

## ***United States – Definitive Safeguard Measure on Imports of Circular Welded Carbon-Quality Line Pipe from Korea***

ORAL STATEMENT OF THE UNITED STATES  
AT THE SECOND MEETING OF THE PANEL WITH THE PARTIES  
6 June 2001

1. Good morning Mr. Chairman and members of the Panel. We will not attempt to address all of the errors in Korea's submissions. That would take far too much of your time, and would in many instances duplicate arguments raised in our own written submissions. Instead, we will focus on a few areas. We will begin by discussing the critical issues of burden of proof, standard of review, and method of interpreting the WTO Agreement. We will then show why Korea's criticisms of the USITC's serious injury determination are unfounded. We will then return to show why the U.S. decision to impose a safeguard measure was consistent with the provisions of the WTO Agreement that Korea has cited.

2. The burden of proof should not be in question. Our submissions have shown, and Korea has never disputed, that the burden of proof in a WTO dispute lies with the complaining party. However, Korea suggests at several points in its rebuttal submission that actions of the United States, such as the remedy recommendation of the USITC or the deletion of confidential information from public documents, somehow lower the evidentiary hurdle for Korea or shift the burden of proof to the United States. That is not the case. Rather, it falls to Korea, as the complainant, to prove that the line pipe safeguard is inconsistent with the WTO Agreement. Since it has failed to make even a *prima facie* case, Korea's claims should be rejected.

3. There should also be no question about application of the standard of review to the different obligations under Article 4 and Article 5 of the Safeguards Agreement. In *Lamb Meat*, the Appellate Body distinguished between the DSU Article 11 standard of review itself and the *application* of that standard to Article 4 of the Safeguards Agreement. The Article 11 standard applies to all obligations under the WTO Agreement, and requires an objective assessment of the matter before the Panel. In *Lamb Meat*, the Appellate Body enunciated a legal test specific to the *application* of that standard to a claim under Article 4 of the Safeguards Agreement, stating that:

an "objective assessment" of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination.<sup>1</sup>

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<sup>1</sup> *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, para. 103 (1 May 2001).

As you can see, the Appellate Body cited Article 4 as the basis for this test. The title of that Article states plainly that it applies to the “Determination of Serious Injury or Threat Thereof,” and the text refers only to the competent authorities’ determination of serious injury.

4. Korea quotes the terms of this test, but omits any reference to Article 4, leaving the impression that the test applies to all obligations under the Safeguards Agreement. It does not. Rather, as the Appellate Body recognized in *Lamb Meat*, and before that in *Argentina – Footwear*, it is the terms of each obligation that govern the *application* of the Article 11 standard to the claims under dispute. In this dispute, the DSU requires that the Panel’s assessment of Korea’s claims under Article 5 of the Safeguards Agreement be conducted under the terms of Article 5, and not under a test derived for Article 4.

5. As a last point, the Panel should hold Korea to two important principles that Korea itself has endorsed – that the interpretation of the WTO Agreement should begin with the text of the Agreement, and that panel and Appellate Body reports should in most circumstances be interpreted to address only those issues that were raised in the dispute. As we will show later, application of these precepts leads to a result opposite to the one advocated by Korea, especially with regard to its claims under Article XIII of the GATT 1994 and Article 5 of the Safeguards Agreement.

### ***Increased Imports***

6. There can be no question that the increased imports requirement was met in this investigation. Imports nearly tripled in the last two full years of the period of investigation, rising from about 127,000 tons in 1996, to about 331,000 tons in 1998 on an absolute basis, and from about 17 percent in 1996, to about 42 percent in 1998 relative to domestic production.

7. Korea seeks to draw attention away from this large increase in imports by insisting that the Panel should look only at the last 12 months of the period investigated. Indeed, Korea claims erroneously that the Appellate Body in *Argentina-Footwear* established a legal standard requiring an examination of import data only for the last 12 months of the period of investigation.<sup>2</sup> In fact, the Appellate Body’s decisions in *Argentina-Footwear* and *United States-Lamb Meat* make clear that there is no such rule. In *Argentina-Footwear* the Appellate Body approved of the examination of a period of two to three years in considering import trends; this is explained in paragraphs 13 and 14 of our second written submission.

8. Much of Korea’s argument on the issue of increased imports rests on a single footnote in *Argentina-Footwear* (footnote 130). In *Lamb Meat* the Appellate Body sought to clarify that footnote and to place it in an appropriate context. The Appellate Body explained that “the period

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<sup>2</sup> Written Rebuttal of the Republic of Korea, paras. 64-70.

of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.”<sup>3</sup> This statement makes clear that the Appellate Body had no intention of establishing a legal standard requiring the examination of import levels and trends only in the most recent 12 months.

