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

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

First Written Submission of the United States of America

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I. INTRODUCTION

1. There is no dispute that the U.S. steel industry was in crisis in 2001. Following the Asian financial crises which began in mid-1997[1], U.S. steel import levels surged in 1998 to 1999, and again in 2000. These successive import surges drove steel prices down to levels not seen in many years. The increase in imports and resulting collapse in prices produced massive financial losses and bankruptcies across the entire steel industry, including integrated steel producers and minimills, and encompassing producers of flat, long, tubular and stainless steel products alike.

2. There is also no dispute that the situation in the United States reflected changes in the steel market. Over the preceding three years, steel demand and steel prices in other parts of the world had fallen dramatically, in most regions to prices below those in the United States. At the same time, global steelmaking capacity increased steadily throughout the 1990s, from about 800 million tons in 1991 to nearly 950 million tons by 2000.[2]

3. The effect of these developments on the U.S. steel industry was catastrophic. Despite record-high domestic demand, steel prices collapsed, as domestic producers had to reduce their prices to compete with a flood of low-priced imports diverted into the U.S. market by these unexpected events. Even when the surge of imports of certain products leveled off, prices did not return to their normal levels. Thus, even when the U.S. business cycle was reaching its peak, the U.S. steel industry became increasingly unprofitable.

4. By 2001, prices had fallen to levels unseen for more than 20 years, and the industry's losses had grown larger. More than 27 producers, including some of the largest producers, had to declare bankruptcy. Several ceased operations altogether. This situation caused a collapse in investment in the steel industry, endangering its ability to remain competitive in the global economy.

5. The United States developed a three-prong strategy for dealing with the situation – (1) global negotiations to address excess inefficient steelmaking capacity; (2) global negotiations to address government interventions in the marketplace that distorted global trade in steel; and (3) a domestic safeguard investigation to evaluate whether increased imports were causing or threatening serious injury to domestic industries. On June 22, 2001, the U.S. Trade Representative ("USTR") requested that the U.S. International Trade Commission ("ITC") conduct such an investigation for a wide variety of steel products.[3]

6. The ITC conducted an exhaustive investigation. It gathered data from thousands of steel producers, importers, and consumers. The ITC's Commissioners held eight days of hearings on the question of serious injury, heard hundreds of witnesses, and received several hundred submissions from domestic steel producers, foreign steel producers, U.S. steel importers, and

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[1] *See*, *e.g.*, *Steel*, Inv. No. TA-201-73, USITC Pub. 3479, at OVERVIEW-16, FLAT-6, and LONG-6 ("ITC Report"), (Exhibit CC-6).

[2] ITC Report, p. OVERVIEW-14.

[3] ITC Report, p. OVERVIEW-1.

steel consumers.[4] The ITC then reached affirmative determinations for eight products, and negative determinations for 17 products. The ITC Commissioners were divided in their votes for four products.[5] The ITC then proceeded to the "remedy" phase, in which the agency gathered information and views on the appropriate measures to apply in response to the findings of serious injury and threat caused by increased imports. There were three days of hearings on this issue, and again, hundreds of participants and submissions.[6]

7. The ITC issued its three-volume report on December 19, 2001, which it supplemented on January 9, 2002 and February 4, 2002. The United States notified the determination and report to the WTO Committee on Safeguards, and invited other Members to request consultations. The European Communities ("EC") and Brazil requested formal consultations at this time under Article 12.3 of the *Agreement on Safeguards* ("Safeguards Agreement" or "SGA"). Other Members requested and received informal consultations with U.S. government officials. Many of the parties that appeared before the ITC also requested and received meetings with U.S. government officials to discuss the situation.

8. Based on the findings of the ITC and in light of consultations with foreign governments and meetings with industry participants, the United States imposed safeguard measures on ten steel products ("steel safeguard measures"). The measures consist of temporary increased tariffs, ranging from 8 to 30 percent in the first year, for certain carbon flat-rolled steel ("CCFRS"); tin mill; hot-rolled bar; cold-finished bar; rebar; certain welded pipe; fittings, flanges and tool joints ("FFTJ"); stainless steel bar; stainless steel wire rod ("stainless steel rod"); and stainless steel wire.[7] The United States did not impose measures on two other products, tool steel and stainless steel fittings and flanges, which had been subject to divided ITC determinations.

9. Throughout this exhaustive process, the United States complied with both the substantive and procedural obligations of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the Safeguards Agreement. Arguments by the EC, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil (collectively, "Complainants") do not provide any basis to conclude otherwise.

II. PROCEDURAL BACKGROUND

10. The EC requested consultations with the United States on March 13, 2002, pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the GATT 1994, and Article 14 of the Safeguards Agreement. The request for consultations alleged that the steel safeguard measures – embodied in Proclamation

[4] ITC Report, p. OVERVIEW-1 and B-1.
[5] ITC Report, p. 1, n.1.
[6] ITC Report, p. OVERVIEW-1 and B-1.
[7] Proclamation 7529 of March 5, 2002, 67 Fed. Reg. 10553, Annex 25-35 (Mar. 7, 2002).

7529 – were inconsistent with Articles 2.1 and 2.2, 3.1 and 3.2, 4.1 and 4.2, 5.1 and 5.2, 7.1, and 9.1 of the Safeguard Agreement, and Articles I:1, XIII, and XIX:1 of the GATT 1994.[8]

11. Requests for consultation were filed by Japan, Korea, China, Switzerland, Norway, New Zealand, and by Brazil.[9] In addition, the following countries filed requests to join the consultations: Switzerland, Japan, Korea, Venezuela, Norway, China, Canada, New Zealand, and Mexico.

