

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

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

**Executive Summary of the
First Written Submission of the United States of America**

October 11, 2002

INTRODUCTION

1. There is no dispute that the U.S. steel industry faced a crisis in 2001. The Asian financial crises that began in mid-1997, along with other unexpected events, had resulted in increases in imports that drove steel prices down even as the business cycle was reaching its peak. By 2001, prices had fallen to 20-year lows and 27 producers had declared bankruptcy, including some of the largest steel producers. Accordingly, the United States initiated a safeguard proceeding before the U.S. International Trade Commission (“ITC”) on June 22, 2001. After an exhaustive investigation, which included written submissions and hearing testimony from hundreds of interested parties, the ITC reached affirmative determinations that increased imports of eight products caused serious injury¹ to the domestic industry producing a like or directly competitive product. It also reached 17 negative determinations. The six Commissioners were evenly divided in their determinations with regard to four products.²

2. Based on these findings by the ITC, the President established safeguard measures on ten steel products (“steel safeguard measures”) on March 5, 2002.³ Following consultations with WTO Members under the *Agreement on Safeguards* (“Safeguards Agreement”), the United States applied the steel safeguard measures.

3. The steel safeguard measures cover the following products: (a) certain carbon flat-rolled steel (“CCFRS”), including carbon and alloy steel slabs; plate (including cut-to-length plate and clad plate); hot-rolled steel (including plate in coils); cold-rolled steel (other than grain-oriented electrical steel); and corrosion-resistant and other coated steel; (b) carbon and alloy hot-rolled bar and light shapes (“hot-rolled bar”); (c) carbon and alloy cold-finished bar (“cold-finished bar”); (d) carbon and alloy rebar (“rebar”); (e) carbon and alloy welded tubular products (other than oil country tubular goods) (“certain welded pipe”); (f) carbon and alloy flanges, fittings, and tool joints (“FFTJ”); (g) stainless steel bar and light shapes (“stainless steel bar”); (h) stainless steel wire rod (“stainless steel rod”); (i) carbon and alloy tin mill products (“tin mill”); and (j) stainless steel wire.

ARGUMENT

A. Analytical Framework

4. In this dispute, as in any other under the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”), the Complainants bear the burden of proof to establish a *prima facie* case that the responding party, in this case the United States, has taken actions inconsistent with its WTO obligations. Consistent with Article 11 of the DSU, the Panel must make an objective assessment of the facts and the applicability of, and conformity with, the relevant covered agreements. It may not conduct a *de novo* review of the ITC determination.⁴

5. Contrary to complainants’ views, the nature of the Panel’s inquiry does not change

¹ In this submission, “serious injury” in the generic sense encompasses both serious injury and threat of serious injury.

² See, e.g., *Steel*, Inv. No. TA-201-73, USITC Pub. 3479, p. 1 (“ITC Report”), (Exhibit CC-6).

³ Proclamation 7529 of March 5, 2002, 67 Fed. Reg. 10553 (Mar. 7, 2002).

⁴ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Panel Report, 21 June 1999, para. 7.24 (“*Korea – Dairy*”).

because the Appellate Body described safeguard measures as “extraordinary” in *US – Line Pipe*. The Appellate Body has also found that the characterization of a provision (in that case, as an “exception”) does not change the normal rules of treaty interpretation.⁵ In *US – Line Pipe*, the Appellate Body also recognized that the terms of the Safeguards Agreement themselves reconcile the objectives of providing an “effective remedy” and ensuring the remedy is not applied beyond the extent necessary for “extraordinary and temporary relief.”⁶ Thus, to the extent that the “extraordinary nature” of the remedy is relevant, it is taken into account in the design of the substantive and procedural obligations under the Safeguards Agreement, and not through the application of special rules of treaty interpretation by a panel.

6. The Panel should also reject Complainants’ arguments that the methodologies applied by the ITC must by themselves ensure compliance with the Safeguards Agreement. A methodology is one step in a competent authority’s analytical process. It can help the authority to organize and analyze the facts of a case, and ensure that the results are neutral and unbiased. But the fact that the competent authorities take steps beyond applying their standard methodologies to satisfy requirements of the Safeguards Agreement does not suggest any infirmity in their methodologies or their determination.

7. The Panel should also reject Complainants’ arguments that the omission of a fact, citation, or alternative explanation of the facts from the ITC Report is inconsistent with Articles 3.1 and 4.2(c). The Appellate Body has found that a report is inconsistent with Articles 3.1 and 4.2(b) “if some *alternative explanation* of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation.”⁷ As the parties asserting the affirmative of a claim, Complainants bear the burden of proof to demonstrate both that the alternative explanations they have posited are “plausible” and, in light of that alternative explanation, that the ITC explanation is inadequate. They have failed to do so.

B. Complainants Have Not Established Any Basis for the Panel to Conclude That Any of The ITC’s Determinations of Like Product Are Inconsistent With Articles 2.1 and 4.1 of the Safeguards Agreement or Articles X:3(a) and XIX:1 of GATT 1994

8. Complainants’ appeals on this issue present the Panel with the first occasion to examine fully the interpretation and application of the term “like products” in the context of the Safeguards Agreement.

9. The Appellate Body has found that 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

⁵ *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26 and 48/AB/R, Appellate Body Report, adopted 13 February 1998, para. 104 (“*EC – Hormones*”).

⁶ *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002, para. 82-83 (“*US – Line Pipe*”).

⁷ *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. 106 (“*US – Lamb Meat*”).

purpose of the covered agreement in which the provision appears.”⁸ The term “like or directly competitive products,” or more specifically, the term “like products” is not defined in the Safeguards Agreement or GATT 1994, nor has it been at issue in dispute settlement proceedings involving the Safeguards Agreement. Where the term “like products” has been addressed in other GATT or WTO dispute settlement proceedings, it has been in the context of provisions of GATT 1994, or other covered agreements with distinct and different purposes from those of the Safeguards Agreement. As the Appellate Body has cautioned, the interpretation of the term “like products” for one context can not be automatically transposed to other provisions or agreements where the phrase “like products” is used.⁹

10. For instance, it is clear that the interpretation of the term “like products” in the context of provisions of other covered agreements (*e.g.*, Article III of GATT 1994), whose purpose is to avoid protectionism and protect an equal and competitive relationship between products, will necessarily not be identical to, and perhaps not particularly relevant for, the Safeguards Agreement, which has the opposite purpose, *i.e.*, permitting the temporary protection of a domestic industry under certain circumstances. The Panel should recognize the clear distinction between these 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.

11. Moreover, in spite of Complainants’ mischaracterizations, the dispute settlement proceedings in *US – Lamb Meat* provided little guidance on the issue of defining the like product. There was no disagreement in that dispute regarding the definition of like product.¹⁰ Rather, the issue in *US – Lamb Meat* involved the definition of the domestic industry after the ITC had already defined the like product. The findings in *US – Lamb Meat* spoke to which producers could be considered members of the domestic industry producing a single domestic like product and not to defining the like product, as Complainants have alleged.¹¹

12. With regard to the context of the Safeguards Agreement, it has not been established in other GATT 1947 or WTO dispute settlement proceedings what factors are appropriate to be considered in determining whether a domestic product is like an imported product. While “general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the ‘likeness’ of particular products. . . . 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.”¹² Moreover, it is clear that the domestic like product analysis under the Safeguards Agreement should involve “an unavoidable element of individual, discretionary judgement” . . . [and] be made on a case-by-case basis.”¹³ As the Appellate Body has stated, “the adoption of a particular

⁸ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, para. 88 (“*EC-Asbestos*”).

⁹ *EC – Asbestos*, footnote 60, at p. 34.

¹⁰ *US – Lamb Meat*, AB Report, para. 88.

¹¹ *US – Lamb Meat*, AB Report, paras. 84, 90, and 95.

¹² *EC – Asbestos*, AB Report, para. 102.

¹³ *EC – Asbestos*, AB Report, para. 101; *see also Japan – Alcohol*, AB Report, at p. 20-21.

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.”¹⁴

13. 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.¹⁵ The ITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations.

14. There is no support in the Agreement or adopted panel and Appellate Body reports for Complainants’ contentions that the primary basis for the ITC’s like product definitions should have been tariff classification¹⁶ nor that it was prohibited from considering manufacturing processes (*i.e.*, where and how a product is made). Furthermore, contrary to Complainants’ mischaracterizations, the Appellate Body has 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. Complainants have erroneously urged application of Appellate Body findings in *US – Lamb Meat* regarding the definition of a domestic industry to the like product definition and ignored the Appellate Body’s explicit recognition that consideration of production processes may be a relevant factor in defining like products.¹⁷ The Appellate Body also 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 different forms of a single like product or had become different products.¹⁸

15. In defining the domestic like product, the ITC starts with the imported article (or articles) that has already been identified in the request or petition for an investigation (“subject imports”) and examines the evidence in order to determine the domestic product(s) that are like the subject imported product(s). While the ITC begins with the universe of imports identified in the request, the ITC only is required to define or identify the domestic product or products like or directly competitive with the imported article or articles in the petition or request. It is not required to consider whether and how to subdivide (or combine) the imported article or articles identified in the request into relevant sub-groupings prior to identifying the domestic like products.

16. The ITC’s approach regarding the definition of the like product is consistent with the

¹⁴ *EC – Asbestos*, AB Report, para. 102.

¹⁵ *Accord EC – Asbestos*, AB Report, para. 102.