9. Korea next attempts to justify its reliance on a comparison of the last six months of 1998 with the first six months of 1999 by claiming that “the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury determination.”<sup>4</sup> Korea’s characterization of the USITC’s analysis is simply untrue. The Commissioners finding serious injury referred to the second half of 1998 only three times,<sup>5</sup> mostly in responding to arguments made by respondents, or explaining why the financial performance of the domestic industry was much stronger in interim 1998 than in full year 1998.

10. The fact that the USITC collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998 – is clear from a review of the discussion of the serious injury factors on pages I-16 through I-20 of the USITC Report. This also is clear from an examination of virtually every table with numerical data in the entire USITC Report.

11. The USITC acted consistently with the “objectivity” requirement of Article 4.2 of the Safeguards Agreement by evaluating the data in this case in the same neutral and unbiased manner that it conducts all of its safeguards investigations. In contrast, Korea is urging the Panel to impose a requirement that the competent authorities conduct a results-oriented evaluation – a suggestion which, in our view, would put the competent authorities’ actions in direct contravention of the Agreement.

12. Even if the Safeguards Agreement required that the period for analyzing imports be limited to the last 12 months of the period investigated – and clearly it does not – Korea’s theory that imports declined does not hold up. As shown in the table of monthly import figures in Exhibit USA-3, there was a sharp increase in imports in May and June of 1999.

13. Korea claims that these monthly import figures should be ignored because they are “public data” and therefore inaccurate.<sup>6</sup> As explained in our second written submission,<sup>7</sup> this is incorrect. The Japanese respondents reported that there were no imports of Arctic grade line pipe

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<sup>3</sup> *United States – Lamb Meat* (AB), para.138 n.88 (emphasis added).

<sup>4</sup> Written Rebuttal of the Republic of Korea, para. 62.

<sup>5</sup> USITC Report, pp. I-19, I-22 and I-28.

<sup>6</sup> Written Rebuttal of the Republic of Korea, para. 73.

<sup>7</sup> Second Written Submission of the United States, para. 23 n.25.

from Japan in the first half of 1999; and the USITC's monthly import figures exclude alloy line pipe. Thus, these monthly figures for the first half of 1999 accurately reflect the subject merchandise.

14. Korea's other attempts to discredit the import data are likewise unavailing. With respect to the absolute increase in imports, Korea claims that "the public data does not accurately represent the imports of subject merchandise in the first and second halves of 1998 and 1999."<sup>8</sup> However, the USITC Report did not break out the data for either 1998 or 1999 into two halves; and, indeed the 1999 data did not even cover the latter months of that year since they were outside the period of the injury investigation. If Korea is concerned that the "public" data in the USITC Report does not exactly correspond to the definition of the subject merchandise, then the Panel can turn to the indexed data in the United States' February 16th letter. These data show an increase in the absolute volume of imports of a similar magnitude as that shown by the data contained in the public version of the USITC Report.

15. With respect to the increase in relative import levels, Korea claims that the "removal of import data from Japan . . . is of questionable validity and utility given the U.S. concession during the First Substantive Meeting that imports from Japan of subject merchandise varied widely in different periods."<sup>9</sup> By agreeing that the Panel could consider relative import levels net of all imports from Japan (as presented in revised table 4 of the USITC Report, submitted with the United States' April 23rd letter), the United States is in effect "over-adjusting" for the exclusion of Arctic-grade and alloy product. Even with this over-adjustment, relative import levels rose from 17 percent of domestic production in 1996 to 42 percent in 1998.

### ***Serious Injury***

#### ***Consistency With Requirements of Articles 3.1 and 4.2(c)***

16. Korea challenges the USITC's serious injury determination by claiming that there needs to be an adequate explanation of why and how the majority of ITC Commissioners came to a contrary conclusion to that of the sole dissenting Commissioner.<sup>10</sup> We have explained in our written submission why Commissioner Crawford's views are not part of the determination of the USITC. There is nothing in the Safeguards Agreement requiring competent authorities to respond to the views of a person or entity that does not comprise a part of the competent authorities for purposes of the serious injury determination.

17. Korea questions the United States on this point, claiming that Commissioner Crawford

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<sup>8</sup> Written Rebuttal of the Republic of Korea, para. 74.

<sup>9</sup> Written Rebuttal of the Republic of Korea, para. 75.