12. Consultations were held in Geneva on April 11 and 12, 2002, and June 13, 2002, but failed to settle the dispute. The EC requested establishment of a panel on May 7, 2002.[10]

13. The Dispute Settlement Body established panels to review the various parties' allegations on June 3, 2002, June 14, 2002, June 24, 2002, July 8, 2002, and July 29, 2002.[11]

14. On July 15, 2002, the United States, China, the EC, Japan, Korea, New Zealand, Norway, and Switzerland reached a procedural agreement to allow consideration of all complaints by a single WTO Panel.[12] On July 18, 2002, the United States reached a similar agreement with Brazil.[13]

15. The Director-General composed the single panel on July 25, 2002. Canada, Chinese Taipei, Cuba, Malaysia, Mexico, Thailand, Turkey, and Venezuela reserved their rights to participate in the Panel proceedings as third parties.[14]

III. FACTUAL BACKGROUND

A. Condition of the Domestic Industry

16. By the fall of 2001 the U.S. steel industry was in a severe crisis caused by record levels of low-priced imports that began in 1998.

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[8] Request for Consultations by the European Communities, WT/DS248/1, G/L/527, G/SG/D20/1.

[9] WT/DS249/1 (26 March 2002), WT/DS251/1 (26 March 2002), WT/DS252/1 (2 April 2002), WT/DS253/1 (8 April 2002), WT/DS254/1 (10 April 2002), WT/DS258/1 (21 May 2002), and by Brazil on WT/DS259/1 (23 May 2002).

[10] Request for the Establishment of a Panel by the European Communities, WT/DS248/12 (8 May 2002).

[11] Constitution of the Panel Established at the Request of the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil, WT/DS248/15 (12 August 2002).

[12] Procedural Agreement between the United States and China, the European Communities, Japan, Korea, New Zealand, Norway and Switzerland, WT/DS248/13 (22 July 2002).

[13] Procedural Agreement between the United States and Brazil, WT/DS259/9 (23 July 2002).

[14] Constitution of the Panel Established at the Request of the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil, WT/DS248/15 (12 August 2002).

17. From December 1997 through October 2001, 25 steel producers in the U.S. filed for protection under Chapter 11 of the U.S. bankruptcy law. These firms accounted for 30 percent of U.S. crude steelmaking capacity.[15] These bankruptcies accelerated job losses in the industry and total employment in the sector fell to the lowest levels in decades.

18. Even steel producers that avoided bankruptcy experienced declining profits and other indicators of financial performance as they lost market share to low priced imports. Per unit costs for both integrated and minimill producers increased as overall production volume and capacity utilization declined. The overall performance of the domestic industry deteriorated to the extent that it was no longer able to meet existing financial obligations or fund the investments that were necessary for it to compete with imports.

19. Prior to the Asian crisis, the U.S. industries had performed comparatively well and had been undergoing a continuous process of restructuring. In the decade prior to 1998 the industries had invested billions of dollars in the upgrading of existing facilities and the construction of new efficient capacity, while permanently closing inefficient facilities. As a result of these investments, by 2000 more than 97 percent of steel produced in the United States used the continuous-cast method of production, as opposed to only 76 percent in 1991. Labor productivity increased as total employment in the steel industries declined by 18.5 percent between 1989 and 1999.[16] Overall, the investments and restructuring efforts made during these years increased U.S. firms' competitiveness by improving quality and productivity and lowering costs.[17]

20. The magnitude of the crisis can be seen by examining the record of the investigation of the flat-rolled steel industry. In 1996 and 1997 the domestic flat-rolled steel industry earned reasonable operating profits and made substantial capital investments in a growing domestic market. However, domestic prices began to fall markedly beginning in 1998, and were at much lower levels in 1999 and 2000 than earlier in the period investigated by the ITC. At the same time, domestic capacity utilization rates also fell significantly. As a result, industry profits turned to substantial annual operating losses.[18]

B. Injury Investigation and Establishment of the Steel Safeguard Measures

21. Following receipt of a request from the USTR on June 22, 2001, the ITC instituted a safeguard investigation to determine whether increased imports of certain steel products were a substantial cause of serious injury, or threat of serious injury, to the domestic industry or industries.

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[15] ITC Report pp. OVERVIEW-11 and OVERVIEW-25.
[16] ITC Report, p. OVERVIEW-29.
[17] ITC Report, p. OVERVIEW-20
[18] ITC Report, pp. C-2 - C-7.

22. On June 26, 2001, the ITC requested public comment on the draft questionnaires to be used in the investigation. Subsequently, the ITC mailed producer and importer questionnaires to approximately 825 domestic firms that were believed to have produced one or more of the subject steel products. The ITC received 281 responses to the domestic producer questionnaires.[19] The ITC also selected approximately 220 additional firms that received importer questionnaires. 326 responses to the importer questionnaires were received. Four purchaser questionnaires (i.e., one questionnaire for each broad steel product category) were included in the mailing to the 825 firms identified as possible U.S. producers of steel, as well 220 additional firms identified as U.S. importers of the subject merchandise. After asking U.S. producers and importers to identify their three largest purchasers for 33 steel product categories, the ITC then mailed the four purchaser questionnaires to 1,100 additional firms. The ITC received approximately 1,180 usable purchaser questionnaire responses. Additionally, the ITC posted the blank foreign producer questionnaire on its website and informed all persons indicating an interest in the investigation of this fact. The ITC received 475 foreign producer questionnaire responses.[20]

23. On July 26, 2001, the ITC received a resolution adopted by the Committee on Finance of the United States Senate requesting an investigation of certain steel products under the domestic safeguard law.[21] The Senate request was consolidated with the previously instituted investigation.

24. All interested parties had an opportunity to submit a prehearing injury brief by September 10, 2001. The ITC received approximately 157 such briefs.

25. On September 17, 19, 20, 24, 25, and 28, 2001, and on October 1 and 5, 2001, the ITC conducted hearings as to whether imports of certain steel products were a substantial cause of serious injury, or threat of serious injury to the domestic industry or industries. Approximately 500 persons or parties filed notices of their intention to participate in the hearing, including witnesses from industry participants, various embassies, U.S. Congress, and local and state governments. All individuals who filed notices to appear were provided with an opportunity to present testimony.

26. All parties were also provided with an opportunity to submit posthearing injury briefs, which were due between September 27 and October 9, depending on the product. The ITC received approximately 100 such briefs. In addition, any person who had not entered an appearance as a party to the investigation was permitted to submit a written statement of information pertinent to the consideration of injury by October 9, 2001.