¹⁶ *See Japan – Alcohol*, AB Report, pp. 21-22. *Accord Japan – Alcoholic Beverages 1987*, Panel Report, para. 5.6.

¹⁷ *US – Lamb Meat*, AB Report, para. 94, n. 55. *See also Japan – Alcoholic Beverages 1987*, Panel Report (BISD 34S/116-117), para. 5.7.

¹⁸ *US – Lamb Meat*, AB Report, paras. 90, 92 and 94; *see also US – Lamb Meat*, Panel Report, para 7.95 and 7.96.

Safeguards Agreement. Complainants’ alleged requirement to subdivide or identify separate imported products prior to defining the domestic like product has no support in the Agreement. Complainants’ urge that there is support for such requirements and narrow definitions by reading interpretations into the Agreement that are not permitted by the text or purpose of the Safeguards Agreement.

17. In particular, Complainants’ reliance on the Appellate Body’s findings in *US – Lamb Meat* in alleging that the ITC was required to define “specific imported products” first is misplaced. In the finding quoted by Complainants,¹⁹ the Appellate Body rejected imposing a safeguard measure on an imported article, lamb meat, because of the prejudicial effects that such imported article had on the domestic producers of another wholly different domestic product, live lambs, that had not been defined as a like product.²⁰ This statement pertains to the process of defining a domestic industry consisting of producers of like or directly competitive products and does not speak to separating subject imports into categories prior to defining domestic like products as Complainants allege.²¹ Furthermore, in the paragraph following this finding, the Appellate Body explicitly states that “the first step . . . is the identification of the products which are ‘like or directly competitive’ with the imported product,” *i.e.*, the first step is defining the domestic like product.²²

18. The facts in this case also are very different from those in *US – Lamb Meat*. In the present case, the ITC’s definitions of like products are coextensive with the subject imports. The ITC did not define the domestic “like products” to encompass more or different types of steel than the imported articles identified as subject to investigation. Moreover, the ITC considered the effects of only the subject imports (that corresponded to each domestic like product definition) on the domestic industry consisting of the producers of the corresponding domestic like product. The ITC’s approach is clearly consistent with the Safeguards Agreement and the Appellate Body’s findings in *US – Lamb Meat*.

19. Complainants contend that the Safeguards Agreement is an exception to other obligations, and point to statements in *US – Lamb Meat* regarding the prejudicial effects of imports on producers of domestic products not defined as like products. However, to the extent that these considerations are applicable or valid, they do not require a narrowly construed like product definition, as Complainants contend. The like product and domestic industry definitions in this case correspond exactly to the imports subject to investigation. Thus, the effects of imports on domestic producers of goods that are not defined as like products is not at issue.

20. Complainants provide no support for their allegation that “the notion ‘*specific product*’ referring to imports is distinct and more narrow than the concept ‘like or directly competitive product’ referring to domestic versus imported products.”²³ Moreover, their rationale for

¹⁹ See, *e.g.*, EC first written submission, para. 184.

²⁰ *US – Lamb Meat*, AB Report, para. 86.

²¹ See *US – Lamb Meat*, AB Report, para. 86.

²² *US – Lamb Meat*, AB Report, paras. 87, 92 and para. 94, n.55.

²³ See, *e.g.*, EC first written submission, paras. 184-185.

defining “specific imported products” first is to require authorities to consider whether such imports have increased, as a “filter,” prior to conducting the like product analysis. Complainants’ proposed methodology has no basis in the Agreement. Moreover, it is ironic that Complainants, who have alleged incorrectly that the ITC’s like product definitions were made in order to attain a desired result, actually propose that the ITC should have conducted a results-oriented test prior to defining the domestic like product.

21. An underlying premise of many of Complainants’ arguments is that there are universally accepted definitions of what constitutes specific steel products in general, and in trade remedies matters, in particular, and that the ITC disregarded such definitions. Complainants’ own arguments show that no such consensus on steel product definitions exists. Their proposals for appropriate like product definitions range 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. Far from universal agreement, some Complainants even propose different definitions for the same item for different purposes, based on the issue contested and their desired result.

22. Complainants’ arguments seem to be based on a notion that definitions of the like product are made prior to the gathering of evidence. The ITC, however, does not predetermine its definitions of like product. In the present case, the ITC appropriately began its like product analysis with the imports subject to this particular investigation, which included a range of steel products, and after considering the factors appropriate for the context and the facts of this particular investigation, made its like product definitions. Contrary to the Complainants’ allegations, the ITC was not required to begin with any predefined like products that had been identified in different investigations pursuant to other statutory standards and based on the particular records of the cases in which they were defined.

23. In particular, Complainants’ arguments that the ITC should have defined the various like products using the same factors and with the same results as it has in antidumping and countervailing duty investigations involving steel fails to recognize that those definitions (as they are in a safeguard investigation) are dependent on the imports subject to that particular investigation. Contrary to Complainants’ allegations, the ITC had no obligation nor reason to explain why its like product definitions in the instant Safeguard action based on a different type of trade remedy investigation, with a very different scope of subject imports and a different record, were not the same as the various decisions in other types of trade remedy investigations that were based on different subject imports and different underlying facts.

24. The ITC defined 27 separate like products that correspond to subject imports. Ten of these definitions correspond to subject imports on which remedies were imposed and are subject to review by this panel. While Complainants challenge the ITC’s methodology, they specifically focus on the ITC’s definitions of three like products – certain carbon flat-rolled steel, tin mill products, and certain welded pipe. The U.S. submission addresses the general issues raised regarding interpretation and application of the term “like product” in the context of the Safeguards Agreement and responds to the specific allegations involving the ITC’s definitions of like product in this case.

25. The ITC considered the record evidence using long established factors and looked for clear dividing lines among the various types of domestic steel corresponding to the imported steel subject to this investigation. The methodology employed by the ITC is unbiased and objective. The ITC’s definitions of like products were adequate, reasoned, and reasonable explanations were provided, consistent with U.S. obligations under the Safeguards Agreement.

C. The “Increased Imports” Requirements of the Safeguards Agreement Were Satisfied.

26. Complainants misconstrue or ignore the Appellate Body and panel reports addressing the “increased imports” requirement of the Safeguards Agreement. They misconstrue the Appellate Body’s report in *Argentina – Footwear* by arguing that an increase in imports must be recent, sudden, sharp, and significant, according to some absolute standard. It is clear that there are no such absolute standards for how recent, sudden, sharp or significant the increase in imports must be. As the Appellate Body said, it is not a “mathematical or technical determination.”²⁴ The Appellate Body was very clear – the imports must be recent *enough*, sudden *enough*, sharp *enough*, and significant *enough* to cause or threaten serious injury. These are questions that are answered as competent authorities proceed with the remainder of their analysis (*i.e.*, with their consideration of serious injury/threat and causation). These analyses need not form a part of the evaluation of the threshold issue of whether the imports have increased either absolutely or relative to the domestic industry.

27. Complainants further misconstrue what the Appellate Body found in *Argentina–Footwear* about considering trends in imports over the period of investigation. The Appellate Body addressed trends in order to show that consideration of end points alone was insufficient, and that an examination of intervening points must be made. The Appellate Body did not state – as has been suggested by Complainants – that trends must show a constant increase in imports or an increase that lasts for the entire period of investigation.

28. Complainants largely ignore the Appellate Body’s report in *US – Lamb Meat*, which made clear that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.²⁵ Complainants also attempt to downplay the panel report in *US – Line Pipe*, which explains that it is not necessary to find that imports are still increasing in the period immediately preceding the competent authority’s determination, or up to the very end of the period of investigation.²⁶

29. Complainants’ claims that the United States made methodological errors are without merit. First, the ITC did not engage in a simple end points analysis of comparing import data in 1996 with import data in 2000, and it did not fail to consider intervening movements or trends in imports over the entire period of investigation. The ITC considered trends in imports over the

²⁴ *Argentina – Footwear*, AB Report, para. 131.

²⁵ *US – Lamb Meat*, AB Report, para. 137.

²⁶ *US – Line Pipe*, Panel Report, para. 7.207.

entire period of investigation for each product, often stating the absolute and relative imports for each year of the period of investigation and for the interim periods. Second, Complainants' assertion that the ITC selected 1996 as a base year in order to achieve a particular result has no merit. The ITC followed its established practice in safeguards investigations of using a period of investigation of five years plus whatever interim period is available. Third, Complainants' criticism that the ITC failed to give enough weight to interim 2001 import data when these showed a decrease in imports is unfounded. An exclusive focus on import data in interim 2001 would disregard the annual data in preceding years, which would be inconsistent with the Safeguards Agreement. Fourth, Complainants' position that the ITC failed to engage in an adequate "quantitative analysis" of the import data is unfounded. Competent authorities are not required to analyze the import data in every possible permutation. The ITC described the import data in a clear and straight-forward manner and, accordingly, acted in conformity with the Safeguards Agreement.

30. Fundamental legal and practical considerations should lead the Panel to reject Complainants' attempts to expand the period of investigation to encompass full-year 2001 data that are not on the record of the ITC's investigation. First, to the extent that Complainants are suggesting that the ITC should have relied on full-year 2001 data without giving interested parties an opportunity to comment on those updated data, Complainants' position is directly at odds with Article 3.1.