<sup>10</sup> Written Rebuttal of the Republic of Korea, para. 79.

must be part of the competent authorities because she was a member of the USITC.<sup>11</sup> Korea misses the point. The United States is not claiming that Commissioner Crawford was not a member of the USITC, but rather that her dissenting views were not part of the determination of the USITC in this case. Contrary to Korea's assertion, the U.S. law cited in our first written submission (at para. 53) makes this point clear: a distinction is made in that law between the *determination* of the Commission, and "any dissenting or separate *views* by members of the Commission regarding the determination."<sup>12</sup>

### ***Geneva Steel***

18. Korea completely misconstrues the situation regarding Geneva Steel. It is important to understand the basic facts. Geneva was an "integrated" producer of line pipe; it internally produced the hot-rolled steel which it then used to make line pipe.<sup>13</sup> The company also produced hot-rolled sheet and cut-to-length plate as end products. Although line pipe was the smallest of the three products by tonnage, it was "an essential part of [the company's] business from an overall margin perspective."<sup>14</sup>

19. Geneva temporarily shut down one of its two blast furnaces between December 1998 and September 1999. An executive from Geneva testified that the company was hurt by imports of all three of its main products. The company lost half of its line pipe volume between 1997 and 1999. This witness explained that the loss of line pipe sales was particularly damaging to Geneva because the company needed to maintain a base load of production to run its second blast furnace.<sup>15</sup>

20. Commissioner Crawford stated that the shutting down of the blast furnace and the company's bankruptcy filing "reflect the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate."<sup>16</sup> If Commissioner Crawford was saying that conditions in the hot-rolled sheet and cut-to-length plate markets *contributed* to the decision to shut down the blast furnace, together with those conditions in the line pipe market, then this was consistent with the evidence on the record.

21. Korea, however, states that the decision to close the blast furnace was entirely due to

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<sup>11</sup> Written Rebuttal of the Republic of Korea, para. 82.

<sup>12</sup> Compare §202(f)(2)(A) and §202(f)(2)(C) of the Trade Act of 1974 (Exhibit USA-2).

<sup>13</sup> USITC Report, p. II-25.

<sup>14</sup> Transcript of injury phase hearing, p. 52 (Exhibit USA-24).

<sup>15</sup> Transcript of injury phase hearing, p. 52-53, (Exhibits USA-24 & USA-29).

<sup>16</sup> USITC Report, p. I-63.

conditions in the hot-rolled sheet and plate markets, and had nothing to do with line pipe conditions.<sup>17</sup> This is clearly at odds with the evidence in the record that Geneva lost half of its line pipe volume, and that line pipe production was essential to running the second blast furnace.

22. Under the logic of Korea’s argument regarding the identification of data specific to the like product, financial data would never be accurate unless it represented a complete isolation of the production operations of the like product. Such a complete isolation is neither required by the Safeguards Agreement nor consistent with generally accepted accounting principles.

### *Lone Star*

23. Korea builds its entire argument concerning Lone Star on an unfounded assumption that Lone Star “mis-allocated” part of a selling, general and administrative (“SG&A”) expense to line pipe operations. Korea simply assumes – based on nothing more than an ambiguous statement by Commissioner Crawford – that there was some mis-allocation inherent in the financial charge that was partially allocated by Lone Star to line pipe operations. Yet, there is no evidence to support this assumption. The Commissioners finding serious injury specifically noted that “[i]ncreases in per-unit overhead and SG&A were allocated by the domestic producers in proportion to their sales of end products or based on other acceptable allocation methodologies.”<sup>18</sup> Furthermore, USITC accountants conducted a verification of Lone Star’s data, which included the partial SG& A allocation to line pipe operations.

24. In sum, to the extent that Commissioner Crawford’s views can be read to suggest that the charge in question was mis-allocated to line pipe, she had no basis for making such a statement. All of the evidence in the record – especially the fact that Lone Star was verified by USITC accountants – indicates that there was nothing improper about this allocation.

25. In its second written submission, Korea repeatedly states that the Lone Star charge had an impact of up to 33 percent on the industry’s profit margin.<sup>19</sup> The basis for this is the response to Panel Question No. 8, in which the United States informed the Panel that reversing the Lone Star charge would not increase the industry’s 1998 operating income ratio of 2.9 percent by more than one percentage point. The United States wishes to emphasize that the one percentage point figure is an outside parameter, chosen to protect the confidential information at issue.

26. Moreover, even if one were to assume that reversing the charge would lead to an industry-wide operating income ratio of 3.9 percent, this would still compare unfavorably with the industry 8.1 percent return in 1997. Furthermore, the USITC did not rely only on the

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<sup>17</sup> Written Rebuttal of the Republic of Korea, para. 91.

