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

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

Executive Summary of the Written Rebuttal of the United States of America

December 3, 2002

I. INTRODUCTION

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

2. From the inception of the GATT in 1947, the availability of safeguard relief (incorporated in Article XIX) was considered to be a critical component of the international system of rules-based trade. One of the primary motives for the inclusion of a safeguard provision was the conviction that the existence of a "safety valve" would facilitate trade concessions.[2] The negotiating history of the Safeguards Agreement shows that it was not intended to change this objective. Rather, the negotiators sought to stop the proliferation of the so-called "grey area measures" and to encourage WTO Members to employ instead open, transparent and established procedures in considering temporary import relief.

3. Thus, the Safeguards Agreement reflects a carefully balanced bargain – a bargain that the parties relied upon in establishing and becoming Members of the WTO. The Panel should decline Complainants' invitation to interpret the Safeguards Agreement so as to write that bargain out of existence. Instead, the Safeguards Agreement must be interpreted and applied based on the ordinary meaning of its terms, in their context and in light of the object and purpose of the Agreement, namely to permit temporary safeguard measures in appropriate circumstances, and to encourage the use of this mechanism rather than the non-transparent measures that had previously proliferated.

4. The notion, advanced by the EC in particular, that the U.S. safeguard measures were applied for "short-term, political and electoral motives"[3] is utterly devoid of merit. The Safeguards Agreement envisages temporary import relief by means of safeguard measures in precisely this type of situation.

5. The injury suffered by the domestic industries was unquestionably serious, with dramatic declines in capacity utilization, average unit values of shipments, operating income, and capital expenditures. Perhaps the most extraordinary fact about these developments is that they occurred at a time of generally very strong U.S. demand. U.S. steel producers' poor financial performance in this favorable situation is clearly attributable to imports. In general, the years 1998 - 2000 saw the highest levels of steel imports in history – imports which, for many products, were sold at

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

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

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

prices that were literally unsustainable and that were demonstrably ruinous to domestic industries.

II. ARGUMENT

A. Analytical Framework

6. Complainants in this dispute have challenged the *application* of the U.S. safeguards law with regard to ten specific steel products.[4] No claim has been made that any aspect of the U.S. safeguards law or practice is on its face inconsistent with WTO obligations.[5] As the application of the U.S. safeguards law took the form of ten separate safeguards measures, each of these measures therefore must be considered separately by the Panel to determine whether each was applied consistently with WTO rules.

7. It is not enough for Complainants to challenge the general *methodologies* used by the ITC in investigating the impact of increased imports on each of the ten domestic industries identified. Article 2.1 of the Safeguards Agreement requires a *fact-based* determination as to each of the conditions for imposing a safeguards measure. To the extent the Panel finds it useful to explore the methodologies employed by the ITC in each of the ten safeguards investigations at issue, the proper inquiry is whether a methodology *permits* results consistent with the terms of the Safeguards Agreement. This is clear from the approach taken by the panel in *US – Line Pipe*.[6]

8. A review of Complainants' methodological arguments demonstrates that they have not made out a *prima facie* case of inconsistency with the Safeguards Agreement. Specifically:

- A five year period of investigation does not preclude a consideration of intervening trends in imports, and the ITC actually performed such an analysis;
- Use of like product factors different from those suggested by Complainants does not prevent determinations consistent with the Safeguards Agreement; and
- The causation methodology of the ITC provides for the separation and distinction of the effects of imports from the effects of other factors.

9. Complainants also confuse substantive and procedural obligations imposed by the Safeguards Agreement. A *prima facie* case that the competent authorities have failed to explain some aspect of a safeguards determination adequately may support a claimed inconsistency with the Article 3.1 procedural requirement to provide "findings and reasoned conclusions."[7] But

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

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

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

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

such a showing would not support a separate claimed inconsistency with the substantive obligations under Article 2.1, which do *not* require an explanation.

10. Finally, the EC and Switzerland argue that Article XIX and the provisions of the Safeguards Agreement require that the competent authorities analyze the Article 2.1 conditions for applying a safeguard measure in a particular order. To the contrary, Article 2.1 and Article XIX require findings that certain conditions exist and a demonstration of certain circumstances, but do not specify a particular order to perform the analysis.

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

11. The issues and arguments presented to this Panel regarding "such product" and "like product" have little to do with whether the methodology[8] employed by the United States in defining domestic products like imported products is consistent with the Safeguards Agreement, but rather are about the application of that methodology to the particular facts in the Steel investigation. In fact, many Complainants acknowledge that their main complaint is with the broad range of imports subject to investigation, a matter wholly unrelated to "like product" methodology, and where particular lines were drawn in defining specific like products.[9] Nevertheless, U.S. methodology as well as the particular like product findings in this case are consistent with U.S. obligations under the Safeguards Agreement.

