of certain carbon flat-rolled steel overall, and specifically for feedstocks products -- slab, hot-rolled, and cold-rolled -- is internally transferred. Thus, when certain carbon flat-rolled steel enters the commercial market, the primary marketing channel generally is directly to end-users.[214] 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 types of certain carbon flat-rolled steel. The primary end-use applications for commercial shipments of certain carbon flat-rolled steel are the automotive and construction industries. Thus, the ITC found that all types of certain carbon flat-rolled steel are substantially affected by the collective demand of these two markets.

279. The ITC found that domestic certain carbon flat-rolled steel is like the corresponding imported certain carbon flat-rolled steel that is subject to this investigation and defined CCFRS as a single like product.

280. **Tin Mill Products**:[215] The ITC started this analysis with the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request. The ITC then applied its long established factors in considering whether to analyze specific types of certain carbon flat-rolled steel separately or as a whole. After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy flat products, four Commissioners subdivided this category into three separate like products, one of which was defined as tin mill products, and

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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, p. 40-41.

[213] 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.

[214] 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. *Id.*, Table FLAT-13.

[215] *See* U.S. first written submission, paras. 143-144.

two Commissioners determined that the steel in this category, including tin mill, should be defined as a single like product.[216]

281. Tin mill products are cold-rolled steel that have been coated with tin or chromium or chromium oxides.[217] In defining tin mill products as a separate like product, Commissioner Miller found that the cold-rolled feedstock used to make tin mill products generally was further processed than was required to produce other finished products although she recognized that tin mill products shared common manufacturing processes with certain carbon flat-rolled steel and GOES.[218] Commissioner Miller also found that tin mill products were overwhelmingly sold directly to end users, were sold almost exclusively by long-term contract to those end users,[219] and were used in the production of containers, packaging and shipping materials.[220] She found that domestic and imported tin mill products shared the same physical attributes, generally were interchangeable, and were primarily sold to end-users under contract for the same uses.[221] In defining a single like product for carbon and alloy flat products, including tin mill, Commissioner Bragg found that these carbon flat products share certain basic physical properties, posses a common metallurgical base, and travel through similar channels of distribution.[222] She recognized that there was limited overlap in end-uses, but found that production was shifted among these products. In defining a single like product for all flat products, including tin mill, Commissioner Devaney found that there was a continuous manufacturing process for flat steel products. Regarding tin mill steel, he indicated that it was dedicated at the inception of production as tin mill steel and used cold-rolled steel as its feedstock.[223]

282. **Certain Welded Pipe**:[224] The ITC started this analysis with the range of steel broadly categorized as certain carbon and alloy pipe and tube, all of which had been identified as imports subject to this investigation in the President's request. After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy pipe and

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[216] Four Commissioners found clear dividing lines so as to define three separate like products within this category, and two Commissioners determined that this entire category was a single like product. Commissioners Okun, Hillman, Miller, and Koplan defined the following three separate like products: 1) certain carbon flat-rolled steel ("CCFRS"); 2) grain-oriented electrical steel ("GOES"); and 3) tin mill products. Commissioners Bragg and Devaney defined a single like product, consisting of carbon and alloy flat products (including slab, hot-rolled sheet and strip, cut-to-length plate, cold-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products).

[217] ITC Report, p. FLAT-4.

[218] ITC Report, pp. 48-49.

[219] ITC Report, p. 48; ITC Report, Table FLAT-18.

[220] ITC Report, Table OVERVIEW-2 and p. FLAT-4.

[221] ITC Report, p. 49.

[222] ITC Report, pp. 272-273.

[223] ITC Report, pp. 36, n.65, 38, n.83, 43, n.126, 45, nn. 137 and 139.

[224] *See* U.S. first written submission, paras. 156-157.

tube, the ITC found clear dividing lines so as to delineate four separate like products.[225] The ITC found that domestic certain welded pipe was like the corresponding imported certain welded pipe.[226]

283. The ITC applied its long established factors, as discussed above, in considering whether there existed clear dividing lines between specific types of certain carbon and alloy pipe and tube.[227] 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.[228] The various types of certain welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[229] 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.

147. Please elaborate on the similarities and differences between the various items that comprise the CCFRS product?

284. As discussed in response to question 146, in the U.S. first written submission,[230] and the ITC report,[231] the ITC found that CCFRS at different stages of processing has shared physical properties, common end-uses, is generally distributed through the same marketing channels and 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.

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[225] Four Commissioners found clear dividing lines and defined four separate certain carbon and alloy pipe and tube like products from this category, and two Commissioners divided this category into three separate like products. Commissioners Okun, Hillman, Miller, and Koplan defined the following four separate like products: 1) welded pipe, other than OCTG ("certain welded pipe"); 2) seamless pipe, other than OCTG; 3) OCTG, welded and seamless; and 4) fittings, flanges, and tool joints. Commissioners Bragg and Devaney defined the following three separate like products: 1) carbon and alloy welded tubular products (including welded tubular other than OCTG and welded OCTG); 2) carbon and alloy seamless tubular products (including seamless tubular other than OCTG and seamless OCTG); and 3) carbon and alloy fittings, flanges, and tool joints.