<sup>18</sup> USITC Report, p. I-31.

<sup>19</sup> Written Rebuttal of the Republic of Korea, paras. 2, 98 and 104.

operating income ratio in its assessment of the industry's financial performance; it also relied on absolute declines in revenue, and noted that in 1998 ten of the 14 U.S. producers reported reduced operating income or increased losses.<sup>20</sup> Reversal of the Lone Star charge – even if this were called for, and the data indicates that it is not – would not significantly change this industry-wide picture.

### ***Effects of Declining OCTG Sales***

27. The United States has shown that Korea's theory that the financial performance of the line pipe industry was affected by declining OCTG production is unsupported for several reasons. First, Korea's contention that the decline in OCTG shipments in 1998 was much more severe than for line pipe is simply not correct. We have shown that the declines in the two types of pipe in 1998 were almost identical.<sup>21</sup> In its second written submission Korea continues to rely on a graph that it produced, which does no more than create the illusion of divergent trends in OCTG and line pipe shipments.<sup>22</sup>

28. Second, even if there had been a disproportionately large decline in OCTG sales, we have shown that the effect that this could have had on average unit costs for line pipe would have been nominal because the majority of average unit costs were variable.

29. Finally, we note that Korea keeps shifting the time period when this alleged effect of declining OCTG sales occurred. In paragraph 229 of its first written submission, Korea identifies the period between September 1998 and March 1999. In the following paragraphs, however, Korea focuses on the year 1998. OCTG sales did not decline disproportionately to line pipe sales in either of these periods.<sup>23</sup> In paragraph 103 of its second written submission, Korea focuses on yet a different period, "late 1998 to late 1999." In this period, sales of both OCTG and line pipe were rising, thus disproving Korea's theory.

### ***Korea's Arguments That the Serious Injury Finding Is Negated Because of Improvements at the End of the Period***

30. Korea argues that the condition of the domestic industry was improving "at the end of the period." It relies on three points: (1) the entry of two new producers into the industry;<sup>24</sup> (2)

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<sup>20</sup> USITC Report, p. I-18, I-20.

<sup>21</sup> Second Written Submission of the United States, para. 35.

<sup>22</sup> *E.g.*, Written Rebuttal of the Republic of Korea, para. 103.

<sup>23</sup> Exhibit USA-3, charts entitled "Shipments of welded line pipe" and "Shipments of welded OCTG."

<sup>24</sup> Written Rebuttal of the Republic of Korea, para. 108.

statements by USITC Commissioners in their views on remedy to the effect that conditions in the oil and gas industries were improving;<sup>25</sup> and (3) announcements of price increases.<sup>26</sup> None of these detract from the hard evidence showing a significant overall impairment in the U.S. line pipe industry in 1998 and interim 1999.

31. With respect to new producers, the USITC Report shows that one firm that had produced standard pipe throughout the period of investigation began producing line pipe in 1998, and that another firm made an initial startup in 1999 of a new facility producing a wide range of pipe products, including line pipe.<sup>27</sup> As we explained before, the USITC recognized that capital investment projects in this industry have long lead times. Thus, decisions by these two firms to begin producing line pipe were likely to have been made years before the 1998 and interim 1999 downturn in the industry. We also do not know whether these firms were in fact producing line pipe in any significant volume during this period. The fact that two firms began producing line pipe in 1998 and early 1999 does not detract from the USITC's finding that the industry was suffering serious injury during this time.

32. Nor do the statements by USITC Commissioners in their views on remedy detract from the serious injury finding. The Commissioners simply noted, when writing these views in December 1999, that oil and gas prices had increased since early 1999, leading to improved demand for line pipe.

33. Korea also relies on announcements by three producers of intended price increases in or after August and September of 1999. The United States has explained that such announcements of intended price increases are of little probative value. First, it is unclear whether these attempts at price increases were actually successful. Second, the announcements were made by only three firms in an industry that consisted of 15 producers. Finally, as two of the three producers explicitly stated in their price increase announcements, these were due to increases in raw material costs, or overall manufacturing costs. As the USITC found, raw material costs were likely to increase because of the imposition of antidumping measures on hot-rolled steel in the late summer of 1999.

34. Korea questions whether these announcements of intended price increases were connected to rising raw material costs. None of Korea's arguments on this point are persuasive.

35. Korea suggests that the antidumping measures would not have led to raw material price

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<sup>25</sup> Written Rebuttal of the Republic of Korea, para. 109.

<sup>26</sup> Written Rebuttal of the Republic of Korea, para. 114-117.