31. Second, if the ITC had updated the import data to include full-year 2001 figures, it would also have had to update all the data in the record, including data concerning injury and causation, through the end of 2001. By the time that this could have been accomplished, full-year 2001 data would no longer be the most current. Thus, Complainants' proposed use of full-year 2001 data would have required an endless process of updating data that would preclude any final decision in a safeguards investigation. It is obvious that competent authorities must be permitted to set the end of a period of investigation at a point that will permit them to gather, compile and analyze not only import data but also information concerning the condition of the domestic industry and the overall market environment. It is also clear that in setting the end of the period of investigation at June 30, 2001, the ITC was gathering the most recent information it could, given that the investigation was instituted in late June 2001.

32. For each of the ten steel products with respect to which the United States has taken a safeguard measure, the ITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the ITC's determination that there were imports in such increased quantities, and under such conditions, as to cause or threaten serious injury to the domestic industry.

D. The ITC's Determinations of Serious Injury and Threat of Serious Injury Are Consistent with Articles 2.1, 4.1, and 4.2 of the Safeguards Agreement.

33. After determining that certain steel products were being imported in increased quantities, the ITC evaluated the relevant factors bearing on the situation of the pertinent domestic industry producing the like product. For eight of the ten products on which the United States imposed

safeguards measures, the ITC found the domestic industry to be seriously injured. For the remaining two products, the ITC found the industry to be threatened with serious injury. The ITC's determinations of serious injury and threat of serious injury reflect a thorough and objective evaluation of the evidence and fully comply with the requirements of Articles 2.1, 4.1, and 4.2 of the Safeguards Agreement.

34. In determining that the pertinent domestic industries were either seriously injured or threatened with serious injury, the ITC relied on the domestic safeguards statute, which defines "serious injury" identically to Article 4.1(a) of the Safeguards Agreement – *i.e.*, as "a significant overall impairment in the position of the domestic industry."

35. Article 4.2(a) of the Safeguards Agreement identifies several relevant factors that investigating authorities are to examine to ascertain whether there is serious injury: "the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the levels of sales, production, productivity, capacity utilization, profits and losses, and employment." The ITC evaluated each of these enumerated factors.

36. The ITC's evaluation was based on the factors as a whole. Various WTO Appellate Body and panel reports indicate that a competent authority may find serious injury although not every single factor it examines pertaining to the industry's condition is declining. Instead, the authority must consider the totality of the trends and their interaction.

37. In conducting its analysis of serious injury an authority may examine factors not expressly referenced in Article 4.2(a). For several industries, the ITC evaluated additional factors it deemed to be relevant. One such factor concerned whether producers had declared bankruptcy. The significance of this factor is clear. Bankruptcies can indicate reductions in the industry's productive facilities and employment levels. Additionally, that a corporation lacks sufficient liquid assets to pay its creditors, and consequently must seek protection, restructuring, or even liquidation from the U.S. bankruptcy courts, has obvious implications for the competitive viability of that producer. A corporation will generally not make a bankruptcy filing unless its operations have been significantly impaired and other attempts to adjust have been exhausted. Similarly, an entire industry's viability may be in question when several producers within that industry declare bankruptcy.

38. The ITC's analysis focused on each industry as a whole, consistent with U.S. law and the Safeguards Agreement. In particular, the data upon which the ITC relied concerning each industry's shipments, production, and market share were all computed on the basis of the entire industry. This is also true of the data the ITC used to analyze the financial performance of the various industries. Contrary to the contentions of the EC, the information concerning operating performance and profit margins included in the ITC's report was intended to represent the performance of each industry as a whole, not merely a particular segment of that industry.

39. It is true that the data on operating income appearing in the ITC report were based on the value of commercial sales. There were several reasons why the ITC used this measure. First, the ITC obtained financial performance data principally through the questionnaires it issued. By

requesting that producers, for purposes of providing financial information, limit their reporting to revenues actually received for commercial sales, and costs relating to those sales, the ITC assured that the financial data it received would be computed on a basis that was both consistent among different producers for each particular product on which it collected data and consistent for a particular producer across several products it produced. In this manner, the ITC assured that the financial data it received was in fact “objective” and consistent with U.S. generally accepted accounting principles.

40. Moreover, had the ITC instructed the producers to attempt to estimate “income” for internal transfers of product, the instruction presumably would have required the producers to construct transfer values on the basis of commercial sales values. Under such an instruction, whatever information any of the reporting producers could have provided on transfer values would have had no difference, or only minimal difference, from the data that were reported concerning commercial sales values. This is particularly true for the numerous domestic industries where internal transfers constituted a very small percentage of overall production.

41. The ITC explained in some detail why there was a significant overall impairment of the state of each industry that it concluded was seriously injured. These industries uniformly reported poor financial performance. Numerous firms, and often the entire industry, showed unprofitable operations. In several industries producers had gone bankrupt. For most of the pertinent industries, there were also declines in capacity and production, with closures in productive facilities. Many also had declines in capacity utilization and employment. In industries where not all factors pertaining to the industry’s condition were declining, the ITC provided an explanation, based on its objective consideration of all pertinent data, of why the data supported its conclusion of serious injury.

42. For the industries producing certain welded pipe and stainless steel wire the ITC similarly provided a detailed, fact-based explanation in support of its finding of threat of serious injury. In particular, the ITC explained how declines in industry indicators during the most recent portion of its period of investigation, when considered in the context of the entire period of investigation and the industry’s current condition, supported its conclusion that a significant overall impairment in the state of the industry was clearly imminent.

E. The ITC’s Causation Analysis Was Consistent with the Requirements of the Safeguards Agreement.

43. The ITC’s causation analysis was fully in accordance with Articles 2.1 and 4.2 of the Safeguards Agreement. The ITC thoroughly and objectively analyzed the record evidence for the ten steel products subject to the steel safeguard measures and established unambiguously that there was a “genuine and substantial” causal link between increased imports of these products and serious injury or the threat of serious injury. Moreover, the ITC satisfied its obligation to separate and distinguish the effects of imports from the effects of other factors for all ten products.

1. The Causation Requirements of the Safeguards Agreement

44. Under Article 2.1 of the Safeguards Agreement, a Member may only apply a safeguard

measure on an imported article if “such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

45. Under Article 4.2(b) of the Agreement, a Member may not find that increased imports have caused or are threatening to cause serious injury to an industry unless its “investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.” Article 4.2(b) also cautions 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.”

46. The Appellate Body has stated that Article 4.2(b) of the Safeguards Agreement contains “two distinct legal requirements” that must be satisfied under the Agreement.²⁷ A competent authority must first demonstrate the “existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.”²⁸ In this regard, the competent authority must “determine whether there is ‘a genuine and substantial relationship of cause and effect’ between increased imports and serious injury and threat thereof”²⁹ by assessing whether there is a “relationship between the movements in imports (volume and market share) and the movement in injury factors.”³⁰

47. Second, the competent authority must ensure that the “injury caused by factors other than the increased imports [is] . . . not . . . attributed to increased imports.”³¹ According to the Appellate Body, this non-attribution language “requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports.”³² More specifically, “the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports.”³³

48. Several aspects of the Appellate Body’s explanation of these requirements should be noted. First, the Appellate Body has consistently indicated that imports need not be the “sole cause of serious injury” under Article 4.2(b).³⁴ Instead, the Appellate Body has stated that the Agreement’s requirement of a “genuine and substantial” causal link between imports and serious injury is satisfied if imports simply “contribute to ‘bringing about,’ ‘producing’ or ‘inducing’ the serious injury” being suffered by an industry.³⁵

²⁷ *US - Line Pipe*, AB Report, para. 208.

²⁸ *US - Line Pipe*, AB Report, para. 208.

²⁹ *US - Lamb Meat*, AB Report, para. 179.

³⁰ *Argentina – Footwear*, AB Report, para. 144.

³¹ *US - Line Pipe*, AB Report, paras. 208.

³² *US - Line Pipe*, AB Report, para. 211 (quoting *US - Lamb Meat*, AB Report, para. 179).

³³ *US - Line Pipe*, AB Report, para. 217.

³⁴ *US - Line Pipe*, AB Report, para. 209; *US - Wheat Gluten*, AB Report, para. 67.

³⁵ *US - Wheat Gluten*, AB Report, para. 67 (emphasis added).

49. Second, neither the Appellate Body nor previous Panels have found the Agreement to require that a competent authority “quantify” the precise amount of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b).³⁶

50. Third, the Appellate Body has specifically stated that the standards it has announced in these reports leave “unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b).”³⁷ Accordingly, the Appellate Body has recognized that the Safeguards Agreement leaves the development of appropriate analytical methodologies under Articles 2.1 and 4.2(b) to the discretion of the competent authorities.

2. The ITC’s Analytical Methodology

51. Like the Safeguards Agreement, the U.S. safeguards statute requires that the ITC determine “whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”³⁸ More specifically, the statute directs the ITC to take into account “all economic factors” that are relevant to its analysis, including – but not limited to – an examination of increases in the absolute or relative volumes of imports during the period of investigation, declines in the domestic industry’s market share during the period of investigation, and changes in the condition of the industry over the course of the relevant business cycle.³⁹

52. The statute also directs the ITC to assess whether “factors other than imports . . . may be a cause of serious injury, or the threat of serious injury, to the domestic industry” in question.⁴⁰ After examining whether any other factors have caused injury, the statute then directs the ITC to assess whether imports are an “important” cause of serious injury and a cause that is “not less than any other cause” of injury.⁴¹ In other words, the ITC may only reach an affirmative finding in a safeguards proceeding if imports are both an “important cause of serious injury or threat” of serious injury and “a cause equal to or greater than any other cause” of injury or threat.⁴² Thus, the ITC must both analyze the extent to which imports are a cause of serious injury to the industry and identify, separate and distinguish the injury caused by other effects from those caused by imports.