[226] ITC Report, p. 147, n. 893. This issue was not disputed in the underlying proceeding.

[227] ITC Report, pp. 147-157.

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

[229] 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).

[230] *See* U.S. first written submission, paras. 116-142.

[231] *See* ITC Report, pp. 36-45.

285. In particular, the ITC found that CCFRS at different stages of processing share certain basic physical properties and are interrelated to a certain degree.[232] 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 casting or semifinished stage.[233] The mix in metallurgy depends on the requirements of the end-use, whether the end-use is at the same or different stages of processing.

286. An important factor is the fact that CCFRS at one stage of processing generally is feedstock for the next stage of processing.[234] Since earlier processed carbon flat-rolled steel is the feedstock for further processed steel, such steel is produced using essentially the same production processes at least at the initial stages, with downstream steel merely employing later stages of processing. 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. Substantial quantities of earlier processed steel are internally transferred for production of further processed steel.[235] This tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the ITC also recognized that there is commonality of facilities and substantial vertical integration in the industry.

287. The majority of certain carbon flat-rolled steel overall, and specifically for 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.[236] 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 types of certain carbon flat-rolled steel.

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

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

[234] This is most prominent at the earlier stages. *See* U.S. first written submission, paras. 120-121; ITC Report, pp. 38-39.

[235] 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.

[236] *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. *Id.*, Table FLAT-13.

288. 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.[237] Thus, the ITC found that all types of certain carbon flat-rolled steel are substantially affected by the collective demand of these two markets.[238]

289. 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.[239] 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.[240]

148. With respect to the argument made by the United States that the items within the CCFRS product are part of a continuum and, therefore, justify its treatment as a single product, could the parties explain and illustrate whether and how a similar argument could be made with respect to welded tubular products other than OCTG?

290. Within most any defined like product (and the corresponding specific imported product) a range of goods of different sizes, grades, or stages of processing exists. While goods along the continuum share similar or like factors, individual items at the end of the continuum may not be as similar.[241] For example, is a size 6 skirt like a size 10 skirt? Or size number 3 rebar like size number 18 rebar?

291. As discussed in response to question 146, 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

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

[238] 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 Report, pp. 43-44.

[239] *See* ITC Report, p.44.

[240] *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 at I-8, and nn.18 and 19.

[241] 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.

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.

149. Is there a specific US market for plate, hot-rolled steel, cold-rolled steel, coated steel, slab, fittings, flanges and tool joints? What do parties understand by "market" in this context?

292. The majority of slab, hot-rolled steel, and cold-rolled steel are feedstock for the next stage of processing. Thus, as discussed in the U.S. first written submission and the ITC Report, the market for virtually all slab is captive consumption for processing into hot-rolled steel; the primary market for hot-rolled steel is captive consumption for processing into cold-rolled steel or cut-to-length plate; and the primary market for cold-rolled steel is captive consumption for processing into coated steel. In contrast, after CCFRS reaches the stages of CTL plate and coated steel, the markets for the next stages are varied. Thus, there are clear dividing lines between the market after CCFRS reaches the CTL plate and coated steel stages, and the variety of other further processed steel products. CCFRS at earlier stages is primarily feedstock for the next stage of processing which tends to blur any distinctions in markets until CCFRS enters the commercial market. When CCFRS enters the commercial market the primary marketing channel generally is directly to end-users.[242]

293. Finally, fittings, flanges and tool joints, which generally are used to join or cap (*i.e.*, connect) pipe, are often distributed with other tubular products.[243]

150. What factors should be taken into account in defining the dividing lines between products? Should the determination of whether products are like be made on the basis of physical characteristics, end-uses, tariff classifications, commercial perception, prices and/or any other criteria?

294. As discussed in the U.S. first written submission,[244] the ITC traditionally has taken into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (*i.e.*, where and how it is made), its uses, and the marketing channels through which the product is sold in determining what constitutes the like product in a safeguards investigation. These are not mandatory criteria and do not limit the ITC from considering other factors, as appropriate, in making its findings.[245] No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the

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[242] *See* U.S. first written submission, para. 122; ITC Report, Tables FLAT-12-15 and FLAT-17.

[243] *See* ITC Report, pp. 148-152 and 156-157.