<sup>27</sup> USITC Report, page II-11.

increases because there were “over 40 exporters” not affected by the antidumping measures.<sup>28</sup> But, as the United States has explained, the three countries affected by these measures accounted for over 60 percent of U.S. imports of hot-rolled steel in 1998.<sup>29</sup>

36. Korea also asserts that raw material costs were not rising, and cites to the USITC Report. Korea confuses the relevant time periods. The USITC Report contains information that raw material costs fell between the beginning of 1998 and June 1999. The antidumping measures and the attempted price increases occurred in the months after that.

37. What is most remarkable about Korea’s position on the question of serious injury is that it fails to address many of the factors which the USITC found pointed to a finding of serious injury. As explained in detail in our first written submission and first oral statement, the evidence of serious injury in this case was pervasive.<sup>30</sup>

#### ***Causation (Alleged Shift from OCTG to Line Pipe Production)***

38. Citing to the Appellate Body’s decision in *Wheat Gluten*, Korea claims that the USITC should have further investigated the extent to which U.S. pipe producers may have redirected production from OCTG to line pipe.<sup>31</sup> Korea misconstrues the Appellate Body’s analysis in *Wheat Gluten*. While the Appellate Body ruled that competent authorities may not limit their examination of “ ‘other factors’ to those clearly raised before them as relevant by interested parties,” it also rejected “the European Communities’ argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant.”<sup>32</sup>

39. All of the record evidence before the USITC indicated that there was no substantial switch from OCTG to line pipe production. Domestic producers stated at the USITC injury hearing that any diversion of production would have been relatively small, and they explained that line pipe production declined at the same time as OCTG production.<sup>33</sup> There is no contrary evidence in the record. The USITC Report shows that production of line pipe declined substantially between the end of 1997 and June 1999,<sup>34</sup> making it implausible that serious injury

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<sup>28</sup> Written Rebuttal of the Republic of Korea, paras. 114-115.

<sup>29</sup> United States Response to Questions from the Panel and Korea, para. 64.

<sup>30</sup> First Written Submission of the United States, paras. 9-14.

<sup>31</sup> Written Rebuttal of the Republic of Korea, para. 142.

<sup>32</sup> *US – Wheat Gluten* (AB), para. 56.

<sup>33</sup> Transcript of injury phase hearing, p. 110.

<sup>34</sup> USITC Report, p. II-22, Table 5.

was caused by overproduction of line pipe resulting from any shift from OCTG production.

### ***Causation (Pricing)***

40. The USITC relied on three types of evidence for finding that imports had significant adverse price effects: (i) declining average unit values of imports in 1998 and interim 1999; (ii) quarterly pricing comparisons which showed pervasive underselling; and (iii) questionnaire responses, including those from importers and purchasers of line pipe (who presumably would have had a vested interest in avoiding the imposition of safeguard measures).<sup>35</sup>

41. Korea's attempts to discredit this evidence are unpersuasive. First, Korea claims that the average import unit values on which the USITC relied are inaccurate because they are based on "public data."<sup>36</sup> It is clear that this is not the case; the USITC Report specifically notes that the average unit value data on which the USITC relied was adjusted to exclude imports of Arctic-grade and alloy line pipe.<sup>37</sup>

42. Second, Korea argues that the quarterly pricing data do not prove that imports "led prices down" in the second half of 1998 and the first half of 1999.<sup>38</sup> Korea is tilting at windmills. The USITC did not make any finding that "imports led prices down" specifically in this period. Rather, the USITC found that underselling was pervasive throughout the period of investigation, occurring in about 82 percent of all quarterly comparisons.

43. Third, Korea dismisses the questionnaire responses from industry participants, many of whom stated that imports played a "very important" or "important" role in causing price declines. Korea argues that such statements cannot take the place of an analysis of actual pricing data. The short answer is that the USITC considered this evidence from questionnaire responses *together* with other evidence of widespread underselling. Each type of evidence corroborated the other. Furthermore, there is no support for Korea's suggestion that the observations of those with intimate knowledge of the industry are not objective.

44. Korea also argues that the line pipe industry's declining profitability was caused primarily by an increase in unit costs rather than a decline in prices.<sup>39</sup> This argument suffers from several flaws. Korea states that unit costs increased by 10-20 percent in 1998. This is not so. The USITC Report shows that the cost of goods sold plus SG&A expenses increased from \$471 per

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<sup>35</sup> USITC Report, pp. I-24-25.

<sup>36</sup> Written Rebuttal of Republic of Korea, para. 127.

<sup>37</sup> USITC Report, p. I-24, note 152.