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[19] ITC Report, p. OVERVIEW-2.

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

[21] Letter from the United States Senate Committee on Finance to the U.S. International Trade Commission (July 26, 2001).

27. On October 22, 2001, after conducting an investigation in conformity with both the procedural and substantive requirements of the Safeguards Agreement, and after reviewing the economic data and taking into account the views of all interested parties, the ITC concluded that certain domestic industries were seriously injured or threatened with serious injury due to increased imports. The ITC reached affirmative determinations as to: (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 ("GOES")); 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 ("OCTG")) ("certain welded pipe"); (f) carbon and alloy flanges, fittings, and tool joints ("FFTJ"); (g) stainless steel bar and light shapes ("stainless steel bar"); and (h) stainless steel wire rod ("stainless steel rod"). The ITC Commissioners were equally divided with respect to their determinations regarding (i) carbon and alloy tin mill products ("tin mill"); (j) stainless steel wire; (k) tool steel; and (l) stainless steel fittings.

28. The ITC made negative determinations in regard to the following 17 products: (a) GOES; (b) billets; (c) rails; (d) carbon and alloy wire; (e) carbon and alloy rope; (f) nails; (g) shapes; (h) fabricated structural units; (i) seamless tubular products other than OCTG; (j) seamless OCTG; (k) welded OCTG; (l) stainless steel slabs/ingots; (m) stainless steel plate; (n) stainless steel cloth; (o) stainless steel rope; (p) stainless steel seamless tubular products; and (q) stainless steel welded tubular products.

29. The ITC also found, pursuant to section 311(a) of the North American Free-Trade Agreement ("NAFTA") Implementation Act, that imports of hot-rolled bar; cold-finished bar; FFTJ; stainless steel bar and stainless steel fittings from Canada accounted for a substantial share of the total imports and contributed importantly to the serious injury or threat thereof caused by imports.[22] The ITC was equally divided in its finding with regard to certain welded pipe from Canada.[23] The ITC made a negative finding with regard to imports from Canada of (a) CCFRS; (b) tin mill; (c) rebar; (d) tool steel; (e) stainless steel rod and (f) stainless steel wire.[24]

30. With regard to imports from Mexico, the ITC determined that imports of certain carbon and alloy flat-rolled steel (slabs, plate, hot-rolled steel, cold-rolled steel, and coated steel); carbon and alloy steel fittings; and stainless steel fittings from Mexico account for a substantial share of the total imports and contribute importantly to the serious injury or threat thereof caused by imports.[25] The ITC voted in the negative regarding imports from Mexico of carbon and alloy

[22] ITC Report, p. 1.
[23] ITC Report, p. 1 n.2.
[24] ITC Report, p. 1 n.3.
[25] ITC Report, p. 1.

steel (a) tin-mill products; (b) hot-rolled bar; (c) cold-finished bar; (d) rebar; (e) welded tubular products other than OCTG; (f) tool steel; and stainless steel (g) bar, (h) rod, and (i) wire.[26]

31. For products subject to affirmative determinations or divided votes, the ITC then moved into the "remedy" phase of its proceedings, in which it gathered information and views on what action the United States should take in response to the findings of serious injury or threat of serious injury. All interested parties were provided with an opportunity to submit prehearing briefs on remedy issues by October 29, 2001. The ITC received approximately 95 such briefs.

32. On November 6, 8, and 9, 2001, the ITC conducted hearings in the remedy phase of the investigation. More than 250 persons or parties filed notices of their intention to appear at these hearings, including industry participants, representatives of embassies, and members of the U.S. Congress, embassies, and industry participants. All individuals who filed notices to appear were provided with an opportunity to present testimony.

33. Parties were permitted to file posthearing briefs between November 13 and 15, 2001, depending on the product. Approximately 88 posthearing remedy briefs were filed with the ITC.

34. On December 19, 2001, the three-volume findings and recommendations of the ITC were transmitted to the President. The ITC's determination and the views of the Commissioners are contained in the first volume that is over 500 pages in length. The second and third volumes, which together exceed 575 pages, contain information obtained during the investigation.

35. On January 3, 2002, the USTR requested, and the ITC subsequently provided, additional information regarding unforeseen developments, analysis of the econometric models submitted in the remedy phase, and potential country exclusions under the safeguard measure.

36. U.S. government officials also conducted a number of consultations with foreign governments and meetings with private parties to obtain their views on appropriate action. For instance, the Trade Policy Staff Committee ("TPSC"), an interagency body composed of officials from major U.S. Government agencies and departments (including USTR, the Commerce Department, the Council of Economic Advisers, the Department of Justice, the Labor Department, the Office of Management and Budget, the State Department, and the Treasury Department), held 96 meetings with parties interested in the potential safeguard measures during the week of January 7-11, 2002. In all, from October 2001 through March 2002, the Office of the U.S. Trade Representative and the TPSC conducted at least 200 meetings and consultations on the subject of the Steel 201 dispute. These included meetings and/or consultations with all of the parties to this WTO dispute, as well as hundreds of other foreign governments, foreign steel producers and importers, and U.S. importers and purchasers.

[26] ITC Report, p. 1 n. 4.

37. The remedy consultation process included extensive consideration of exclusions to the safeguard remedy. USTR requested that interested parties file product exclusion requests by December 5, 2001. More than 200 such requests were filed. In particular, exclusions were sought by numerous foreign producers from the countries that are the Complainants in these disputes. The Administration then considered responses to these exclusion requests. Domestic producers filed more than 100 exclusion responses.

38. Following the ITC's findings, the United States considered whether to apply a safeguard measure. As part of its deliberative process, the United States consulted with Members that would be affected by a proposed safeguard. The USTR gave thorough consideration to all product exclusion requests.

39. On March 5, 2002, the President of the United States issued Presidential Proclamation 7529, which imposed the steel safeguard measures for a period of three years and one day. Proclamation 7529 provided for more than 100 product exclusions requested by foreign producers and governments. The Proclamation also provided for additional opportunities to request exclusions.