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

Agreement:

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

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

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

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

c. There is some consensus that the order of analysis employed in the ITC's general methodology (*i.e.*, whether the domestic like product or specific imports are identified first) is not the issue but rather the issue is whether some product definitions in this particular investigation were too broad.[10]

d. There is consensus on some of the criteria considered appropriate (though not necessarily required) for like product analysis.[11] All parties agree on the following criteria: physical properties/characteristics, uses, and customs treatment/tariff classification. Many parties agree that consideration of manufacturing processes may be appropriate.[12] While several Complainants maintain that consumer tastes is an appropriate criteria, no party has objected to the ITC's consideration of marketing channels.

e. There is consensus that there is a distinction between "like products" and "directly competitive products" in Article 2.1.[13]

Disagreement:

a. There is disagreement on certain of the ITC's product definitions. The disagreement stems more from whether some allegedly universally accepted steel product definitions, on which even Complainants themselves have not reached a consensus, should have governed the analysis than from complaints about the appropriate methodology, or even criteria, to employ in defining like products.

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[10] *See, e.g.*, Brazil, Brazil's Responses to the Panel's Questions for the Parties, question 23 (12 November 2002) ("sequencing issue, however, masks the real issue.") ("Brazil, response to questions from the Panel").

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

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

[13] *See, e.g.*, Brazil, response to questions from Panel, question 57 (*see also* response to question 57 from Japan, Korea, New Zealand, and Norway).

b. The EC contends that imports first should be identified by tariff lines in order to first consider whether imports have increased.[14] Other Complainants and the United States do not agree that tariff lines should govern the imported product definitions or that the first step in any analysis must be the consideration of whether imports have increased.[15]

1. "Such Product"

13. The text of the Safeguards Agreement[16] does not specify that a competent authority's analysis of the relevant product begin with either the imported product or the like or directly competitive product produced by the domestic industry. Instead, the Agreement simply describes a relationship which must exist between the imported product or "such product" and the "like or directly competitive" domestic product.[17] While the Agreement establishes this relationship, it does not set forth a particular order or method for conducting the analysis for delineating these products.

14. The initial focus on the domestic product rather than the imported product for the ITC's analysis of whether there is a single or multiple like products is fully consistent with the object and purpose of the Safeguards Agreement.[18] The Safeguards Agreement provides for an analysis of the condition of the domestic industry (*i.e.*, consideration of whether the domestic producers of the like product are experiencing serious injury) in order to protect it if necessary, albeit temporarily, from increased imports. Given the purpose of the Agreement, examining the products domestically produced to ascertain the composition and scope of the pertinent like products is eminently reasonable. After all, if the objective is a precise identification of the domestic like product so as to be able to define the relevant domestic industry "so as to ensure that only domestic producers suffering *serious injury* are given temporary breathing room to facilitate adjustment,"[19] logic dictates that the analysis start with consideration of the domestic products, not the subject imports. The focus of the safeguard analysis is on the condition and response to stimuli of the domestic industry. The nature of the exporting producer and industries would not logically further this required analysis.

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

[15] *See, e.g.*, Brazil, response to questions from the Panel, question 20; Japan, response to questions from the Panel, questions 20 and 31; Korea, response to questions from the Panel, questions 20 and 31; New Zealand, New Zealand's Responses to the Panel's Questions for the Parties, question 20 (12 November 2002) ("New Zealand, response to questions from the Panel"); and Norway, response to questions from the Panel, question 20.

[16] 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.

[17] In response to the Panel's questions, most responding Complainants (Japan, Korea, New Zealand, and Brazil) agree that there should be a one-to-one relationship between such imported product and the domestic like product. *See, e.g.*, Brazil, response to questions from Panel, question 19.

[18] *See, e.g., United States – Definitive Safeguard Measures on Imports of Certain Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002, para. 82 ("*US – Line Pipe*").

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

15. Moreover, it is not clear how subdividing or explicitly defining the imports as separate products prior to defining corresponding domestic like products, as Complainants generally favor, would necessarily result in different like product definitions in many instances. These arguments seem to be premised on the erroneous notion that there are universally accepted definitions of what constitutes specific steel products, and that the ITC disregarded such definitions. Complainants' varied and inconsistent arguments in their submissions and presentations to this Panel regarding the appropriate definitions of like product demonstrate that no such universal definitions of steel products exist.[20] Moreover, Complainants' contentions, that they do not have to agree on what definition would be appropriate,[21] begs the question of how the Complainants know that the ITC's definitions were too broad if Complainants cannot reach a consensus on any alternative definition.

16. The EC takes yet another approach, contending that imports first should be identified by tariff lines, which will not necessarily correspond to domestic like product definitions, in order to first consider whether imports have increased.[22] Like many of the Complainants, the United States takes the view that while consideration of customs treatment/tariff classification may be a relevant factor in an analysis of whether there are clear dividing lines between products, depending on the facts of a particular case, it is still just one of a number of criteria and not alone dispositive.[23] [24] The EC's proposed methodology is neither required by the Agreement nor apparently followed by the EC in its own safeguard actions.[25]

2. Like Product Criteria

17. There is consensus among the parties on some of the criteria considered appropriate for the like product analysis.[26] All parties agree on the reasonableness of the following criteria:

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

[21] *See* Japan, Oral Statement of the Government of Japan Regarding the Proper Definition of the Domestic Industry Producing the Like Product, para. 23 ("Japan, first oral statement (like product)").