<sup>38</sup> Written Rebuttal of Republic of Korea, para. 127.

<sup>39</sup> Written Rebuttal of Republic of Korea, para. 126.

ton in 1997, to \$493 per ton in 1998.<sup>40</sup> This is an increase of only 4.6 percent.

45. More fundamentally, Korea's theory does not explain the large decline in the industry's revenues and its negative operating income in interim 1999. In interim 1999, the \$458 per ton cost of goods sold plus SG&A was 3.6 percent lower than the \$475 per ton cost plus SG&A in interim 1998.<sup>41</sup> Revenue per ton, however, also was lower, but by a much greater magnitude: 19 percent lower in interim 1999 as compared with interim 1998.<sup>42</sup> Thus, the data for interim 1999 demonstrate the invalidity of Korea's broad contention that declining profitability was caused mostly by an increase in unit costs.

#### ***Causation (Non-Attribution)***

46. In its arguments addressing causation, Korea seeks to add a requirement that is found nowhere in Article 4.2 or elsewhere in the Safeguards Agreement. Specifically, Korea argues that the "only" means to assure that injury from other factors is not attributed to imports is to "*cumulatively*" consider all of the other factors.<sup>43</sup> There is absolutely no such requirement in the Safeguards Agreement. Indeed, Korea does not even cite to the terms of the Agreement to support this *cumulative* analysis theory. Rather, Korea relies on United States common law concerning torts as the basis for its argument. Clearly, non-safeguards domestic common law, particularly on a subject not even within the realm of the USITC's authority, is irrelevant to the interpretation of the provisions of the WTO Safeguards Agreement.

47. More importantly, the Appellate Body's report in *Lamb Meat* contradicts Korea's argument that the Safeguards Agreement requires a *cumulative* causation analysis. In that report the Appellate Body provided a road map for the type of explanation it looked for to assess whether the USITC complied with the non-attribution requirement of Article 4.2(b) of the Safeguards Agreement. The Appellate Body accepted the USITC's separate identification of individual causal factors, but suggested that to meet the requirements of Article 4.2(b) the USITC should have explained the nature of the injurious effects of each of these other factors. Thus, neither the terms of Article 4.2(b) nor the Appellate Body's interpretation of that Article support Korea's contention that the competent authority must *cumulatively* consider all of the other causes.

48. Korea is also incorrect in asserting that the Agreement requires a finding that the domestic industry would still have suffered serious injury irrespective of the crisis in oil and

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<sup>40</sup> USITC Report, p. II-28, Table 10.

<sup>41</sup> USITC Report, p. II-28, Table 10.

<sup>42</sup> USITC Report, p. II-28, Table 10 (\$412 per ton as compared with \$509 per ton).

<sup>43</sup> Written Rebuttal of Republic of Korea, para. 139.

gas.<sup>44</sup> In *Wheat Gluten*, the Appellate Body stated that, under the Safeguards Agreement, competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, causes serious injury.<sup>45</sup> In its *Lamb Meat* report, the Appellate Body again confirmed that Article 4.2 of the Safeguards Agreement does not require that increased imports “alone”, “in and of themselves” or “*per se*” must be capable of causing serious injury.<sup>46</sup> Rather, the Agreement contemplates that other factors may be contributing at the same time to the situation in the domestic industry.<sup>47</sup> Where there are several causal factors, the Agreement, as interpreted by the Appellate Body, requires competent authorities to identify and distinguish the effects of the different causal factors by whatever reasonable methodology the Member chooses.<sup>48</sup>

49. Distinguishing the effects of the various causal factors is not the same as finding that the imports by themselves would have caused serious injury irrespective of the presence of other causes. As noted, the Appellate Body has rejected the notion that the latter finding is required. In the real world, industries are usually affected by a variety of factors, and it is unrealistic to expect that a “genuine and substantial” causal link can exist between *imports* and serious injury only in a vacuum. The Safeguards Agreement recognizes this reality, and, while requiring competent authorities to distinguish the effects of other causes to assure non-attribution, it is based on the assumption that there may be other adverse factors that bear upon the existing condition of the market into which the imports are entering. The question for the competent authorities is not whether the increased imports would have caused serious injury absent those other factors, but whether there is a “substantial and genuine” causal link between the increased imports and serious injury that occurs as a result of the entry of those imports into the market as it exists.

50. Korea alleges the USITC’s causation analysis is “backwards.”<sup>49</sup> That allegation is not true. As the Appellate Body stated in the *Lamb Meat* Report, Article 4.2(b) does not require that competent authorities follow any particular methodology or legal “tests” to comply with the non-

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<sup>44</sup> Republic of Korea’s Comments to Questions from the Panel to the United States, question 23.