40. Following the issuance of Proclamation 7529, the United States conducted numerous formal and informal consultations with WTO Members pursuant to Article 12.3 of the Safeguards Agreement. In response to these consultations and to requests from domestic steel consumers, the United States solicited additional requests for exclusion from the steel safeguard measures. The United States granted more than 720 additional exclusions, out of approximately 1300 requests, on April 5, July 12, and August 30, 2002. This process resulted in the exclusion of approximately one-quarters of covered steel imports from the safeguard measures. The USTR will review additional requests on a yearly basis, with the next round of requests scheduled to be decided in March 2003.

IV. ARGUMENT

A. Analytical Framework

1. The Complainants Bear the Burden of Proof to Establish a *Prima Facie* Case That the United States Acted Inconsistently With Its Obligations

41. As demonstrated in this submission, the United States fully complied with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") in applying the steel safeguard measures. Under the WTO Agreement, the Complainants bear the burden of proof to demonstrate an inconsistency. Unless they meet that burden with regard to a particular safeguard measure, there would be no basis for finding that

measure to be inconsistent with the WTO Agreement.[27] None of the Complainants has met its burden to establish a *prima facie* case with respect to the claims contained in its panel request. They each rely in large measure on unfounded assertions advanced without supporting evidence or legal grounding.

42. In *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* the Appellate Body noted that "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."[28] Addressing the same question in the context of a safeguard measure, the *Korea – Dairy* panel found that "[a]s a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process."[29]

43. The *Korea – Dairy* panel also noted that it fell to the EC, as the complainant, to submit a *prima facie* case of violation of the Safeguards Agreement.[30] That panel concluded further that once the EC made its *prima facie* case, it was for Korea (the responding party in that dispute) to present its own evidence and arguments showing that it had complied with the requirements of the Safeguards Agreement at the time of its determination.[31] The *Korea – Dairy* panel then concluded that "[a]t the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions on whether the EC claims are well-founded."[32]

2. There Is No Special Interpretive Approach Applicable to Claims Arising Under the Safeguards Agreement

44. Just as in any other dispute, Article 11 of the DSU instructs the Panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . ." The standard of review to be applied in safeguards cases is well-established. In *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea -- Dairy")* and *Argentina --*

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[27] *See for example, Report of the Panel - United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, 31 May 2001: "7.23 In this line, we consider that Pakistan, the complaining party, bears the burden of proof for establishing a prima facie case that the subject transitional safeguard measure is in violation of Article 6."

[28] *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Appellate Body Report, adopted 25 April 1997, para. IV *("U.S. – Wool Shirts").*

[29] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Panel Report, 21 June 1999, para. 7.24 ("*Korea – Dairy").*

[30] *Korea – Dairy*, Panel Report, para. 7.24. As the Appellate Body has noted, a *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." *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*").

[31] *Korea – Dairy*, Panel Report, para. 7.24.

[32] *Korea – Dairy*, Panel Report, para. 7.24.

Safeguard Measures on Imports of Footwear (*"Argentina -- Footwear")*, the panels specifically rejected the notion that panels may review *de novo* the determination made by the domestic investigating authority.[33] Rather, as articulated by the panel in *Argentina – Footwear,*

> our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement.[34]

45. To a substantial degree, Complainants' arguments reflect a misunderstanding of the standard of review. As we discuss below, a great deal of their argumentation simply presents another view of the facts, rather than showing that the findings made by the ITC or the decision by the United States to apply a safeguard measure was in any way inconsistent with the Safeguards Agreement or Article XIX. Such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.

46. The interpretive approach of a panel in assessing claims under the Safeguards Agreement and Article XIX of the GATT 1994 is the same as in a dispute arising under the other covered agreements. Article 3.2 of the DSU requires the panel to interpret the Safeguards Agreement and Article XIX[35] "in accordance with customary rules of interpretation of public international law." Within this framework, the "fundamental rule of treaty interpretation" is "that a treaty shall be

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[33] *Korea – Dairy* at ¶ 7.30 ("*Korea -- Dairy")*; *Argentina -- Safeguard Measures on Imports of Footwear,* WT/DS121/R, 25 June 1999, at ¶ 8.117 (*"Argentina -- Footwear").*

[34] Report of the Panel in *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted on 12 January 2000 ("*Argentina -- Footwear*"), at para. 8.124. Similarly, the *Korea – Dairy* Panel concluded that:

> the Panel's function is to assess objectively the review conducted by the national investigating authority, . . . an objective assessment entails an examination of whether the [Korean national authority] had examined all facts in its possession or which it should have obtained in accordance with Article 4 of the Safeguards Agreement (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Safeguards Agreement), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea.

Report of the Panel in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, adopted 12 January 2000, para. 7.30.

[35] In this submission, all citations to Articles designated with Arabic numerals are to the Safeguards Agreement, and all citations to Articles designated with Roman numerals are to the GATT 1994, unless otherwise indicated.

interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty."[36]

47. As the Appellate Body has recognized, these standards apply even if a provision is characterized as an "exception":

> merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[37]

48. However, Complainants propose that a special standard of interpretation applies to the provisions of the Safeguards Agreement – that "when construing the prerequisites for taking [safeguard] actions, their extraordinary nature must be taken into account."[38] In some instances, they characterize this standard as requiring a "strict" or "narrow" construction of the terms of the Safeguards Agreement.[39]

49. To support their approach to construction of the agreement, Complainants cite the Appellate Body's statement in *US – Line Pipe* that

> it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard measures is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.[40]

As an initial point, the Complainants' reading of this passage ascribes to the *US – Line Pipe* report precisely the approach to treaty interpretation that the Appellate Body condemned in *EC – Hormones* – basing the rigor of interpretation of a covered agreement on whether it pertains to an "extraordinary" measure. The Appellate Body's Line Pipe report nowhere says that it is contradicting the approach correctly articulated in *EC- Hormones* and should not be read as departing from that approach. Indeed, using the classifications of the Appellate Body, a tariff

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[36] *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. 244 ("*US – Line Pipe*").