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

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

[24] *Accord 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*"); *Japan-Alcoholic Beverages 1987*, Panel Report, L/6216 (BISD 34S/116-117), adopted 10 November 1987, para. 5.6 ("*Japan-Alcoholic Beverages 1987*").

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

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

physical properties/characteristics, uses, and customs treatment/tariff classification. Many parties agree that consideration of manufacturing processes may be appropriate. While several Complainants maintain that consumer tastes also is an appropriate criteria, no party has objected to the ITC's consideration of marketing channels.

18. The Appellate Body has found, albeit in the context of GATT Article III, that "general criteria . . . provide a framework for analyzing the 'likeness' of particular products . . . [but] it is well to bear in mind [that such criteria are] simply tools to assist in the task of sorting and examining the relevant evidence."[27]

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

20. In accordance with the Appellate Body's findings, this Panel should recognize the clear distinction between agreements with different purposes and reject Complainants' proposals to automatically transpose criteria established for another context, such as Article III, to the Safeguards Agreement.[28] The focus of the analysis in a safeguards investigation is on the condition of the domestic industry and not, as it is under Article III, on whether imports are being treated in a manner different from domestic products in the home market, *i.e.*, whether they are afforded national treatment.[29] While protecting the competitive relationship between imports and domestic products and avoiding protection to domestic production is the purpose of Article III,[30] affording temporary protection if necessary to the domestic industry is the purpose of the Safeguards Agreement.[31]

Brazil, response to questions from Panel, questions 19, 24, and 150; EC, response to questions from the Panel, question150; and Norway, response to questions from the Panel, question150.

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

[28] *EC – Asbestos*, AB Report, para. 88 and footnote 60 ("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).

[29] 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.

[30] 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.

[31] *US - Line Pipe*, AB Report, para. 82; *see also United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Panel Report, WT/DS177/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, para. 7.76 (the Agreement's objectives of "creating a

21. The traditional like product criteria considered by the ITC focus on objective rather than subjective factors. Moreover, since the focus of the analysis in a safeguard investigation is on the condition of the domestic industry rather than the consumer or the relationship of imported and domestic products in the market, "likeness" should be viewed from the perspective of the domestic product rather than a consumer, consistent with the purpose of the Safeguards Agreement.[32] The ITC has focused on more objective factors than consumers' tastes in its traditional analysis of like products such as the product's marketing channels and manufacturing process, in addition to the three criteria on which all parties agree (physical properties, uses, and customs treatment).[33]

22. While most Complainants agree that consideration of manufacturing processes, *i.e.*, how a product is made, is an appropriate criteria for a safeguards investigation, they disagree with the ITC's additional consideration of where the product is made in the manufacturing process.[34]

23. In the context of the Safeguards Agreement, where the focus is on the domestic industry, consideration of both how and where a product is made is an appropriate and objective factor.[35] Moreover, this factor is particularly relevant where the inquiry involves a product at different stages of processing. The interrelationship of the manufacturing processes for a product at different stages of processing may be informative in finding clear dividing lines between the stages of processing.[36] Considering the manufacturing processes of steel at various stages of processing, particularly the fact that they are feedstocks, is a "product-oriented" and not "producer-oriented" analysis, as alleged by Complainants.[37]

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mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury. . . .").

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

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

EC - Asbestos, AB Report, para. 92.

[33] *See 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), and 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.").

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

[35] *Accord United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, adopted 16 May 2001, para. 94, n. 55. *See also Japan – Alcoholic Beverages 1987*, Panel Report, para. 5.7.

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

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

24. Substitutability is not one of the traditional factors considered by the ITC in conducting its analysis of whether there are clear dividing lines between domestic products in order to define like product(s).[38] 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.[39] Complainants' references to *US - Cotton Yarn* as relevant to the like product definition fail to recognize the Appellate Body's statement that "there is no disagreement . . . that yarn imported from Pakistan and yarn produced by the producers of the United States . . . are like products. . . . It is, therefore, not necessary for us to address the meaning of the term "*like products*" for the purposes of this appeal."[40] The issue in *US - Cotton Yarn* was whether imported and domestic products determined to be like could be determined not to be directly competitive.[41]

25. There clearly is a competitive relationship between the imported and domestic products. Complainants have not disputed, and neither did the parties in the underlying investigation, that the imported and domestic products generally consist of the same types of steel, are interchangeable and thus compete with each other. Moreover, within any defined like product and the corresponding specific imported product there exists a range or continuum of goods of different sizes, grades, or stages of processing. While goods along the continuum share identical or similar factors, individual items at the extremes of the continuum may not be as similar or substitutable.[42]

26. Each like product definition must be based on the facts of the particular case and as the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[43] The methodology used by the ITC is unbiased and objective. Neither Article 2 nor any other provision in the Safeguards Agreement sets forth the factors or the order that the competent authority must consider in identifying the imported product that is like or directly competitive with the domestic product. Complainants have not met their burden of making a *prima facie* case that the U.S. measure is inconsistent with the Safeguards Agreement because of the manner in which like products were defined.