53. The ITC has generally conducted a two-step analysis when performing its causation analysis in a safeguards proceeding. As the first step in this process, the ITC conducts a thorough and objective examination of all relevant economic data for the market in question,⁴³ focusing in particular on changing trends in the volume and pricing movements of imports and trends in the

³⁶ See, e.g., *US - Line Pipe*, AB Report, paras. 200-217; *US - Wheat Gluten*, AB Report, paras. 60-92.

³⁷ *US - Lamb Meat*, AB Report, para. 178.

³⁸ 19 U.S.C. §2252(b)(1)(A).

³⁹ 19 U.S.C. §2252(c)(1)(C) & (c)(2)(A).

⁴⁰ 19 U.S.C. §2252(c)(2)(B).

⁴¹ 19 U.S.C. §2252(b)(1)(B).

⁴² ITC Report, p. 34.

⁴³ See, e.g., ITC Report, pp. 56-63 (certain carbon flat-rolled steel analysis); see also ITC Report, p. 34.

financial and trade indicia of the industry.⁴⁴ Moreover, the ITC examines the relevant economic factors in light of the particular conditions of competition of the market.⁴⁵ 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 industry.⁴⁶

54. In the second step of its causation methodology, the ITC identifies other factors that may be contributing to the serious injury being suffered by the industry.⁴⁷ 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.⁴⁸ 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 performs a qualitative assessment of the extent to which the factor is contributing to the injury suffered by the industry.⁴⁹

55. The ITC does not attempt to place a numerical value on (that is, to “quantify”) the amount of the injury caused by imports or any other factor.⁵⁰ Instead, the ITC closely examines all of the data relating to the nature and extent of the injury caused by imports and other factors and 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.⁵¹ By doing so, the ITC is able to assess – as required by U.S. law⁵² – whether increased imports contributed as importantly to injury as any other factor causing injury.⁵³ Accordingly, as required by the Safeguards Agreement, the ITC is able to assess whether there is a genuine and substantial causal link between imports and serious injury, or the threat thereof.

3. The ITC’s Causation Analyses Were Fully Consistent with the Causation Requirements Set Forth in the Safeguards Agreement

a. Complainants’ General Challenges to the ITC’s Determination Are All Unfounded.

56. Although Complainants make a number of general arguments about the ITC’s causation analysis in the steel investigation, these arguments are unfounded.

57. First, the United States has not ignored the Appellate Body’s prior findings in its analysis, as Complainants contend. In its prior decisions, the Appellate Body has not found the two-step causation analysis to be inconsistent with the requirements of the Agreement or directed the ITC

⁴⁴ See, e.g., ITC Report, pp. 59-63.

⁴⁵ See, e.g., ITC Report, pp. 56-58.

⁴⁶ See, e.g., ITC Report, pp. 59-63.

⁴⁷ See, e.g., ITC Report, pp. 63-65.

⁴⁸ See, e.g., ITC Report, pp. 63-65.

⁴⁹ See, e.g., ITC Report, pp. 63-65.

⁵⁰ See, e.g., ITC Report, pp. 59-65.

⁵¹ See, e.g., ITC Report, pp. 63-65 (certain carbon flat-rolled steel).

⁵² ITC Report, p. 34; 19 U.S.C. §2252(b)(1)(B).

⁵³ See, e.g., ITC Report, pp. 63-65.

to change its causation methodology. Instead, the Appellate Body found in those cases that the ITC failed to adequately explain its causation findings. In its steel determination, the ITC provided the thorough and objective causation analysis required by the Appellate Body in its prior decisions.

58. Second, the “substantial cause” standard set forth in the U.S. statute does not inherently lead to a violation of Articles 2.1 and 4.2(b) of the Agreement, as Complainants assert. Under that standard, the ITC must make two separate findings when analyzing the nature and extent of the injury caused by imports and other factors. The ITC must determine that increased imports are – in and of themselves – an “important” cause of serious injury to the domestic industry.⁵⁴ In addition, the ITC must determine that imports are as “important” or more “important” a cause of injury than any other factor.⁵⁵

59. By requiring that the ITC first find that increased imports are an “important” cause of injury and as important as any other cause, the U.S. statute ensures that the ITC will establish that there is a “genuine and substantial” causal link between imports and serious injury in a safeguards proceeding. In this regard, the words “substantial” and “important” have essentially the same meaning. In particular, the New Shorter Oxford English Dictionary defines the word “substantial” as “[h]aving solid worth or value, of real significance; solid; *weighty*; *important*; worthwhile . . .” while it defines the word “important” as “[h]aving great significance; carrying with it great or serious consequences; *weighty*, momentous.”⁵⁶ By requiring imports to be an “important” cause of serious injury, therefore, the U.S. statute contemplates that the ITC will assess whether there is at least a “genuine and substantial” causal relationship between imports and serious injury in its safeguards determination.

60. The “substantial cause” test also requires the ITC to identify the nature and extent of the factors causing injury to the industry, including increased imports. The statute requires the ITC to “examine factors other than imports” that are causing injury and to compare the “importance” of that injury to that caused by imports.⁵⁷ By doing so, the statute inherently requires the ITC to identify the nature and extent of injury caused by other factors and to distinguish them from the effects of imports. Indeed, the Appellate Body has specifically stated that, by “examining the relative causal importance of different causal factors,” the ITC clearly engages in a “process to separate out, and identify, the effects of the different factors, including increased imports . . .”⁵⁸ Accordingly, it is clear that the “substantial cause” test of the U.S. statute requires the ITC to identify the nature and extent of all the factors causing injury, and to “separate and distinguish” them when assessing whether imports are as important or more important than other causes of injury.

61. Third, nothing in the language of the Safeguard Agreement or the findings of the

⁵⁴ 19 U.S.C. §2252(b)(1)(B).

⁵⁵ 19 U.S.C. §2252(b)(1)(B).

⁵⁶ The New Shorter Oxford English Dictionary, 1993 Edition, pp. 1324 & 3124.

⁵⁷ 19 U.S.C. §2252(b)(1)(B) & (c)(2)(B); *see also* ITC Report, p. 34.

⁵⁸ *US - Lamb Meat*, AB Report, paras. 184.

Appellate Body indicates that the ITC must formally consider Canadian and Mexican imports to be another, “non-import” source of injury in its causation analysis. The ITC is clearly not required to consider these imports to be a non-import factor causing injury when performing its initial assessment of whether imports have caused serious injury to the industry. At this stage of the ITC’s analysis – that is, before the ITC considers whether grounds exist for excluding Mexico and Canada from the safeguard measure – the ITC is required by the U.S. statute and the Safeguards Agreement to assess whether imports from all sources have been a substantial cause of serious injury to the domestic industry.⁵⁹ Requiring the ITC to exclude Canadian and Mexican imports from its analysis at this point would be inconsistent with the basic requirements of the Agreement and U.S. law.

62. Similarly, there is no reason that the ITC should be required to perform a more formal non-attribution analysis for Mexican and Canadian imports than it currently performs in the “parallelism” causation analysis now required by the Appellate Body. To observe the parallelism principle, the ITC performs a second causation analysis segregating Canadian and Mexican imports from other imports whenever Canadian and Mexican imports are excluded from a safeguard measure.⁶⁰ By doing so, ITC distinguishes the price and volume effects of NAFTA imports from non-NAFTA imports. This process provides the non-attribution required under Article 4.2(b), as explicated by the Appellate Body. Requiring anything more would be redundant.

63. Finally, no matter how often Complainants assert that the ITC performed “cursory” or “minimal” discussions of certain causation issues, “failed to analyze” other issues, or “ignored” particular facts or causation arguments, one thing is clear: the ITC considered all of the available record evidence pertaining to each issue raised by Complainants, appropriately weighed the record evidence, and performed a thorough and objective assessment of the issue in question. The length and detail of the ITC’s Report in this proceeding establishes that the ITC took the time and the effort to ensure that its analysis was comprehensive, well-reasoned, and fully supported by the record.

b. The ITC’s Causation Analysis For Certain Carbon Flat-Rolled Steel Was Fully Consistent With The Safeguards Agreement

64. The ITC established that there was a genuine and substantial cause and effect relationship between increased imports of certain carbon flat-rolled steel and the serious injury suffered by the domestic industry during the latter half of the period. In sum, the ITC correctly found that a “dramatic increase in the volume of imports in 1998 – at the midpoint of the period examined – coincided with sharp declines in the domestic industry’s performance and condition” and these declines occurred despite a growth in demand in the U.S. market.⁶¹ The ITC also correctly found that this surge of imports in 1998 entered the market at prices that were

⁵⁹ See Safeguards Agreement, Article 2.1, 4.2(a), & 4.2(b).

⁶⁰ *US - Wheat Gluten*, AB Report, para. 96, *US - Line Pipe*, para. 179 *et seq.*

⁶¹ ITC Report, p. 59.