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

[245] *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.").

particular case. The decision regarding the like or directly competitive article is a factual determination.[246] The ITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations.[247]

295. The ITC's like product factors in a safeguard investigation resemble (physical properties, uses, and customs treatment) factors attributed to *Border Tax Adjustments*, as well as focus on such other objective factors as the product's marketing channels and manufacturing process.[248] The appropriateness of considering such objective criteria is discussed in more detail in response to questions 68 and 69.

296. Finally, each like product definition should be based on the facts of the particular case and as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[249] Moreover, the methodology used by the ITC is unbiased and objective. Neither Article 2 nor any other provision of the Safeguards Agreement sets forth the factors that a competent authority must consider. Complainants have not met their burden of making a *prima facie* case that the U.S. methodology is inconsistent with the Safeguards Agreement.

151. If it is argued that the United States should not have based its injury determination on commercial sales, particularly for the CCFRS product, what basis should it have used instead?

297. The United States has argued that it appropriately relied on financial data based on commercial sales in assessing whether each domestic industry was seriously injured or threatened with serious injury. As noted in the response to Question 73, the alternative to relying on financial data for commercial sales (*i.e.* using data concerning both internal transfers and commercial sales) would have resulted in significant double-counting of production for CCFRS. As internal transfers at each stage of production of CCFRS are accounted for in the commercial sales of domestic CCFRS products, the consideration of commercial sales data provides the most accurate and complete data for this industry. No alternative methodology would be as accurate.

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[246] *See, e.g., Extruded Rubber Thread*, Investigation No. TA-201-72, USITC Publication 3375, p. I-6 (December 2000) (Exhibit US-4); *Crabmeat from Swimming Crabs*, Investigation No. TA-201-71, USITC Publication 3349, p. I-6 (August 2000) (Exhibit US-5); *Circular Welded Carbon Quality Line Pipe*, Investigation No. TA-201-70, USITC Publication 3261, p. I-10 (December 1999) (Exhibit US-6); *Certain Steel Wire Rod*, Investigation No. TA-201-69, USITC Publication 3207, p. I-9 (July 1999)(Exhibit US-7).

[247] *Extruded Rubber Thread*, USITC Pub. 3375, p. I-6 (December 2000)(Exhibit US-4); *Circular Welded Carbon Quality Line Pipe*, USITC Publication 3261, p. I-10 (December 1999) (Exhibit US-6).

[248] *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)).

[249] *EC – Asbestos*, AB Report, para. 102.

298. We observe that the EC, the party that has challenged this methodology: (1) has not explained how the ITC could have used data pertaining to transfer values in its financial analysis without raising the problems relating to data consistency and objectivity discussed in the U.S. first written submission; (2) has not explained how the ITC could have used transfer data with reference to CCFRS without raising problems of double-counting; and (3) has not explained how use of transfer data would have yielded any difference in the financial results reported by the ITC.[250]

IV. ARTICLE 5.1 OF THE AGREEMENT ON SAFEGUARDS

152. Do parties think a parallel could and/or should be drawn between the period during which increased imports are identified and the period to which reference is to be made in assessing the level of the safeguard measure under Article 5.1 of the Agreement on Safeguards?

299. Article 5.1 requires only that a measure be applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment, which has been read by the Appellate Body as referring only to injury caused by increased imports. Thus, the *injury* caused by increased imports, and not the imports themselves, and the need to adjust to imports is the proper reference point for analysis of a safeguard measure. It may be that the negative effects of imports began at the same time as the increased imports. In these cases, a Member might find it appropriate to adopt the suggestion in this question, referring to the period during which imports increased to identify the injury caused by imports and devise a measure to prevent or remedy that injury and facilitate adjustment.

300. However, two other scenarios are possible. It may be that at the time imports began increasing, the conditions of competition were such that the imports did not initially have negative effects on the domestic industry, or that the negative effects began so slowly as to not yet constitute serious injury. In that case, the reference period for devising an appropriate measure to prevent or remedy serious injury and to facilitate adjustment may begin after imports began increasing. For example, the analysis of the safeguard measure on rebar in our first written submission recognized that this might be the case, and based the numeric exercise on the period 1999-2001, rather than starting in 1997, when imports began to increase.[251]

301. It is also possible that imports had negative effects on the domestic industry *before* they began increasing, and that the negative effects of imports and other factors matured into serious injury only after the increase. In that case, the reference period for devising an appropriate measure to prevent or remedy serious injury and to facilitate adjustment may begin before imports began increasing. While this was not the case for any of the ten steel safeguard

[250] U.S. first written submission, paras. 332-333.
[251] U.S. first written submission, para. 1121.

measures, the Panel should recognize the theoretical possibility of this occurrence in its analysis of Article 5.1.

302. In short, in requiring that the injury to the domestic industry and its need for adjustment be the benchmark for the safeguard measure, Article 5.1 requires a consideration of the facts of each case. It does not permit an automatic recourse to the period during which imports increased.

153. In paragraph 260 of its Report in United States - Line Pipe, the Appellate Body held that "Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."