[37] *EC – Hormones*, AB Report, para. 104.

[38] EC first written submission, para. 86, *quoting US – Line Pipe*, para. 81.

[39] *E.g.*, Japan first written submission, para. 84; China first written submission, para. 47; Norway first written submission, para. 47.

[40] *US – Line Pipe*, AB Report, para. 81.

would be an example of a measure that applies to "fair" trade, but there has never been any indication that a tariff should be viewed as an "extraordinary" measure requiring a different interpretive approach for those provisions dealing with tariffs.

50. In addition, Complainants' interpretation is based on a provision taken out of context. They fail to mention that after making the statements that Complainants have cited, the Appellate Body went on to recognize that there were counterbalancing considerations in interpreting the Safeguards Agreement:

> Nevertheless, part of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member makes it necessary to protect a domestic industry temporarily.
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> There is, therefore, a natural tension between on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief. . . . The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*.[41]

51. Thus, the Appellate Body recognized that the "extraordinary nature" of the remedy is not the sole, or even the predominant consideration under the Safeguards Agreement. The object and purpose of the agreement is to provide an effective remedy to a domestic industry facing the situation described in the Safeguards Agreement.[42] To the extent that the "extraordinary nature" of the remedy is relevant, the procedural and substantive standard of the agreements already take all concerns into account.

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[41] *US – Line Pipe*, AB Report, paras. 82-83.

[42] The Appellate Body has recognized this as the objective of the Safeguards Agreement since its earliest reports. For example, in *Argentina – Footwear*, it found:

> The object and purpose of Article XIX is, quite simply, to allow a Member to readjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to the product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

Argentina – Footwear, AB Report, para. 94.

52. Thus, Complainants are wrong. The Panel need not take special account of the "extraordinary nature" of a safeguard remedy, as the text of the Safeguards Agreement itself addresses that issue.

3. The Complainants Have Not Demonstrated that Any Methodology of the ITC Is Inconsistent with the Safeguards Agreement

53. In reaching its determinations regarding serious injury and threat of serious injury, the ITC applied a number of longstanding methodologies for organizing and analyzing the information before it. The ITC analysis of each of the like products under investigation was neutral, unbiased, and not chosen to achieve a particular result. In the context of these methodologies, the ITC made findings of fact and determinations that satisfied both the domestic legal requirements and U.S. obligations under the Safeguards Agreement and GATT 1994.

54. The panel in *US – Line Pipe* recognized that an examination of the WTO consistency of methodologies used in reaching a serious injury determination will differ from an examination of factual issues.[43] In that dispute, the panel evaluated both sets of issues in upholding the ITC's conclusions as to increased imports. With regard to the methodologies, the panel performed

> an objective assessment . . . of whether the methodology selected is unbiased and objective, such that its application permits an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports.[44]

Significantly, the panel inquired whether the methodology *permitted* results consistent with the terms of the Safeguards Agreement, not whether it mandated or invariably produced such results.

55. The panel then upheld the ITC's practice of considering five full calendar years of data and two comparable interim periods because:

> first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC *allows* it to focus on the recent imports; and third, the period selected by the ITC is sufficiently long to *allow* conclusions to be drawn regarding the existence of increased imports.[45]

The panel then continued on "to review the ITC's findings on absolute and relative import increases *in light of that methodology*."[46]

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[43] *US – Line Pipe*, Panel Report, para. 7.192.
[44] *US – Line Pipe*, Panel Report, para. 7.194.
[45] *US – Line Pipe*, Panel Report, para. 7.201 (emphasis added).
[46] *US – Line Pipe*, Panel Report, para. 7.205 (emphasis in original).

56. This approach reflects that a methodology is one step in a competent authority's analytical process. A consistent methodology can help the competent authorities to organize or analyze the facts of the case, and ensure that the results are neutral and unbiased. However, use of a methodology is just one way of implementing Safeguards Agreement obligations or domestic law, and one that is not required by the Safeguards Agreement. Thus, a Member is free to use methodologies as part of its analysis or to try to find methodologies that will ensure compliance in every case.

57. Complainants challenge several of the methodologies employed by the ITC on the grounds that they do not "comply with" the standards set out in the Safeguards Agreement or Article XIX of GATT 1994.[47] We will show in subsequent sections that this is not the case. However, there is an important overarching point that the methodologies, as such, do not bear the burden of complying with WTO obligations. The relevant inquiry for purposes of the Safeguards Agreement is whether the competent authorities have conducted an investigation and made a determination that satisfies a Member's WTO obligations. Methodologies are a tool that can assist in the investigation, but Complainants have not indicated any reference in the Safeguards Agreement to methodologies nor to obligations that apply specifically to methodologies. In this regard, past panels and the Appellate Body considering U.S. safeguard measures have consistently recognized that the findings of the ITC can comply with the obligations under the Safeguards Agreement even if the methodology, taken alone, does not incorporate every single one of the relevant criteria.[48]

4. Articles 3.1, Third Sentence, and 4.2(c) Require a Report Reflecting the Investigation by the Competent Authorities, and Do Not Impose an "Open-Ended and Unlimited Duty" to Explain

58. Article 3.1, third sentence, and Article 4.2(c) describe the obligation of the competent authorities to publish a report on the investigation. Together, they require that the competent authorities provide "their findings and reasoned conclusions reached on all pertinent issues of fact and law," along with "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

59. These requirements focus on the competent authorities and their investigation. The competent authorities must publish *their* findings and reasoned conclusions – not those that the

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[47] First written submission of the EC, paras. 112 and 464; first written submission of Norway, paras. 98-99; first written submission of Switzerland, para. 100.

[48] For example, in *US – Lamb Meat*, the Appellate Body found that the relative causation analysis applied by the ITC was not the same as the Safeguards Agreement obligation to "separate out, and identify, the effects of the different factors, including increased imports." However, it still examined whether "the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports" met the requirements of Article 4.2(b). *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. 184 ("*US-Lamb Meat*").