“generally significantly lower-priced” than the first two years of the period and that imports significantly undersold domestic merchandise, leading to declines in domestic prices.⁶²

65. Moreover, the ITC correctly found that there was a clear correlation between import volume and pricing trends and the declines in the industry’s condition in 1999 and 2000, the final two full years of the period of investigation. Although the “volume of imports slackened somewhat during these two years,” imports remained at substantially higher volume levels in 1999 and 2000 than in 1996 and 1997⁶³ and continued to disrupt pricing levels in the market, leading to substantial declines in the industry’s pricing levels and operating income margins.⁶⁴

66. In sum, as the ITC correctly stated, the record showed that:

The import surge in 1998 altered the competitive strategy of domestic producers. After the initial wave of imports in 1998, which captured substantial market share from domestic producers, domestic producers sought to protect [their] market share against further import penetration by competing aggressively against imports on price. Repeated price cuts by the industry, while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry’s condition. Moreover, the price declines occurred despite the fact that demand for certain carbon flat-rolled steel increased in both 1999 and 2000. . . . In such a market, the increased volume of imports, at prices that undercut and depressed and suppressed domestic prices, had an injurious impact on the domestic industry, particularly when the domestic industry aggressively cut prices to meet the continued influx of import volumes.⁶⁵

The ITC’s analysis reflects a well-reasoned and cogent analytical approach to the complexities of a large and sophisticated market for a critical raw material in an advanced industrial economy.

67. Further, the ITC conducted a thorough and objective examination of the nature and extent of injury caused by increased imports and other factors and did not attribute the injurious effects of non-import factors to imports in its analysis. In its analysis, the ITC considered whether declining demand in the domestic market, increases in the industry’s productive capacity, the industry’s legacy costs, possible poor management decisions by the industry, intra-industry competition, and buyer consolidation were sources of injury to the industry. For each of these factors, the ITC identified and discussed in detail the nature and extent of the injury attributable to that factor, if any, and did not attribute to imports any injury caused by those factors. Complainants’ arguments to the contrary are unfounded.

c. The ITC’s Causation Analysis for the Other Steel Products Was Fully Consistent with the Safeguards Agreement

i. *Tin Mill*

⁶² ITC Report, pp. 60-61.

⁶³ ITC Report, p. 60; INV-Y-209, Table FLAT-ALT7 (US-33).

⁶⁴ ITC Report, pp. 60-62.

⁶⁵ ITC Report, pp. 61-62 (emphasis added).

68. Commissioner Miller reasonably found a genuine and substantial causal link between increased volumes of increasingly low-priced imports of tin mill and the significant declines in the overall condition of the tin mill industry during the latter half of the period of investigation. She properly concluded that there was a clear correlation between the surge of imports into the market in 1999 and the substantial declines in the industry's condition in that year.⁶⁶ She also reasonably found that elevated levels of imports continued to have significant adverse effects on domestic prices and profitability levels in 2000 and interim 2001.⁶⁷ Finally, Commissioner Miller correctly examined whether demand declines, excess industry capacity, and consolidation of purchasers were sources of injury to the industry during the period of investigation. She discussed in detail the injury attributable to each of these factors and ensured that she did not attribute the injurious effects of these factors, if any, to imports.

69. Moreover, the President did not rely solely on Commissioner Miller's causation findings for tin mill as the basis for imposing a safeguard measure on tin mill, as several Complainants assert. On the contrary, the President specifically stated that he based the safeguard measure on the affirmative determinations of the three Commissioners who made affirmative findings covering tin mill – Commissioners Miller, Bragg and Devaney.⁶⁸

ii. *Hot-Rolled Bar*

70. The ITC correctly found there was a genuine and substantial cause and effect relationship between increased imports of hot-rolled bar and the serious injury suffered by the domestic hot-rolled bar industry. The ITC concluded that, through price-based competition, increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling. This led to the hot-rolled bar industry's poor operating performance, declines in output and employment, and plant closures and bankruptcies during the latter portion of the period of investigation.⁶⁹ Further, the ITC also correctly considered whether intra-industry (i.e., minimill) competition, the alleged inefficiency of certain domestic producers, changes in demand, and changes in input costs were possible sources of injury to the industry. The ITC discussed in detail the injury attributable to these factors and ensured that it did not attribute to imports the injury caused by those factors, if any.

iii. *Cold-Finished Bar*

71. The ITC also correctly found there was a genuine and substantial cause and effect relationship between increased imports of cold-rolled bar and the serious injury suffered by the domestic cold-rolled bar industry. In particular, the ITC correctly found that aggressive pricing by the imports during the latter portion of the period of investigation caused the domestic

⁶⁶ ITC Report, p. 308.

⁶⁷ ITC Report, p. 308.

⁶⁸ Presidential Proclamation No. 7259, 3 March 2002, paragraph 4. As discussed in more detail in the United States' first written submission, Commissioners Bragg and Devaney found that tin mill was part of the same like product as all other carbon flat-rolled steel and made an affirmative finding for that like product.

⁶⁹ ITC Report, p. 96.

industry to lose market share and revenues and suffer serious injury, particularly in 2000.⁷⁰ Further, the ITC also correctly considered whether changes in demand and the poor performance of one industry producer were possible sources of injury to the industry. The ITC discussed in detail the injury attributable to these factors and ensured that it did not attribute to imports the injury caused by these factors, if any.

iv. *Rebar*

72. The ITC further established there was a genuine and substantial cause and effect relationship between increased imports of rebar and the serious injury suffered by the domestic rebar industry. In particular, the ITC concluded that increased imports of rebar put price pressure on domestic producers. This pressure prevented domestic producers from fully achieving the benefits of cost reductions during certain portions of the period of investigation and from fully recovering increased costs during others. The ITC properly found that imports prevented domestic producers from fully benefitting from the large increase in domestic consumption over the period of investigation and caused the industry's operating margins to decline.⁷¹ Moreover, the ITC correctly considered whether increases in domestic capacity and changes in input costs were possible sources of injury to the rebar industry. The ITC discussed in detail the injury attributable to these factors and ensured that it did not attribute to imports the injury caused by those factors, if any.

v. *Certain Welded Pipe*

73. The ITC also correctly found there was a clear correlation between increases in certain welded pipe imports during the period of investigation, especially in 2000, and the substantial declines in the certain welded pipe industry's condition during those years.⁷² In particular, the ITC correctly noted that the certain welded pipe industry experienced a substantial reduction in its operating income margins, operating income and gross profit levels, sales revenues, shipments, and production levels in 2000, when imports made their largest single surge into the welded pipe market. Moreover, the ITC correctly found that imports threatened imminent serious injury to the welded pipe industry, given the increasing focus of foreign producers on the U.S. market and the availability of substantial excess foreign producer capacity. The ITC also properly considered whether "excess" domestic capacity and declines in the operating results of a particular pipe producer were possible sources of injury to the certain welded pipe industry. The ITC discussed in detail the nature and extent of the injury attributable to these factors and ensured that it did not attribute to imports the injury caused by these factors, if any.

vi. *Fittings, Flanges, and Tool Joints*

74. The ITC correctly found that there was a readily apparent causal link between increased imports of fittings, flanges, and tool joints ("FFTJ") and the serious injury experienced by the

⁷⁰ ITC Report, p. 105.

⁷¹ ITC Report, p. 112.

⁷² ITC Report, p. 163-65.

domestic FFTJ industry. The ITC emphasized that “the steady increase in volume of imports, and the increase in import market share, especially since 1997, coincided with the deterioration of the condition of the domestic industry . . .”⁷³ The ITC correctly found that import volume increased every year during the period of investigation and the domestic industry’s condition deteriorated in correlation with these increases, as the industry’s sales production, capacity utilization, profitability and employment levels all declined generally. The ITC also considered whether the business cycle, increased industry capacity, industry inefficiency, worker shortages, and purchaser consolidation were possible sources of injury to the FFTJ industry. The ITC discussed in detail the injury attributable to these factors and ensured that it did not attribute to imports the injury caused by these factors, if any.

vii. *Stainless Steel Bar*

75. The ITC correctly found a direct correlation between trends in imports of stainless steel bar and declines in the industry’s condition. It properly found that the stainless steel bar industry experienced substantial declines in its market share, operating income margins, operating income, production levels, sales revenues, and shipments, from the beginning of the period until interim 2001, as imports consistently and persistently increased their share of the domestic market and undersold the domestic merchandise.⁷⁴ Moreover, in its analysis, the ITC properly considered whether a number of factors, including demand declines during late 2000 and 2001, energy price increases during the same period, and the poor operating results of two producers during the period, were sources of possible injury to the industry. The ITC discussed in detail the injury attributable to these factors, as well as nickel costs and increased industry capacity, and ensured that it did not attribute to imports any injury caused by those factors, if any.

viii. *Stainless Steel Rod*

76. The ITC correctly found a direct correlation between increased imports of stainless steel rod and declines in the industry’s condition during the period of investigation. In particular, the ITC properly found the industry experienced substantial declines in its market share, operating income margins, operating income, production levels, sales revenues, and shipments during the period of investigation, particularly during 1999 and 2000, as import quantities and market share grew from their levels in 1998 and as imports undersold the domestic industry.⁷⁵ The ITC also correctly found that the largest declines in the industry’s condition during the period occurred in 2000, when the largest import increase occurred. Moreover, the ITC correctly considered whether demand declines during late 2000 and 2001, energy price increases during the same period, and the poor operating results of two producers during the period were sources of possible injury to the industry. The ITC also analyzed whether nickel costs and increased industry capacity had an adverse impact on the industry. The ITC discussed in detail the injury attributable to each of these factors and ensured that it did not attribute to imports any injury

⁷³ ITC Report, p. 176.