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[38] 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.

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

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

[41] The Appellate Body in *US – Cotton Yarn* rejected a finding that a product could be part of the like product definition but then defined out as not directly competitive and thus not included in the definition of the domestic industry. *US – Cotton Yarn*, AB Report, para. 105.

[42] For example, a size 36 skirt is like a size 44 skirt, but are they substitutable? Or is size number 3 rebar substitutable for size number 18 rebar? Or are calves substitutable for cattle at other stages of development (*i.e.*, yearling or stocker cattle, feeder cattle, or fed cattle ready for immediate slaughter)? 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.

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

C. The ITC Satisfied the "Increased Imports" Requirement

27. Complainants' assertion that "imports were declining, not increasing, after 1998" is not accurate as to any of the products subject to this dispute proceeding. For seven of the ten products imports peaked in 2000, the final full year of the ITC's period of investigation.[44] Imports in *US – Line Pipe* followed this precise pattern, and the panel in that dispute rejected Korea's contention that the ITC's finding of increased imports was inconsistent with Article 2.1.[45] For two other products imports peaked in 1999 and remained well above pre-1999 levels in 2000.[46] For certain carbon flat-rolled steel, imports peaked in 1998, declined somewhat in 1999 and increased slightly in 2000; moreover, imports in 2000 were significantly greater than in 1996 or 1997.[47]

28. There is no merit to Complainants' assertion that the United States has "read out the separate increased imports requirement by collapsing it with the causation analysis."[48] This separate "increased imports" requirement is satisfied, *in the first instance*, by any increase in imports, absolute or relative to domestic production. Then, as competent authorities consider the other conditions necessary for imposition of a safeguard, they determine whether the increase in imports was recent enough, sudden enough, sharp enough, and significant enough to cause or threaten serious injury.

29. Complainants maintain that there is an independent temporal condition that imports be "recent and sudden," that is derived from the words "is being imported" in Article 2.1 of the Safeguards Agreement and from paragraph 130 of the Appellate Body's report in *Argentina – Footwear*.[49] Complainants seem to agree that paragraph 131 explicitly abjures arbitrary standards and cut-offs.[50] They draw a distinction between "sudden and recent" in paragraph 130 of *Argentina – Footwear* and the "recent enough, sudden enough, sharp enough, and significant enough" language in paragraph 131.[51] But Complainants overlook that paragraph 130, like paragraph 131, does not provide an absolute standard. The conclusion to be drawn

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[44] ITC Report, Vol. III, Tables LONG-C-3 (hot-rolled bar), LONG-C-4 (cold-finished bar), TUBULAR-C-4 (certain welded pipe), TUBULAR-C-6 (fittings, flanges, and tool joints), STAINLESS-C-4 (stainless steel bar), and STAINLESS C-7 (stainless steel wire); ITC Report at Vol. I, pp. 234-235; *see also* Exhibit US-66. Imports also peaked in 2000 for the stainless steel wire and rope category defined by Commissioner Bragg.

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

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

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

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

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

[50] Brazil, response to questions from the Panel, question 37; Japan, response to questions from the Panel, question 37; Korea, response to questions from the Panel, question 36; New Zealand, response to questions from the Panel, question 36; and Switzerland, Answers to the Questions of the Panel at its First Substantive Meeting, question 36 ("Switzerland, response to questions from the Panel").

[51] *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, paras. 130-131 ("*Argentina – Footwear*").

from this is that "sudden and recent," like "recent enough, sudden enough, sharp enough, and significant enough" will depend on the specific facts of each investigation.

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

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

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

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

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

34. The EC's arguments to the contrary are speculative and evince a misunderstanding of the financial data available to the ITC. The EC provides no rebuttal to our statements about the lack of objective data pertaining to financial performance concerning internal transfers. It responded to the Panel's question asking it to explain how taking internal transfers into account would have affected the injury analysis by admitting that it could not do so.[52]

35. The United States has allayed any possible concerns about the ITC's cost allocation methodology. The ITC accounting staff reconciled the financial data U.S. producers reported in their questionnaire responses with those producers' audited financial statements to ensure that cost data in its report were allocated to commercial sales in a manner consistent with U.S. generally accepted accounting principles. Indeed, because the audited financial statements contain information about commercial sales only, and do not encompass internal transfers, the

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[52] EC, response to questions from the Panel, question 71.

ITC could not have performed an analogous reconciliation process had it attempted to use data concerning such transfers for its financial analysis.