Panel or one of the Complainants might have made. The competent authorities must demonstrate the relevance of the factors examined – not those that the Panel or the Complainants would have examined. And this analysis must appear in the report. If the report, as in the case of the ITC Report, contains narrative views and separate data tables, both must be considered in evaluating whether the report has satisfied the obligations.

60. Several of the Complainants argue that the omission of a fact, a citation, or an argument renders the ITC Report inconsistent with Article 3.1 or 4.2(c).[49] However, Articles 3.1 and 4.2(c) do not impose a burden of investigative or explanatory perfection that no competent authority could meet. For example, if an error or omission does not cast doubt on a particular conclusion, that conclusion is still "reasoned" and, thus, consistent with Article 3.1. Similarly, if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1.

61. We note in this regard that the Appellate Body has found that Article 3.1 requires a "reasoned and *adequate* explanation."[50] The Appellate Body reached a similar conclusion in *US – Lamb Meat*, in which it recalled its description of the proper causation analysis in *US – Wheat Gluten* and stated:

> these three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal "tests" mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.[51]

62. Several of the Complainants argue that the ITC did not address alternative explanations of the facts. They point to the Appellate Body's statement that

> [a] panel must find, in particular, that an explanation is not reasoned, or is not adequate, 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.[52]

However, they have disregarded that this consideration applies only if there is an alternative explanation that is "plausible" *and* the competent authorities' explanation is inadequate in light of that alternative view. As the party asserting the affirmative of a claim, Complainants bear the burden of proof to demonstrate that their particular alternative explanations are both "plausible"

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[49] E.g., EC first written submission, para. 256.
[50] *US – Line Pipe*, para. 216 (emphasis added).
[51] *US – Lamb Meat*, AB Report, para. 178.
[52] *US – Lamb Meat*, AB Report, para. 106.

and demonstrate that the ITC explanation is inadequate.[53] As we show below, their submissions fail to satisfy this requirement.

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, as well as Articles X:3(a) and XIX:1 of GATT 1994

1. Introduction

63. Complainants' appeals on this issue present the Panel with the first occasion to examine the interpretation and application of the term "like products" in the context of the Safeguards Agreement.

64. The Appellate Body has clearly set forth 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 purpose of the covered agreement in which the provision appears."[54] 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 that in 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.[55]

65. The following points should set the parameters for consideration of the appropriate application of the term "like products" in the context of the Safeguards Agreement and in particular for review of the ITC's determinations of like products in the present case:

– With regard to the context of the Safeguards Agreement, it has not been established in other GATT or WTO dispute settlement proceedings what factors are appropriate to be considered in determining whether a domestic product is like an imported product.

– There are no universally accepted definitions of what constitutes a specific steel product. For example, tin mill products consist of a wide variety of flat-rolled carbon and alloy steel, plated or coated with tin or chromium. Certain Complainants would accept defining tin mill products as a single like product and others, such as Norway, appear to suggest that tin mill should have been defined far more narrowly as many like products

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[53] *US – Wool Shirts*, AB Report, p. 17.

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

[55] *EC-Asbestos*, footnote 60, at p. 34 ("We also cautioned against the automatic transposition of the interpretation of 'likeness' under the first sentence of Article III:2 to other provisions where the phrase 'like products' is used."), *referring to Japan-Alcohol*, at 113.

corresponding to certain requests for product exclusions. Moreover, Complainants who challenge the like product definition for certain welded pipe do not agree on what the definition should have been; Korea seems to propose two like products based on size and Switzerland seems to propose three like products based on function.

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

– In the present case, the ITC's definitions of like product are coextensive with the subject imports. In spite of the implied allegations, the ITC defined like products that match-up with imports subject to investigation and did not define like products that encompass more types of steel than subject imports. The ITC considered the facts using well-established factors and looked for clear dividing lines among the various types of 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 its reasonable explanations should be upheld by the Panel.

– 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.

2. The Text of the Safeguards Agreement Regarding the Definition of Like Product

66. Article 2.1 of the Safeguards Agreement provides:

> A Member may apply a safeguard measure to **a product** only if that Member has determined, pursuant to the provisions set out below, that 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**[56] [57] (emphasis added).

67. Article 4.1(c) of the Safeguard Agreement provides additional clarification regarding the definition of the domestic industry but does not expand on the term "like or directly competitive products." Article 4.1(c) states:

> in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of **the like or directly competitive products** operating within the territory of a Member, or those whose collective output of **the like or directly competitive products** constitutes a major proportion of the total domestic production of those products (emphasis added).

68. Thus, the term "like or directly competitive products," or more specifically, the term "like products" is not explicitly defined in the Safeguards Agreement or GATT 1994. The term "like products" also has not been at issue in GATT or WTO dispute settlement proceedings involving the Safeguards Agreement.[58] [59]

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[56] Very similar language is set forth in Article XIX:1(a) of GATT 1994, which states in relevant part:

> If . . . **any product is being imported** . . . in such increased quantities and under such conditions as to cause or threaten serious injury to **domestic producers in that territory of like or directly competitive products**. . . . (emphasis added).

[57] The U.S. statute, 19 U.S.C. § 2252(b)(1)(A), includes similar language, indicating that the Commission shall conduct an investigation to consider "the domestic industry producing an article like or directly competitive with the imported article." (US-2).

[58] *Accord* Japan first written submission, para. 98.

[59] The Appellate Body has considered the issue of definition of the domestic industry based on whether or not products were defined as directly competitive in the context of the safeguard provision in the *Agreement on Textiles and Clothing* ("ATC"); the terminology in the ATC is different, *i.e.*, "like and/or directly competitive products." *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, paras. 82-105 ("*US-Cotton Yarn*"). In *US-Cotton Yarn*, imported cotton yarn and domestically-produced cotton yarn had been found to be like. However, cotton yarn produced by vertically integrated domestic fabric producers was determined not to be directly competitive with the imported cotton yarn, and thus was not included in the definition of the domestic industry. The Appellate Body, however, found that the "captively produced yarn is directly competitive with imported yarn sold on the merchant market" and that the producers of such yarn should be included in the scope of the domestic industry. *Id.*, paras. 104-105. In this context, the Appellate Body indicated that: "'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like.'" *Id.*, para. 91(d). The Appellate Body rejected a finding that a product could be part of the like product definition but then defined out as not directly competitive and thus not included in the definition of the domestic industry. The Appellate Body reiterated in its findings in *US-Lamb Meat* that: "the product defines the scope of the definition of the domestic industry. . . ." and that "the definition of the *domestic industry* must be product-oriented and not producer-oriented, and that the definition must be based on products produced by the *domestic industry* which are to be compared with the imported product in terms of their being like or directly competitive." *Id.*, para. 86 and n. 56. Moreover, *US-Cotton Yarn* indicates that

(continued...)