⁷⁴ ITC Report, p. 210-213.

⁷⁵ ITC Report, pp. 219-222.

caused by those factors, if any.

77. Although the EC contends that the ITC improperly redacted a significant amount of confidential industry data from its public opinion, the Safeguards Agreement not only permits, but indeed requires, that a competent authority not disclose any information submitted to it on a confidential basis, unless the submitting party consents to its disclosure.⁷⁶ The ITC properly treated the information as confidential. Moreover, the ITC's analysis is sufficiently detailed that the Panel can assess whether it satisfies the requirements of the Safeguards Agreement.

ix. *Stainless Steel Wire*

78. Commissioner Koplan reasonably found a genuine and substantial cause and effect relationship between increased imports of stainless steel wire and the threat of serious injury to the domestic industry. Commissioner Koplan reasonably found that, in interim 2001, the industry experienced a substantial reduction in its market share, production levels, shipments, operating income margins, and employment levels when imports made their largest single surge into the stainless steel wire market.⁷⁷ He reasonably concluded that the evidence of increased import competition in interim 2001 showed that imports threatened serious injury to the industry in the imminent future. Moreover, he also properly considered whether a decline in demand for stainless steel wire in interim 2001 and an increase in the industry's unit costs of goods sold⁷⁸ were sources of possible injury to the industry. Commissioner Koplan discussed in detail the injury attributable to these factors and ensured that he did not attribute to imports the injury caused by those factors, if any.

79. Finally, the President did not rely solely on Commissioner Koplan's causation findings for stainless steel wire as the basis for imposing a safeguard measure on stainless steel wire, as several Complainants assert. On the contrary, the President specifically stated that he based the safeguard measure on the affirmative determinations of the three Commissioners who made affirmative findings for tin mill – Commissioners Koplan, Bragg and Devaney.⁷⁹

F. By Providing a Separate Injury Finding for Imports from Non-FTA Sources, the United States Fully Satisfied the Requirement of Parallelism in Articles 2.1, 2.2, and 4.2.

80. Complainants argue that the ITC was required to address each of the requirements under Articles 2.1 and 4.2 in its analysis of non-FTA imports. The ITC structured its analysis by first reaching conclusions as to all imports, and then reaching conclusions as to non-FTA imports. The latter conclusions relied, where they were applicable, on findings made in the analysis of all imports. This combination provides "findings and reasoned conclusions," as required by Article

⁷⁶ Safeguards Agreement, Article 3.2.

⁷⁷ ITC Report, pp. 256-57, 258-59, Table STAINLESS-C-6.

⁷⁸ ITC Report, p. 259.

⁷⁹ As discussed in more detail in the United States' first written submission, Commissioners Bragg and Devaney found that stainless steel wire was part of the same like product as stainless steel wire rope and made an affirmative finding for that like product.

3.1, that imports from non-FTA sources by themselves satisfy the requirements of Articles 2.1 and 4.2. It further provides the “detailed analysis of the case under investigation” required by Article 4.2(c). The fact that elements of the analysis appeared in different portions of the ITC Report does not detract from this conclusion. Similarly, the timing of these analyses does not matter, since both were performed before application of the steel safeguard measures. Thus, the analysis of non-NAFTA imports is not “an *ex post facto* analysis,” as Japan charges.

81. The Safeguards Agreement does not support Complainants’ assertion of a new type of parallelism, which would preclude the exclusion from a safeguard measure of an imported item covered by the determination of serious injury. “Parallelism” as enunciated by the Appellate Body derives from the obligation under Article 2.2 to apply safeguard measures to an imported good “irrespective of its source.” Since exclusions based on physical characteristics are neutral as to source, they simply do not raise parallelism concerns. Moreover, under Article 5.1, a Member may apply a safeguard measure “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.” Reducing the extent of application of a measure by excluding imported items is consistent with this obligation.

82. The ITC found that imports from Israel were “small and sporadic” and that there were “virtually no imports” from Jordan. The ITC’s finding that the exclusion of imports from Israel and Jordan would not change its conclusions met the requirements of Articles 3.1 and 4.2(c).⁸⁰ Such reasoning does not, as the EC charges, read a *de minimis* rule into the Safeguards Agreement. Rather, it comports with the Article 3.1 requirement of findings and reasoned conclusions. If a particular factor is so insignificant that it does not change the results of the analysis – which the record shows was the case for imports from Israel and Jordan – a reasoned explanation of that conclusion says just that, and no more.

83. Parallelism did not require the ITC to treat excluded imports from FTA partners as a “factor other than increased imports” under Article 4.2(b). Nor was there any obligation to perform a parallelism analysis with regard to excluded developing countries.

84. Finally, the ITC’s analysis of non-NAFTA imports satisfied all relevant requirements of the Safeguards Agreement. The ITC found that increased imports from non-NAFTA sources (*i.e.*, all sources other than Canada and Mexico) caused serious injury or threat of serious injury to each pertinent domestic industry – *i.e.*, those producing CCFRS, tin mill, hot-rolled bar, cold-finished bar, rebar, certain welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire.

85. The ITC’s analysis of non-NAFTA imports can be found in several places in its report. The Complainants that focus exclusively on the Second Supplemental Response of the ITC in criticizing the adequacy of the ITC’s findings concerning non-NAFTA imports overlook how the ITC structured its report. While Article 3.1 of the Safeguards Agreement requires that competent authorities publish a report setting forth findings and conclusions on pertinent issues of fact and law, the Agreement does not require the use of a particular structure or format for the report. The

⁸⁰ *E.g.*, ITC Report, p. 366; Second Supplemental Response, p. 4.

ITC issued its report in several different sections. While the sections were not all prepared or published simultaneously, they constitute a single report, and all sections of the report are intended to be read together. Thus, the ITC findings pertinent to non-NAFTA imports are not merely those provided in the document that the United States has designated, for purposes of convenience, the Second Supplemental Response. Instead, the pertinent findings are provided throughout the entire ITC report, including those portions of the report that contain analysis pertinent to imports from all sources.

86. It is not disputed that the ITC's analysis of imports from all sources contained discrete sections discussing the conditions of competition for each domestic industry, as well as discrete sections providing for each industry detailed findings concerning the serious injury factors specified in U.S. domestic law and Article 4.2(a) of the Safeguards Agreement. Several Complainants criticize the ITC for not similarly including discrete sections on conditions of competition and serious injury in the sections of the report specifically discussing non-NAFTA imports. A review of the full ITC report, however, reveals that the ITC made findings on these issues pertinent to an analysis of non-NAFTA imports in the portions of its report containing the analysis of imports from all sources.

87. The findings the ITC made in its analysis of imports from all sources concerning conditions of competition for each industry generally focused on the U.S. marketplace as a whole. Generally speaking, these conditions of competition did not relate specifically to imports, much less to imports from particular sources. Because these findings concerning conditions of competition that the ITC provided in its analysis of all imports were equally applicable to an analysis of non-NAFTA imports, there was no need for the ITC to repeat the findings in the portion of the report specifically addressing non-NAFTA imports.

88. Similarly, the findings the ITC made in its analysis of imports from all sources concerning serious injury were based on data concerning the particular U.S. industry at issue. That data did not relate to imports, and, thus, did not change depending on the set of imports being examined. Because the findings concerning serious injury that the ITC provided in its analysis of all imports were equally applicable to an analysis of non-NAFTA imports, there was no need for the ITC to repeat the findings in the portion of the report specifically addressing non-NAFTA imports.

89. It is true that the discussion the ITC provided in its analysis of all imports concerning the issues of increased imports and causal link would not automatically be applicable to non-NAFTA imports. The ITC, however, provided a particularized discussion of increased imports and causal link for non-NAFTA imports in its analysis of non-NAFTA imports for each pertinent domestic industry.

90. The ITC frequently found, in its analysis of increased imports, that overall import trends were the same for non-NAFTA imports as they were for all imports. In such circumstances, the ITC's analysis of causal link for non-NAFTA imports focused on the same periods as did the analysis for all imports. This follows from the point, explained above, that the nature and timing of the serious injury suffered by the domestic industry was the same regardless of the set of imports examined.

91. Additionally, in its discussion of causal link for all imports, the ITC made findings concerning factors other than imports that were alleged to cause serious injury. These findings often focused on data pertaining to the U.S. industry or the U.S. marketplace as a whole. Such findings were equally applicable with respect to an analysis pertaining to non-NAFTA imports as they were to an analysis pertaining to all imports. This consequently was another set of findings that the ITC was not obliged to repeat in the sections of its report dealing specifically with non-NAFTA imports.

92. Consequently, to support its conclusions concerning non-NAFTA imports, the ITC report contains for each industry: (1) a specific finding that non-NAFTA imports increased; (2) a finding, in the analysis of all imports, that the industry was seriously injured; (3) findings, in the analysis of all imports, concerning the pertinent conditions of competition in the industry; (4) a specific finding describing the causal link between the non-NAFTA imports and the domestic industry's serious injury; and (5) findings, in the analysis of all imports, concerning factors other than imports that were alleged to cause serious injury.

G. The ITC's Demonstration of Unforeseen Developments

93. Consistent with U.S. obligations under Article XIX, GATT 1994, the ITC identified the unforeseen developments that resulted in the ten steel products being imported in such increased quantities and under such conditions as to cause serious injury or the threat thereof to the domestic industries producing like products.