<sup>45</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 78.

<sup>46</sup> *Lamb Meat* (AB), paras. 169-171. See *Wheat Gluten* (AB), paras. 67, 78, 79.

<sup>47</sup> *Wheat Gluten* (AB), para. 67; *Lamb Meat* (AB), paras. 166, 179-180.

<sup>48</sup> *Lamb Meat* (AB), paras. 181, 183.

<sup>49</sup> Republic of Korea’s Comments to Questions from the Panel to the United States, questions 23 and 24.

attribution requirement.<sup>50</sup>

51. It also appears that Korea misunderstands the analysis undertaken by the USITC. The USITC did not begin with an analysis of the “combined effects of other factors plus imports” to determine whether they “together” cause injury. The USITC’s initial inquiry into whether the domestic industry was in fact experiencing or threatened with serious injury was not a causation test. Rather, it was a condition precedent to the USITC’s examination of whether any serious injury or threat was caused by the increased imports. Having found that the domestic industry was experiencing serious injury, the USITC proceeded to examine whether the increased imports were causing, or under the language of the U.S. statute, were a substantial cause of, the serious injury. The USITC did not, as Korea asserts, examine whether imports and other factors together were causing injury. It examined whether imports were a *substantial cause* of serious injury first by looking at the relationship between the increased imports and the injury suffered by the industry, and then examining other alternative causes to assure that the impact of the increased imports was not less than that of any other cause.

52. In addressing whether each other alleged cause was a greater cause of injury to the domestic line pipe industry than the increased imports, the USITC provided the type of analysis outlined by the Appellate Body in *Lamb Meat*, and thus ensured that there was a “*genuine and substantial relationship of cause and effect*” between increased imports and serious injury. The USITC explained the injurious effects of all other causal factors.

53. As explained in our written submissions, the USITC determined that there were mainly two circumstances responsible for the decline in the domestic industry – the increased imports and the decline in oil and natural gas prices. The USITC carefully identified, distinguished and explained the effects of each of those two causes. Yet Korea faults the USITC for doing so, and complains about the USITC’s well-supported factual finding that the effects of the oil and gas crisis were of a demand-oriented nature.

54. In addition, Korea’s factual assertions are internally inconsistent. For example, Korea asserts that 1997 was an unusually good year for the industry, and then faults the USITC for leaving 1997 out of its comparison and instead comparing the period prior to 1997 with that subsequent to 1997.<sup>51</sup> Korea further fails to recognize that, in observing the significance of imports during the latter period (when the industry was suffering financial losses), the USITC compared market share for 1998 and 1999 with market share for 1994-1996, and found that import market share had more than doubled in the later period. Irrespective of actual apparent consumption, the domestic industry had lost significant market share in 1998 and 1999, as compared to its share in 1994-1996.

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<sup>50</sup> *Lamb Meat* (AB), paras. 178, 181.

<sup>51</sup> Written Rebuttal of Republic of Korea, para. 131.

55. After distinguishing the effects of the oil and gas declines from those of the increased imports and then examining the effects of each of these two principal causes, the USITC found that the increased imports were the predominant cause of the declining condition of the domestic industry. The USITC then also examined the minor causes of injury. As described in our written submissions, the USITC found that one asserted “causal” circumstance – alleged misallocation of overhead and SG&A expenses – was not borne out by the facts, and that one cited factor – decline in interim 1999 prices for hot-rolled carbon steel – was not a “cause” of any injury. The USITC examined the effects of each of the other possible alternative causes. It found either that any injury caused by these other factors was too small to account for the injurious effects attributed to the increased imports, or that the nature of the other cause was such that it had always been a factor in the market in good times as well as bad, and therefore could not be linked to the declines attributed to the increased imports.

56. Many of Korea’s arguments that the line pipe safeguard is inconsistent with Article XIII and Article 5 rely on the notion that TRQs are quantitative restrictions or quotas. To the contrary, the text of the WTO Agreement, a panel report analyzing the text of GATT 1947, and the practice of the WTO Members necessitate the conclusion that TRQs are neither quantitative restrictions nor quotas. Korea has never even addressed these arguments. As we have nothing to rebut, we refer the Panel to our written submissions and move on to the next topic.