36. The nature of the reconciliation process ensured that the financial data on which the ITC relied were objective. By contrast, a financial analysis based on data relating to internal transfers, as the EC advocates, would have raised many difficulties with respect to double counting of product, particularly with respect to the CCFRS like product.

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

37. In their oral statements and written responses to the Panel's questions, Complainants have failed to provide any additional information that shows that the ITC's causation analysis was inconsistent with the Safeguards Agreement. Complainants merely reiterated their prior conclusory arguments concerning the ITC's analysis. To the extent that they have addressed new issues, they have, to a great extent, conceded the correctness of several of the United States's argument.

38. The United States has several comments to make with respects to Complainants' oral statements and written responses. First, it is clear that Complainants now appear to concede that imports need not always have an immediate impact on all of an industry's performance indicia, but that they can have a direct but lagged impact on certain indicia of an industry's condition. For example, in its responses to the Panel's questions, the EC has stated that "there is no mathematical formula which dictates the applicable time frame for establishing [a] causal link" between imports and declines in the condition of the industry during the period of investigation,[53] while Japan agrees that there is "no test for determining when the effect of increased imports on the domestic industry must materialize."[54] In other words, the Complainants acknowledge that the temporal "correlation" between import increases and changes in an industry's condition is dependant upon the performance factors being examined and the manner in which imports affect those factors.

39. Second, Complainants continue to mistakenly argue that there was not a temporal "coincidence" between the 1998 surge in imports and the serious deterioration of the carbon flat-rolled industry's condition during the period of investigation. The data show otherwise. In 1998, when import volumes increased by 31.3 percent and import unit sales values dropped by 8.4 percent,[55] the industry's share of the overall market fell by 2.5 percentage points, its aggregate net sales value dropped by 3.0 percent (despite an increase in its overall net sales quantity of 0.5 percent), its average unit sales prices fell by 3.2 percent, its aggregate gross profits fell by 19.8 percent, its aggregate operating income levels dropped by 36.9 percent, and its operating income margins fell by 2.1 percentage points.[56] Clearly, no matter what Complainants state, there was a

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[53] EC, response to questions from Panel, question 86.
[54] Japan, response to questions from Panel, question 86.
[55] INV-Y-209, Table FLAT-ALT7 (US-33).
[56] INV-Y-209, Table FLAT-ALT7 (US-33); ITC Report, p. 61.

direct and clear correlation between the import surge in 1998 and the industry's deterioration in that year.

40. Similarly, the declines in the carbon flat-rolled industry's condition that occurred in 1999 and 2000 were also clearly correlated with continuing adverse volume and price trends of imports. In 1999 and 2000, import volumes in both years remained higher than their 1996 and 1997 levels,[57] with import levels being 13.7 percent higher in 2000 than 1996.[58] These elevated levels of imports in 1999 and 2000 continued to be sold at prices that were substantially lower than domestic prices, as well as their 1996 and 1997 levels.[59] As a result of this continued and substantial underselling, imports depressed and suppressed domestic prices in both 1999 and 2000, causing continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[60] Again, the record firmly established a correlation between import trends and declines in the industry's condition in these years. The Panel should reject Complainants' mistaken characterization of these trends.

41. Third, no Complainant has yet described in detail an economic model that will isolate and quantify the *overall* level of injury attributable to increased imports. Even though the Panel specifically requested Complainants to describe in detail how a model might be developed to perform such an analysis, Complainants have brushed the Panel's question aside by baldly asserting that economists have been developing such models for years. In fact, as their sole example of such a model, Complainants continue to cite the model submitted in the *Steel* investigation by foreign respondents. As we have previously shown, that model contained substantial methodological problems and quantified the effects of imports on only one performance factor, price. In other words, Complainants' assertions that an economic model can be found that "quantifies" injury remain, to date, unsupported by fact.

42. Fourth, in a somewhat novel argument, Complainants now attempt to minimize the importance of underselling to a competent authority's causation analysis in a safeguards proceeding. Their argument simply ignores economic reality. In a market in which imports are substitutable for the domestic merchandise, consistent underselling by imports will generally tend to establish that significant price declines in that market are the result of that underselling. Given this fundamental characteristic of a market, the ITC quite properly examines the extent to which imports have undersold domestic merchandise in a safeguards investigation. Thus, although underselling is not a necessary condition for an affirmative finding that imports have caused price-suppression or depression in the market (which a number of Complainants now concede), underselling is nonetheless a strong indicator that imports, rather than other factors, are causing domestic price declines in a market.

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

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

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

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

43. Fifth, the United States does not believe, as Brazil and Japan now assert, that the ITC may find that imports are contributing in a "genuine and substantial" way to serious injury if they are having only a "negligible" impact on the industry. The U.S. statute requires that imports be an "important," that is, a "substantial," cause of the serious injury being suffered by the domestic industry.[61] Accordingly, to the extent that imports were only contributing "negligibly" to serious injury – that is, in a "small" or "insignificant" way – the ITC would not be permitted by the U.S. statute to find that imports are an "important" cause of injury.