94. The term "unforeseen developments" covers any change that the negotiators of the Contracting Party did not foresee when they undertook obligations or tariff concessions with regard to that product subject to the measure.

95. The Appellate Body has construed "unforeseen" as synonymous with "unexpected" rather than with "unforeseeable."⁸¹ The *Lamb Meat* panel found "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. . . ."⁸² The appropriate focus is on what was actually "foreseen" rather than "theoretically 'foreseeable.'"⁸³

96. Article XIX implies no more than a sequential relationship between trade concessions, unforeseen developments, and serious injury. The quantities of imports or the conditions which cause injury must be "a result of" unforeseen developments, but need not be directly caused by those developments.⁸⁴

97. Neither Article XIX nor the Safeguards Agreement requires that the unforeseen developments be limited to, or even directly related to, the particular product or products under investigation. An unforeseen event thus may be a macroeconomic development that disrupts a

⁸¹ *Korea – Dairy*, AB Report, para. 84.

⁸² *US – Lamb Meat*, Panel Report, para. 7.22.

⁸³ *Ibid.*

⁸⁴ *US – Lamb Meat*, Panel Report, para. 7.16.

variety of economic and financial relationships.

98. Neither Article XIX nor the Safeguards Agreement requires that the unforeseen events must develop in a Member, or that a Member's demonstration of unforeseen developments address the effect of those developments on other economies.

99. Neither Article XIX nor the Safeguards Agreement requires that the finding of "unforeseen developments" must be "coupled with" the effect of the obligations, including tariff concessions, incurred under the GATT 1994. Nor do they specify or limit which "obligations" are relevant.

100. The only temporal requirement in Article XIX is that the finding of unforeseen developments precede the application of the safeguard measures. The precise timing and sequence of the findings required under Article XIX are irrelevant as long as the findings are made before application of the measures. In the *Steel* investigations, the finding of unforeseen developments was made by the competent authorities well in advance of the application of the measures.

101. Article 3.1 of the Safeguards Agreement does not restrict the format of the report that contains the finding of unforeseen developments. The choice of whether to issue the components of an Article 3.1 report at the same time, or over a period of time, is left to the discretion of individual Members.

102. In the steel investigations, the ITC actively solicited information on unforeseen developments during its investigation and addressed the events in its Report. All parties had opportunities to address the existence and effects of the unforeseen developments.

103. Each of the events cited by the ITC is an unforeseen development under Article XIX. The financial crises that engulfed Southeast Asia were unforeseen by economists right up to the time the crises began. The crises had an unforeseen, radical, and lasting effect on the level of exports from those countries. Steel imports to the U.S. market from five Southeast Asian countries jumped by 113.5 percent between 1997 and 1998 alone, and were 132.8 percent higher in 2000 than in 1996.

104. The financial crises which hit the countries which were republics in the former USSR were also unforeseen. These currency depreciations had an unforeseen, radical, and lasting effect on the level of exports from those countries. Steel imports to the U.S. market from 10 former USSR republics increased by 67.3 percent between 1997 and 1998 alone. Steel imports from Russia were subsequently limited by an agreement, but imports from the nine other former USSR republics remained high. Steel imports into the U.S. market from those nine countries in 2000 were 145.4 percent higher than in 1996.

105. The continued strength of the U.S. market, along with the persistent appreciation of the U.S. dollar, were also unforeseen developments which made the U.S. market an especially attractive one for imports displaced from other markets as a result of the financial crises in Southeast Asia and the former USSR republics.

106. Each of these unforeseen developments was marked by a rapidity, a severity, and a

persistence which made it unforeseen and unusual. Even if some aspects could have been foreseen, the extremity of these events could not have been foreseen. The confluence of a group of such events was itself an unforeseen development.

H. Articles 3.1 and 4.2(c) Do Not Require Any Explanation of the Affirmative Divided Vote Regarding Tin Mill and Stainless Steel Wire Beyond the Views of the Commissioners Making Those Determinations.

107. As we explained above, the affirmative determinations with regard to tin mill and stainless steel wire and the views of the Commissioners in support of those determinations satisfy the requirements of Articles 3.1 and 4.2(c). The fact that the divided vote – with three Commissioners voting in the affirmative and three in the negative – was designated by the President to be an affirmative determination neither changes the analysis under Articles 3.1 and 4.2(c) nor necessitates additional explanation by the President.

108. As the Appellate Body made clear in *US – Line Pipe*, the Safeguards Agreement does not prescribe a Member’s internal domestic process for reaching a serious injury determination.⁸⁵ U.S. legislation (which Complainants have not challenged) provides that if the ITC reaches a divided vote, the President may consider the ITC determination to be either the determination of the Commissioners voting in the affirmative or those voting in the negative.⁸⁶ For the two divided votes at issue, the Commissioners voting in the affirmative specifically stated that their determinations covered tin mill and stainless steel wire, and otherwise met the requirements of Articles 3.1 and 4.2. Thus, nothing in the Safeguards Agreement precludes the President designating these determinations as the determination of the ITC.

109. The fact that the Commissioners voting in the affirmative based their findings on different like products does not change this conclusion. U.S. law allows the ITC to count votes in this manner.⁸⁷ None of the Complainants identifies any provision of the Safeguards Agreement that would bring the question of how the competent authorities count their votes within the purview of a Panel’s review.

110. The President accepted the ITC’s characterization of the tin mill and stainless steel wire votes as divided and, based on the Commissioners’ determinations, chose the affirmative determinations on tin mill and stainless steel wire as the determinations of the ITC. Since the views of the Commissioners fully explained these determinations, there was no need for the President to provide further explanation.

I. Consistent With Article 5.1, the United States Applied the Steel Safeguard Measures

⁸⁵ *US – Line Pipe*, AB Report, para. 158.

⁸⁶ 19 U.S.C. § 1330(d)(1).

⁸⁷ It is also noteworthy that a U.S. court recently held that the ITC’s counting of affirmative and negative determinations by individual Commissioners in the safeguard investigation on tin mill was consistent with U.S. law. *Corus Group v. Bush*, Slip Op. 02-87 (Aug. 9, 2002). The court specifically held that Commissioners Devaney and Bragg considered tin mill in their analysis, and thus made affirmative injury and causation findings with respect to tin mill. This same reasoning applies to the divided vote on stainless steel wire products.

No More Than the Extent Necessary to Prevent or Remedy Serious Injury and to Facilitate Adjustment.

111. A Member may apply a safeguard measure in any form and at any level that falls within the parameters of Article 5.1, which states that a safeguard measure may be applied to "to prevent or remedy serious injury and to facilitate adjustment." It also states that a Member may apply a safeguard measure "only to the extent necessary" for these purposes. Article 5.1 does not restrict a Member's discretion to act within this limitation. The Member may choose any form for the measure – for example, a tariff, tariff-rate quota, or quantitative restriction. Within this limitation, the Member may also choose the level of the measure – an *ad valorem* duty rate, a specific duty amount, the volume subject to a quota, etc.

112. The Safeguards Agreement does not require either the Member applying a safeguard measure or its competent authorities to "quantify" the injury attributable to increased imports. In fact, Article 4.2(a) frames the analysis in a way that makes quantification impossible. That provision requires the competent authorities to evaluate a number of specific factors that are measured in different units. They can no more aggregate these attributes of injury into a single quantification of "injury" than a doctor could quantify "sickness" by adding temperature, blood pressure, and white cell count. No other provision of the Safeguards Agreement suggests that quantification of "injury" is necessary, or even possible. Indeed, under GATT 1947, it was recognized that "it is impossible to determine in advance with any degree of precision the level of import duty necessary" for a safeguard measure to achieve the goals of Article XIX.⁸⁸ Finally, Complainants have posited only one means to quantify injury – economic modeling. While modeling may play some role in evaluating a safeguard measure, it has important limitations that prevent it from quantifying "injury" or measuring with precision the effect of either increased imports or a safeguard measure on a domestic industry.

113. In *Korea – Dairy* and *US – Line Pipe*, the Appellate Body stated clearly that Article 5.1 does not obligate a Member to demonstrate, at the time of taking a safeguard measure, how the measure complies with Article 5.1.⁸⁹ Furthermore, the requirement under Articles 3.1 and 4.2(c) for the competent authorities to publish a report does not imply that the report must establish compliance with Article 5.1. The context of these provisions shows that the report must cover the investigation of *serious injury* – an inquiry that the Appellate Body has found to be "separate and distinct" from the inquiry as to compliance with Article 5.1.⁹⁰ Moreover, the obligation to publish a report falls on the *competent authorities*, who have no role under Article 5.1 in the selection of a safeguard measure.

114. A Member applying a safeguard measure may provide an explanation of how the measure complies with Article 5.1 during dispute settlement, in rebuttal to a claim that the measure is

⁸⁸ *Felt Hats*, para. 35. The Appellate Body cited this report as part of the GATT 1947 *acquis*. *US – Line Pipe*, AB Report, para. 174.

⁸⁹ Quantitative restrictions at certain levels, which are not at issue in this dispute, are an exception to this principle.