57. Korea also claims that the United States violated the Safeguards Agreement by failing to explain in 2000 how the line pipe safeguard conformed to Article 5.1, first sentence, which requires that a safeguard measure be applied no more than the extent necessary to remedy serious injury and facilitate adjustment. Korea recognizes that the Appellate Body already addressed and rejected this argument in *Korea – Dairy*, when it stated that “we do not see anything in Article 5.1 that establishes such an obligation” – namely, to justify a safeguard measure at the time of application – “for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years.”<sup>52</sup> Korea contends that the only question before the panel was related to the quantitative restriction imposed by Korea, and that “the holding did not extend past the question presented and answered by the Appellate Body.”<sup>53</sup> In fact, the “question” before the Appellate Body was exactly the argument raised in this dispute – whether Article 5.1 creates a general obligation to explain a safeguard measure.<sup>54</sup> The Appellate Body rejected that argument, and the panel should do the same now.

58. Korea attempts to find an alternative basis for this claim in the requirement under Articles

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<sup>52</sup> *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 98 (14 December 1999).

<sup>53</sup> Written Rebuttal of Republic of Korea, para. 35.

<sup>54</sup> *Korea – Dairy*, paras. 94 & 99.

3.1 and 4.2(c) that the competent authorities publish a report on “all pertinent issues of law and fact.” However, this argument ignores that the competent authorities are charged solely with the determination of serious injury, and that the report consists solely of the findings of the competent authorities. Thus, Articles 3.1 and 4.2(c) do not require that the report explain the Member’s decision under Article 5.1 whether and to what extent to apply a safeguard measure. Indeed, if there were a requirement to explain *all* safeguard measures, the Article 5.1 requirement to justify a safeguard quota set at less than the level of imports for a representative three-year period would become superfluous. Therefore, under standard rules of the interpretation of treaties, the Panel should reject the notion that a Member must explain its safeguard measure at the time of imposition.

59. Korea argues further that even if there is no requirement to explain a safeguard measure, an explanation became necessary when the President decided not to adopt the remedy recommended by the USITC. But the Safeguards Agreement does not provide for the competent authorities, or anyone else, to issue a “recommended remedy.” Thus, the recommendation and the weight attached to the findings associated with the recommendation are a matter of domestic U.S. law, which is outside the purview of the Safeguards Agreement and, thus, outside the mandate of the Panel.

60. As a final point about the recommended remedy, the obligations of Article 5.1 apply to the *application* of the measure *adopted* by the Member, and not to other potential measures considered by the interested parties (or even the competent authorities) over the course of the proceedings. Thus, findings with regard to measures that the President did not adopt are irrelevant to the resolution of this dispute.

61. Korea’s rebuttal submission also purports to present its *prima facie* case that the line pipe safeguard was inconsistent with Article 5.1. However, this latest attempt by Korea contains several flaws. First, its view that the United States implicitly projected in-quota imports of 63,000 short tons is self-contradictory. Korea itself states that purchasers would likely buy exempt imports before imports subject to the supplemental duty. The record shows that 19 countries shipped line pipe to the United States during the investigation period, and not just the seven cited by Korea. Second, the fact that the supplemental duty was six to ten times the bound rate is merely a testament to the negligible size of the bound rate. It indicates nothing about the effect of the supplemental duty on the imports and any resulting effect on the domestic industry.

62. Third, data on actual line pipe imports from March 2000 to February 2001 does not, as Korea claims, demonstrate the “result of the measure.”<sup>55</sup> Leaving aside for the moment whether such information is properly subject to review by the Panel, it is impossible to determine from the information submitted by Korea whether the line pipe safeguard caused all, some, or none of

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<sup>55</sup> Written Rebuttal of Republic of Korea, para. 49.

the decrease in line pipe imports. The numbers are simply meaningless outside of the context of prices, domestic industry performance, demand, and other market conditions. Perhaps import levels decreased because demand for line pipe fell further, or because exporters found other markets, or because one or more foreign steel mills closed. Thus, the import data does not meet Korea's burden of proof. In fact, the only point that it proves is that the 19 percent supplemental duty did not, as Korea initially claimed, block imports entirely.

63. In closing, we have a final point on the much discussed issue of confidential information. There can be little question that the public report issued by the USITC contained large quantities of public information in support of the USITC's determination. At the outset of this dispute, Korea claimed that confidential information would show that these public figures and the USITC's characterizations of the figures were inaccurate. On two occasions, the United States has provided extensive indexed or aggregate data to the Panel. At each step, those data have demonstrated the accuracy of the public data and of the findings of the USITC. And at each step, Korea has claimed that *other* confidential data, or the entirety of the confidential data on the USITC record, or data that was not even presented to the USITC, would show that the serious injury determination was wrong. It should be clear at this point that Korea's inability to prove any flaw in the USITC determination reflects the strength of the determination, and is not a product of the protection of the confidential data behind that determination.