44. Sixth, as a legal matter, the United States is not required to treat NAFTA imports as an "other" possible cause of injury in its "parallelism" analysis. The second sentence of Article 4.2(b) of the Agreement – which is the provision of the Agreement that requires a competent authority not to attribute to imports the effects of other factors – specifically states that, "when *factors other than increased imports* are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."[62] In other words, the Safeguards Agreement only requires a competent authority to separate and distinguish the effects of factors other than imports that may be causing injury to the domestic industry, even when certain imports are excluded from the remedy.

45. Notwithstanding the lack of an explicit requirement in the Safeguards Agreement, however, the ITC expressly separated and distinguished the price and volume effects of non-NAFTA imports from those of NAFTA imports as part of the its parallelism analysis. The ITC's analysis did, in fact, separate and distinguish the effects of NAFTA imports from non-NAFTA imports.

46. Finally, Complainants mistakenly contend that a flaw in the ITC's like product analysis will inherently lead to a flaw in the ITC's causation analysis. However, a finding by the Panel or the Appellate Body that the ITC's like product or industry finding was flawed would not necessarily require the ITC to alter its like product or industry definition upon reconsideration. Even if the Panel concluded that the ITC had performed a flawed like product analysis, it is possible that the ITC could alter its analysis to reflect the findings of the Panel but still conclude that its original definition of the like product and industry was proper. Accordingly, the Panel should not assume, that a flawed like product or industry analysis will inherently lead to a mistaken causation analysis.

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

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[61] 19 U.S.C. §2252(b)(1)(B).

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

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

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

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

50. We have further demonstrated that the ITC's particularized causation analysis served to separate and distinguish the effects of non-NAFTA imports from the effects of NAFTA imports. Because in the particularized causation analysis the ITC considered only non-NAFTA imports, the ITC separated the volume and pricing effects of non-NAFTA imports from those of NAFTA imports. The ITC's analysis also incorporated from the analysis of all imports those factors that were not dependent on which imports were analyzed.

51. Insofar as Complainants contend that the ITC attributed to non-NAFTA imports effects due to NAFTA imports, they have misread the ITC Report. Japan, for example, disregards that the ITC conducted a particularized examination of whether non-NAFTA import volumes increased. The EC and Korea overlook that the ITC, in its analysis of non-NAFTA imports, found a causal link between non-NAFTA imports, viewed alone, and the serious injury experienced by the pertinent domestic industry. Because NAFTA imports were not considered in the ITC's particularized causal link analysis, their effects were already excluded when the ITC found that there was a causal link between the non-NAFTA imports and the serious injury. Further analyzing NAFTA imports as an alternate cause of serious injury, as the EC and Korea advocate, would have been redundant and hence was unnecessary.

52. The ITC's analysis fully satisfies the requirements of Articles 2 and 4 of the Agreement as articulated by the Appellate Body in *Line Pipe* – that an authority establish explicitly "through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for application of a safeguard measure. . . ."[63] The ITC found that non-NAFTA imports, considered alone, satisfied the conditions for application of a safeguard measure when it separated and distinguished non-NAFTA imports in its analysis of increased imports and causation, the areas in which distinguishing between imports from different sources was appropriate and necessary, and adopted other pertinent portions of its analysis of all imports that did not change depending on the set of imports examined.

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

G. The Commission's Demonstration of Unforeseen Developments

53. Several areas of agreement between Complainants and the United States have been shown to exist. All Complainants agree with the United States that macroeconomic developments can be unforeseen developments under Article XIX.[64] Complainants generally agree that the standard as to whether an event was unforeseen is essentially a subjective one, dependent on the expectations of the negotiators at the time the concession was made.[65] Complainants have also generally agreed that imports from non-WTO Members, such as Russia, could be relevant.[66]

54. The ITC far exceeded its Article 3.1 obligation to provide interested parties an opportunity to submit evidence and views and comment on the presentation of other parties. Contrary to the assertions of the EC, a competent authority is not required to provide a draft of the authority's own views for comment by the interested parties. Such an obligation cannot be extrapolated from Article XIX or the Safeguards Agreement.

55. The ITC's demonstration of unforeseen developments is part of the ITC's report for Article 3.1 purposes. Complainants do not even address the findings in *Chile – Price Bands*, in which the panel accepted a multi-part document (minutes from individual meetings of Chile's Competition Committee) as the report of the competent authorities for the purposes of Article 3.1[67] Nor have Complainants attempted to explain why the format and structure of the report is not the sort of internal detail specifically left to a competent authority.[68]

56. In its demonstration of unforeseen developments, the ITC cited evidence regarding the expectations of the negotiators of the Uruguay Round relating to the likely effects of that Round on imports of steel products.[69] The ITC also cited evidence indicating that the currency crises surprised even professional forecasters, who considered the matter at a much later time, and had more recent information available to them.[70] Thus, the ITC established that the developments were unforeseen. Complainants fail to address, much less rebut, the evidence presented by the

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

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

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

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

[68] *US – Line Pipe*, Appellate Body Report, para. 158.