⁹⁰ *US – Line Pipe*, para. 84.

inconsistent with the Safeguards Agreement. The Appellate Body explicitly stated that a Member may rebut a *prima facie* case of inconsistency with Article 5.1 because, even if the determination of the competent authorities were inconsistent with Article 4, the safeguard measure might still have been applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.⁹¹

115. Complainants assert that the steel safeguard measures went beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. They rest their arguments almost entirely on their claim that the ITC determinations of serious injury were inconsistent with the Safeguards Agreement, and that this alleged shortcoming invalidates the safeguard measures. As previous sections of this submission have shown, the ITC determinations were fully consistent with the Safeguards Agreement and GATT 1994. Therefore the primary argument against the steel safeguard measures themselves is unfounded.

116. However, should the Panel find some flaw with the ITC determinations, two simple numerical tests demonstrate that the United States complied with Article 5.1. These tests cannot be interpreted as a quantification of injury or of the effect of a safeguard measure, which we have shown is neither consistent with the framework established under the Safeguards Agreement nor possible. At best, they can provide an approximation that can indicate that a measure is set at an appropriate order of magnitude. The U.S. written submission contains two such numerical tests, which shows that the magnitude of the steel safeguard measures is consistent with the injury attributable to increased non-FTA imports.

J. The TRQ on Slab is Not Subject to Article 5.2, and is Consistent With Article XIII.

117. The United States used imports of slab during 2000, exclusive of FTA imports that were not subject to the steel safeguard measures, as the basis for the 5.4 million ton slab TRQ. This was the highest level of imports during the investigation period. Based on conditions in the certain carbon flat-rolled steel market, the United States treated as substantial suppliers all sources accounting for more than two percent of imports in 2001, and allotted shares of the TRQ to individual sources on that basis. This process does not implicate Article 5.2, which the panel in *US – Line Pipe* found does not apply to TRQs.⁹² Moreover, by basing the level of imports qualifying as “substantial” on market conditions, rather than abstract thresholds previously used for unrelated products, the United States complied with Article XIII.

K. The U.S. Decision to Exclude FTA Partners From the Safeguard Measures Was Not Inconsistent With Article I or Articles 2.2, 3.1, or 4.2(c).

118. Japan and Korea assert that Article I and Article 2.2 embody the MFN principle of the WTO, and posit that this principle prevents the exclusion of any Member (other than a developing country Member subject to Article 9.1) from a safeguard measure. However, Article XXIV creates an exception to the MFN obligation for parties to a free trade agreement, allowing them to terminate duties and other restrictive regulations of commerce – including safeguard

⁹¹ *US – Line Pipe*, AB Report, paras. 261-262.

⁹² *US – Line Pipe*, Panel Report, paras. 7.69-7.74.

measures – between them. Footnote 1 of the Safeguards Agreement establishes that “[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.” Therefore, the U.S. exclusion of products of Canada, Mexico, Israel, and Jordan from the steel safeguard measures is not inconsistent with GATT 1994 or the Safeguards Agreement.

119. Under Article 802 of the NAFTA, the United States was required to exclude of NAFTA imports if they do not account for a “substantial share” of total imports and “contribute importantly” to serious injury. Neither of these standards appear in GATT 1994 or the Safeguards Agreement. Therefore, the determination of whether the NAFTA criteria require exclusion of NAFTA imports is not one of the “pertinent issues of fact and law” or part of the “detailed analysis of the case” that must appear in the report of the competent authorities under Articles 3.1 and 4.2(c).

L. The United States Complied With Article 9.1 in Not Applying the Safeguard Measures to Imports from Developing Country Members That Accounted for Less Than Three Percent of Total Imports of a Product.

120. Article 9.1 obligates Members to exclude imports of the product of a developing country from the application of a safeguard measure if those imports account for less than three percent of total imports. Article 9.1 assigns no obligation concerning, or role in, this identification process to exporting Members, developing country or otherwise. Since the Member applying the measure is responsible for compliance with Article 9.1, it is responsible for identifying which Members are developing countries for the purposes of the Safeguard Agreement, and whether imports from those sources are below the three percent threshold.

121. China and Norway argue that the U.S. process for identifying developing countries and not applying the safeguard measures is inconsistent with the Safeguards Agreement. However, they have not established a *prima facie* case that any developing country accounting for less than three percent of total imports was improperly included.

122. China claims to be a developing country, but the only basis for this claim is its assertion that it is, and has always claimed to be, a developing country Member, especially when it acceded to the WTO.⁹³ In fact, in particular circumstances and under certain agreements, China has abandoned such claims. Thus, it cannot rely on a pattern of developing country treatment to support its claim.

123. China challenges the use of the list of countries eligible for the U.S. Generalized System of Preferences as “arbitrary” and “irrelevant” for identifying countries for non-application of safeguard measures under Article 9.1. In fact, the list is transparent and predictable. China’s allegation that Proclamation 7529 and the accompanying Presidential Memorandum imply that the steel safeguard measures were applied to some (unspecified) developing countries is contrary to the text of those documents. Norway’s criticism of the use of the 1996-97 period to calculate

⁹³ China first written submission, para. 667.

Article 9.1 eligibility is also inapposite, as that provision does not require use of the most recent period. Finally, for reasons discussed in Section I, Article 3.1 does not require the inclusion in the report of the competent authorities of “findings and reasoned conclusions” on the identification of developing countries eligible for non-application under Article 9.1.

M. The Determinations by the ITC and Decisions by the President Fully Satisfy U.S. Obligations Under Article X:3(a).

124. Several Complainants argue that some of the decisions by the ITC or the President under the U.S. safeguard legislation or the legislation implementing the NAFTA are not “uniform,” “impartial,” or “reasonable” and, consequently, are inconsistent with Article X:3(a). These arguments are based on the mistaken view that Article X:3(a) requires “decisions” to be uniform, and ignore the text of Article X:3(a), which applies to “administering” laws relating to international trade. Panels and the Appellate Body have made clear that Article X:3 applies exclusively to the administration – in the sense of procedures applied – of the laws, regulations, judicial decisions, and administrative rulings of general application described in Article X:1. Other provisions of the covered agreements specify the substantive requirements, and these must be the basis for a claim that the substantive aspects of a Member's actions are inconsistent with WTO obligations. To the extent that the Complainants are complaining that a particular *outcome* is inconsistent with a provision of a covered agreement, they are not asserting a claim that is within the scope of Article X:3(a).

125. Japan, Brazil, Korea and Norway raise Article X:3(a) claims with regard to several specific actions: the ITC’s like product definition, alleged discrepancies in the manner in which semi-finished products were treated by the ITC, the President’s treatment of certain ITC tie votes as affirmative determinations pursuant to Section 330 of the Tariff Act, alleged discrepancies in treatment between certain ITC divided votes, and the President’s decision not to apply safeguards to certain products from Mexico and Canada. However, none of these claims implicates Article X:3(a), as they involve *substantive* findings or determinations, and not the administration of laws, regulations, judicial decisions or administrative rulings of general application.

126. Finally, even if Article X:3(a) does apply to one or more of the actions listed in the previous paragraph, Complainants have failed to make a *prima facie* case of inconsistency. First, they ascribe to Article X:3(a) requirements – such as guaranteeing a full panoply of due process protections and publishing written explanations of decisions – that simply do not fall within its explicit instruction to administer laws “in a uniform, impartial, and reasonable manner” Second, the actions of the ITC and the President were uniform, impartial, and reasonable.

N. The EC Fails to Establish an Inconsistency with the Agreement in its Objection to the Redaction of Confidential Business Information from the ITC Report

127. The EC is the only Complainant in this proceeding to raise a claim concerning confidential information. The essence of the EC’s claim is that the United States acted inconsistently with Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement by not disclosing certain confidential information in 14 of nearly 400 tables in the ITC’s public report, and by not publishing certain “aggregated data” regarding domestic flat rolled producers.

128. The EC cites no provision in the Safeguards Agreement that requires the competent authorities to publish confidential information in a public report. Nor does the EC assert that any of the redacted information is necessary or appropriate to the Panel’s evaluation of its claims, or ask the Panel to invoke Article 13.1 of the DSU.

129. As panels in both *US – Wheat Gluten* and *US – Line Pipe*⁹⁴ have made clear, Article 3.2 of the Safeguards Agreement imposes an obligation upon competent authorities not to disclose confidential information. As the panel in *US – Wheat Gluten* said:

Article 3.2 SA places an obligation upon domestic investigating authorities *not to disclose* – including in their published report settling forth their findings and reasoned conclusions reached on all pertinent issues of fact and law and demonstrating the relevance of the factors examined – information which is “by nature confidential or which is provided on a confidential basis” without permission of the party submitting it.⁹⁵
[Emphasis added.]

130. The EC also claims that the United States “could have” indexed the confidential information in its report, but does not ask for indexes or other summaries. The EC cites no provision in the Safeguards Agreement that would require a Member to publish indexed information or other summaries. No such requirement exists.

131. With respect to the “aggregated data” on flat-rolled producers, disclosure would have revealed confidential, company-specific information about two domestic producers of GOES (grain-oriented electrical steel). This is because the ITC published data in its public report on other flat-rolled steel (*i.e.*, slabs, plate, hot-rolled, cold-rolled, coated, and tin). Publication of the “aggregated data” would have allowed a reader, through a simple arithmetic exercise, to determine the numbers for the two GOES producers, which would reveal confidential information.

⁹⁴ *US – Line Pipe*, Panel Report, para. 7.272-7.273.

⁹⁵ *US – Wheat Gluten*, Panel Report, para. 8.19.