69. As the Appellate Body set forth in *US-Lamb Meat*,

> . . . the **first step** in determining the scope of the domestic industry is the **identification of the products which are "like or directly competitive" with the imported product**. Only when those products have been identified is it possible then to identify the "producers" of those products.[60]

70. In spite of Complainants' mischaracterizations, the dispute settlement proceedings in *US-Lamb Meat* provided little additional guidance on the issue of defining the like product. There was no issue in the proceedings regarding the definition of like product.[61] Rather the issue in *US-Lamb Meat* involved the definition of the domestic industry after the like product had already been defined; specifically, the issue in *US-Lamb Meat* was whether the domestic industry could be defined to also include growers of live lambs, which were not included in the like product, with the producers of the like product, lamb meat. Complainants have misconstrued the findings in *US-Lamb Meat* as requiring a narrowly defined like product.[62] However, the findings in *US-Lamb Meat* spoke to a domestic industry that only includes the producers of the like product, and not to defining the like product.[63]

71. Therefore, there is no directly related treatment of the term to provide guidance on the issue of like product and any guidance gleaned from construction of the term outside the context

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[59] (...continued)
captive production can not be excluded and the entire domestic industry must be considered in either the definition of the domestic industry or the injury analysis. *Id*., para. 102.

[60] *US-Lamb Meat*, Appellate Body Report, para. 87 (emphasis added).

[61] *US-Lamb Meat*, AB Report, para. 88 ("There is no dispute that in this case the 'like product' is 'lamb meat', which is the imported product with which the safeguard investigation was concerned.").

[62] For example, the EC explicitly misstates that "the Appellate Body in *United States - Lamb*, incidentally clarified which criteria are *not* capable of establishing likeness between domestic and imported products." EC first written submission, para. 201, *citing to US-Lamb Meat*, paras. 77 and 95. The two criteria referenced by the EC were never discussed regarding the definition of like product by the Appellate Body or the panel because such criteria were advanced and discussed regarding only the definition of the domestic industry. The EC continues to mischaracterize its case by claiming that the focus was on the like product rather than correctly on the domestic industry when they allege that *US-Lamb Meat* considered how to "make lamb meat like live lamb" which was not addressed at all. EC first written submission, para. 201.

[63] *US-Lamb Meat*, AB Report, para. 84 ("According to the clear and express wording of the text of Article 4.1(c), the term 'domestic industry' extends solely to the 'producers . . . *of the like or directly competitive* products'. (emphasis added) The definition, therefore, focuses exclusively on the producers of a very specific group of products. Producers of products that are *not* 'like or directly competitive products' do not, according to the text of the treaty, form part of the domestic industry."), para. 90 ("In our view, under Article 4.1(c), input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products."), and para. 95 ("We recall that, in this case, the USITC determined that the like products at issue were domestic and imported lamb *meat* and that the USITC did not find that *live lambs* or any other products were directly competitive with lamb *meat*. On the basis of this finding of the USITC, we consider that the 'domestic industry' could *only* include the 'producers' of lamb *meat*. By expanding the 'domestic industry' to include producers of other products, namely, *live lambs*, the USITC defined the 'domestic industry' inconsistently with Article 4.1(c) of the *Agreement on Safeguards*.").

of the Safeguards Agreement or Article XIX of GATT 1994 should recognize the limitations of transposing an interpretation from one context to another.

3. GATT and WTO Treatment of the Term Like Product in the Context of GATT 1994 and Agreements Other Than the Safeguards Agreement

72. As the Appellate Body has clearly set forth, the term "like products" "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears."[64] Thus, as the Appellate Body has cautioned, the interpretation of the term "like products" for one context cannot be automatically transposed to other provisions or agreements where the phrase "like products" is used.[65] In addition, interpretations of the term "directly competitive" should not be transposed to this investigation since the domestic product was not defined on the basis of a directly competitive analysis, but rather on the basis of a like product analysis. Specifically, Complainants' attempts to transpose dispute settlement discussions regarding the term directly competitive and in particular directly competitive factors such as substitutability to the like product analysis should be rejected by this Panel.[66]

73. 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 the GATT 1994, or other covered agreements with distinct and different purposes from those in the Safeguards Agreement. In particular, the term "like products" has primarily been addressed in dispute settlement proceedings regarding allegations that national treatment has not been afforded regarding 1) internal taxes pursuant to Article III:2 of the GATT 1994, and 2) laws and regulations pursuant to Article III:4 of the GATT 1994.

74. In considering the definition of like products under Article III:2 in *Japan-Alcohol*, the Appellate Body approved of "the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis."[67] In affirming the panel's finding in this case that the definition of "like products" in Article III:2 should be construed narrowly, the Appellate Body indicated that "[h]ow narrowly is a matter that should be determined separately for each tax measure in each case."[68] Therefore, the definition of the like product clearly should be made on a case-by-case basis even when it involves a provision where there is some guidance on the approach to be followed.

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[64] *EC - Asbestos*, AB Report, para. 88.

[65] *EC-Asbestos*, AB Report, footnote 60, at p. 34 ("We also cautioned against the automatic transposition of the interpretation of 'likeness' under the first sentence of Article III:2 to other provisions where the phrase 'like products' is used."), referring to *Japan -- Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at 113 ("*Japan-Alcohol*").

[66] *See, e.g.*, Korea first submission, para. 38-39 and 58-59; Japan first written submission, paras. 79 and 101; EC first written submission, para. 240.