What does "increased imports" at the end of this quote refer to: the totality of the imports, including the increase, or only the increase? Is there a practical difference between these two readings?

303. The most logical reading of the quoted statement is that the Appellate Body referred to "increased imports" as that expression is used in Article 4.2 and, therefore, the expression must refer to the totality of imports, including the increase.

304. Based on the reasoning leading up to its conclusion, which relied heavily on Article 4.2,[252] "increased imports" in paragraph 260 of the *US – Line Pipe* Appellate Body report must be read as referring to "increased imports" within the meaning the meaning of Article 4.2. "Increased" is a past participle modifying imports, so the ordinary meaning of the expression is imports that have been "become greater in size, amount, duration, or degree; enlarge[d], extend[ed], intensif[ied]."[253] Since the imports that have increased are all imports, we understand the expression as referring to the totality of imports. We also understand this expression to have a different meaning from the expression the "increase in imports." In that case, "increase" is a noun, and means "[t]he result of increasing; the amount by which something is increased, an addition."[254] Thus, "increase in imports" is equivalent to the expression "only the increase" as used in the question.

305. The context of the expression "increased imports" and "increase in imports" in Article 4 confirms this interpretation. Under Article 4.2(a), the "rate and amount of the increase in imports" and "the share of the domestic market taken by increased imports" are both factors that the competent authorities must consider in their analysis of whether increased imports have caused serious injury. Since a rate is relevant only in evaluating a change, "increase in imports" would indicate the *change* in imports from their previous levels – that is, it would refer to "only the imports." In contrast, "increased imports" is the one factor listed in Article 4.2(a) that is not

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[252] *US – Line Pipe*, AB Report, paras. 249-252.
[253] The New Shorter Oxford English Dictionary, p. 1342.
[254] The New Shorter Oxford English Dictionary, p. 1342.

characterized as a "rate of increase" or a "change in the level." Thus, it must refer to what the question calls "the totality of imports, including the increase."

306. Article 4.2(b) further confirms this understanding. It calls for a finding of a causal link between "increased imports" and serious injury, and provides for nonattribution when "factors other than increased imports are causing injury to the domestic industry at the same time." If "increased imports" meant only the increase in imports, then the causation analysis would apply only to the increase, and would have to ignore preexisting import levels. If the Safeguards Agreement required such an artificial analysis, we would expect it to say so in clearer terms.

307. Practical considerations further support this conclusion. Unlike imports of a certain type of product, imports from a particular source, or products of a particular company, it is impossible to identify the "increase in imports" as a discrete presence in the market and determine its effect on the domestic industry. For example, if imports from all sources increase from 100 units to 150 units between 1999 and 2000 there is clearly a 50 unit increase. But the competent authorities cannot identify any particular 50 of the 150 units imported in 2000 as "the increase." It would, therefore, be impossible for them to perform an analysis of "the increase" by itself that would satisfy the requirements of the Safeguards Agreement.

V. ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

154. Could the United States please confirm the statement made during the first substantive meeting that its position and argumentation in relation to Article 9.1 on the Agreement on Safeguards and developing country status relates only to China and in light of China's Protocol of Accession?

308. The U.S. position and argumentation are based on the observation that under China's Protocol of Accession, its eligibility for the treatment available to developing countries differs from agreement to agreement.[255] In this context, China cannot establish its entitlement to treatment as a developing country simply by asserting that it is one. We have not taken a position in this dispute as to how any other Member would establish that it is entitled to treatment as a developing country under Article 9.1. Nor is it necessary to resolve that question, as no other Member has claimed to be a developing country Member that has been subject to the steel safeguard measures in a manner inconsistent with Article 9.1.

[255] Paragraphs 1267 through 1269 of the U.S. first written submission discuss this issue in more detail.

EXHIBIT LIST

US-67	Joint Comments (item 20010702004)
US-68	Joint Prehearing Framework Brief (item 200109120028)
US-69	EC Prehearing Submission (item 200109100031)
US-70	AK Steel Prehearing Brief (item 200109120111a)
US-71	USWA Prehearing Brief (item 200109120197)
US-72	Domestic Carbon Flat producers Prehearing Brief (item 200109120101a)
US-73	Respondents' Joint Prehearing Brief on Prod 18 (item 200109100062)
US-74	Minimill Coalition (Long products) Prehearing (item 200109120146a)
US-75	Prehearing Staff Report (item 200109060025)
US-76	Respondents' Joint Posthearing Brief (item 200110010031b)
US-77	AK Steel Posthearing Brief (item 200110010019)
US-78	Graphs
US-79	Developing and Least-Developing Country Designations Under the Countervailing Duty Law, 15 C.F.R. § 2013
US-80	Commission Regulation (EC) No. 1694/2002 of 27 September 2002