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

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

ITC indicating that these developments were in fact unforeseen. Contrary to Complainants' assertions, the ITC was not required to find that those developments were also unforeseeable.[71]

57. Complainants assert that a competent authority must demonstrate a specific effect from unforeseen developments on specific industries. Complainants' arguments are not supported by Article XIX or by the Safeguards Agreement, and Complainants' arguments also ignore the ITC's demonstration of unforeseen developments. The ITC found that the cited unforeseen developments did not affect the import levels of all steel products in uniform ways and noted the differing impact of those developments in increasing imports of specific products.[72]

58. Nothing in Article XIX explicitly limits "increased quantities" of imports to imports from Member countries only. Nor does Article XIX require any particular linkage between the unforeseen developments and the tariff concession. The Appellate Body has construed Article XIX:1(a) as simply requiring that both an unforeseen development and a trade concession be demonstrated as a matter of fact, and the ITC demonstrated the existence of both unforeseen developments and trade concessions.[73]

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

1. Complainants Misinterpret Article 5.1

59. Article 5.1 states that a Member "shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Complainants misinterpret the first of these elements and, as explained below, would read the second out of the Agreement entirely. The ordinary meaning of the word "remedy" is "to put right, reform (a state of things); rectify, make good."[74] To "rectify" or "make good" the injurious effects on the industry, a measure would have to stop the ongoing negative effects of increased imports and also address the injurious effects of increased imports as reflected in the industry's current position.

60. Complainants ignore this ordinary meaning. They argue that "the permitted maximum level of the remedy . . . should be an improvement of that profitability limited to the extent that it has been depressed by increased imports."[75] However, this view ignores the accumulation of injurious effects caused by increased imports, which may be as grave a problem as the ongoing injury. Their interpretation of "remedy" also ignores the immediate context of the Article 5.1

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

[72] ITC Second Supplemental Report, p. 4 n. 24.

[73] ITC Second Supplemental Report, pp. 2-4.

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

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

reference to "facilitat[ing] adjustment." A measure that only returned the status quo in prices or profitability might give the industry a three-year respite, but leave it in no better position to respond to increased imports than it was prior to the measure.

61. Certain Complainants err further in arguing that the Appellate Body in *US – Line Pipe* interpreted "to prevent or remedy serious injury and to facilitate adjustment" as meaning "only to the extent that [safeguard measures] address serious injury attributed to increased imports."[76] This view disregards the Appellate Body's silence on the significance of "and to facilitate adjustment."[77] In any event, Article 3.2 of the DSU clearly prohibits the EC's interpretation, as it would effectively excise the words "and to facilitate adjustment" from Article 5.1.

62. Therefore, the Safeguards Agreement establishes to prevent or remedy serious injury *and* to facilitate adjustment as *additive* objectives. If a Member considered that application of a measure achieved one of those objectives, but not the other, it could permissibly apply the measure to a greater extent. However, we note in this regard that even if the steel safeguard measures were judged solely on the basis of their necessity to prevent or remedy serious injury, they would meet the requirements of Article 5.1. As we have described in our first written submission, the U.S. numerical exercises confirm that the safeguard measures did that.[78]

63. Complainants also argue that safeguard measures "can only address the increase in imports."[79] However, it is clear that the inquiry under Article 5.1 is based on imports as a whole. The Appellate Body stated that Members may apply safeguard measures "only to the extent that they address serious injury attributed to increased imports."[80] As explained in the U.S. response to Question 153 from the Panel, the term "increased imports" as used by the Appellate Body refers to imports as a whole, not simply the increase in imports.

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

65. Finally, some Complainants argue that the Appellate Body found in *US – Line Pipe* that a Member applying a safeguard measure must publish a report justifying the measure's compliance with Article 5.1. However, the Appellate Body stated unambiguously in *Korea – Dairy* and *US –*

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

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

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

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

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

Line Pipe that the Safeguards Agreement does not require such a justification at or before the time of taking a safeguard measure.[81] Complainants are simply wrong to argue that, immediately after confirming this principle in *US – Line Pipe*, the Appellate Body reversed itself by requiring a demonstration of compliance with Article 5.1 in the competent authorities' report on their serious injury findings.

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

66. Complainants assert three arguments to establish a *prima facie* case. None is valid.

67. The fact that the safeguard measures adopted by the President differ from the ITC's recommendations does not establish a *prima facie* case of inconsistency with Article 5.1. The panel in *US – Line Pipe* found that the President's safeguard measure may differ from the ITC's recommendation without running afoul of Article 5.1.[82]

68. The exclusion of particular types of each product from the measures does not establish a *prima facie* case of inconsistency with Article 5.1. That Article clearly allows a Member to apply a safeguard measure less than the extent necessary to remedy or prevent serious injury and to facilitate adjustment, as long as it complies with the MFN obligation under Article 2.2. This discretion includes the lessened application – or even nonapplication – of a measure to particular types of a product. However, New Zealand argues that a safeguard measure must apply equally to each and every one of the items included in the product subject to a finding of serious injury.[83] It bases this concept (which we call "scope parallelism") on the requirement of parallelism between the import sources covered by a serious injury finding and the sources covered by the safeguard measure We demonstrated in the first written submission that no such principle exists,[84] and New Zealand has not rebutted our arguments.

69. Several Complainants object that the TRQ on slab suggests flaws in the ITC's like product or injury analyses of CCFRS. However, the President did not revise or modify the results of these analyses in establishing a TRQ. Instead, he found that a TRQ for slab was appropriate based on the various statutory factors that he was required to consider, even if the remedy was less than the maximum remedy permitted under the Safeguards Agreement.

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

70. Some Complainants assert that an inconsistency with Article 4.2(b) not only establishes a *prima facie* case of inconsistency with Article 5.1 but also heightens the burden of proof for a Member applying a safeguard measure. As we have shown throughout this dispute, the ITC

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

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

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

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

determinations complied fully with the Safeguards Agreement, including Article 4.2, meaning that Complainants have not satisfied the *US – Line Pipe* criteria for a *prima facie* case.

71. Moreover, Complainants misstate the standard for evaluating the U.S. counterarguments. The Appellate Body recognized that a Member may "rebut" the presumption created by an inconsistency with Article 4.2(b). In so doing, it did not suggest that the Member bore a burden any greater than a defending party normally bears under the DSU – to counter or rebut a *prima facie* case established by the complaining party.[85] When a complaining party relies on an inconsistency with Article 4.2(b) to create a *prima facie* case on inconsistency with Article 5.1, it will have done nothing more than demonstrate uncertainty as to the appropriate level of the safeguard measure. Thus, the rebuttal would need to show only that the measure was commensurate with the injurious effects attributable to increased imports.

72. The ITC Report provides the findings and reasoned conclusions necessary for such a showing. In this regard, it is clear that the Safeguards Agreement does not require mathematical proof as to the injury attributable to increased imports or the degree to which a safeguard measure could remedy that injury.[86] In line with these principles, the U.S. numerical exercises reflected the fact that an economic model typically produces a range of possible results, no one of them more likely than the others. Since the measures fell within the permitted ranges, the exercises confirmed that the safeguard measures were commensurate with the injury caused by increased imports.[87]

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

73. The Safeguards Agreement does not require that a competent authority composed of multiple decisionmakers achieve consensus as to the rationale for an affirmative determination. Articles 3.1 and 4.2(c) provide only that "the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" and containing a "detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." There is no requirement that individual decisionmakers agree on all aspects of the rationale supporting the competent authority's conclusions. The Appellate Body confirmed this conclusion in *US – Line Pipe*.[88]

74. Japan and Korea attempt to argue that *US – Line Pipe* covers only the situation of different decisionmakers reaching essentially the same result with regard to the same like product. To the contrary, the Appellate Body found that the ITC in that dispute reached findings

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

[86] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of GATT*, GATT/CP/106, Working Party Report adopted 22 October 1951, GATT/CP.6/SR.19, para. 35.

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

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

based on "two distinct concepts."[89] Thus, that report stands for the proposition that as long as the conclusions of each decisionmaker supporting an affirmative determination are consistent with the Safeguards Agreement, as was the case for tin mill steel and stainless steel wire, the overall determination of the competent authorities is valid.

75. Complainants argue that the ITC or the President should have reopened the analysis of increased imports to take account of import data that became available only in mid-January and mid-February of 2002. Nothing in the Safeguards Agreement requires a reopening of the proceedings in these circumstances. In fact, the competent authorities are only obligated to conduct additional proceedings with regard to serious injury at the mid-term of a safeguard measure more than three years in duration (Article 7.4) or if they are evaluating extension of a safeguard measure (Article 7.2). Nor does the Agreement require a government entity other than the competent authorities (such as the U.S. President) to revisit findings made consistent with Articles 3 and 4 to account for information that became available after the end of the information-gathering period.

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

76. Our responses to the Panel's questions regarding the Article X:3 claims fully rebut the arguments raised by Complainants in their responses to those questions. In addition, we note our concern regarding some Complainants' suggestion that a departure from previous practice could be a "warning signal" of or "highly relevant to" determining whether a Member had breached Article X:3.[90] Even more troubling is Japan's view that a Panel should compare the administration of *different* laws in evaluating consistency with Article X:3.[91]

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

77. Our responses to the Panel's questions regarding the Article 9.1 claims fully rebut the arguments raised by Complainants in their responses to those questions. China fails to recognize that Article I:1 and Article 2.2 require most favored nation treatment – the same treatment to all Members. Therefore, if a Member fails to provide treatment consistent with Article 9.1 to a developing country Member, it has acted inconsistently with Article 9.1, but not with Article I:1 or Article 2.2.

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

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

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