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

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

75. Resorting to the "ordinary" or "plain" meaning of the term "like" provided by the dictionary "leave[s] many interpretative questions open."[69] The Appellate Body in *EC-Asbestos* noted that the dictionary definition of "like" does not resolve the following three issues of interpretation:

> First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products. . . . Second, the dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" . . . . Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third, this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.[70]

Thus, reliance on the dictionary definition for the plain or ordinary meaning of "like," as proposed by Complainants, leaves such issues unresolved as: 1) which characteristics or qualities are important; 2) the degree or extent to which products must share qualities or characteristics; and 3) from whose perspective "likeness" should be judged.

76. The Appellate Body in *Japan-Alcohol* recognized that the basic approach for interpreting "like or similar products" set out in *Border Tax Adjustments*[71] was "helpful in identifying on a case-by-case basis the range of 'like products' that fall within the narrow limits of Article III:2, first sentence in the GATT 1994."[72] However, the Appellate Body explicitly cautioned that:

> this approach will be most helpful **if decision makers keep ever in mind how narrow the range of "like products" in Article III:2**, first sentence **is meant to be as opposed**

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[69] *EC-Asbestos*, AB Report, para. 92.

[70] *EC-Asbestos*, AB Report, para. 92.

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

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

Border Tax Adjustments, Report of Working Party, L/3464, adopted 2 Dec. 1970, BISD 18S/97, para. 18 (emphasis added); *quoted in part* in *Japan-Alcohol*, AB Report, p. 20.

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

> **to the range of "like" products contemplated in some other provisions** of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement.*[73]

77. Complainants' attempts to apply statements made by the Appellate Body in *US-Cotton Yarn* to this case ignore the difference in facts and context between the cases.[74] In *US-Cotton Yarn*, as discussed above, imported and domestically produced cotton yarn was found to be like. However, cotton yarn produced by vertically integrated domestic producers was found not to be directly competitive and thus was not included in the definition of the domestic industry. In rejecting the finding that a product could be part of the like product definition but then defined out as not directly competitive and thus not included in the definition of the domestic industry, the Appellate Body stated: "'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like.'"[75] In the present case, the like product corresponds to the definition of the domestic industry and there was no directly competitive analysis or findings. Thus, the *US-Cotton Yarn* statement involves very different facts in the context of a different provision with different terminology and should not be transposed to this case.

78. The Appellate Body recognized in *Japan-Alcohol*, and most recently affirmed in *EC-Asbestos*, that the interpretation of "like products" must be considered in the context of the purpose and objective of the provision or agreement at issue. Specifically, the Appellate Body in *Japan-Alcohol* stated:

> No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. **The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case** to which that provision may apply.[76]

79. The Appellate Body has explicitly cautioned against automatically transposing the interpretation of likeness from one context to another. Complainants, however, would have the

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

[74] *See, e.g.*, Japan first written submission, para. 89; Korea first written submission, para. 31; New Zealand first written submission, para. 4.39; Brazil first written submission, para. 88; Norway first written submission, para. 198.

[75] *US-Cotton Yarn*, AB Report, para. 91(d).

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

Panel adopt interpretations of "like products" developed in cases under Article III of GATT 1994 and use such interpretations in this case under the Safeguards Agreement. But, the Appellate Body in *EC-Asbestos* even rejected directly applying its interpretation of like products under Article III:2 to a case under Article III:4 and found that the starting point for its interpretation was the "general principle" in Article III:1.[77] Therefore, the relevant context, specifically the purpose and objective, of the provision and agreement at issue should be the starting point to resolving the issue of interpretation of "like products" in this case, rather than attempting to apply an interpretation made in a different context.

80. The appropriateness of this approach is reinforced by the fact that a comparison of the "general principles" for Article III of GATT 1994 to those for the Safeguards Agreement demonstrates that they have contradictory purposes. The Appellate Body has indicated that:

> The broad and fundamental **purpose of Article III is to avoid protectionism** in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures '**not be applied to imported and domestic products so as to afford protection to domestic production**'" . . . . Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. . . .[78]

Conversely, the Appellate Body in *US-Line Pipe* set forth that:

> ***raison d'être* of Article XIX of the GATT 1994 and the Agreement on Safeguards** is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member, **makes it necessary to protect a domestic industry temporarily**.[79]

81. In alleging that the ITC was required to consider the competitive relationship between products, Complainants fail to recognize that this factor was found to be relevant in the context of Article III of GATT 1994, as discussed by the Appellate Body in *EC-Asbestos*.[80] Specifically, the Appellate Body in *EC-Asbestos* stated:

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[77] *EC-Asbestos*, AB Report, para. 93 ("in interpreting the term 'like products' in Article III:4, we must turn, first, to the 'general principle' in Article III:1, rather than to the term 'like products' in Article III:2.").

[78] *EC-Asbestos*, AB Report, para. 97 (emphasis added).

[79] *US-Line Pipe*, AB Report, para. 82 (emphasis added); *see also United States -- Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Panel Report, WT/DS177/R and WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177 and 178/AB/R, para. 7.76 ("*US-Lamb Meat*") (the Agreement's objectives of "creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury. . . .").

[80] *See, e.g.*, Japan first written submission, paras. 79 and 101; Korea first written submission, para. 38-39 and 58-59.

> . . . a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace. . . .[81]

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

82. It is clear that the interpretation of the term "like products" in the context of provisions whose purpose is to avoid protectionism and protect an equal and competitive relationship between products will necessarily not be identical to and probably will be narrower than, or at least very different from, that for an agreement with the opposite purpose, *i.e.*, permitting 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.

4. The Appropriate Criteria to Consider in Defining Like Products in the Context of the Safeguards Agreement

83. 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."[82] Moreover, it is clear that the 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."[83]

84. 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. The ITC also takes into account guidance provided in the legislative history to the Trade Act of 1974 which suggests that the term "like" means those articles which are "substantially identical in inherent or intrinsic characteristics (*i.e.*, materials from which made, appearance, quality, texture, etc.)."[84] These are not statutory criteria and do not limit what factors the ITC may consider in making its

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[81] *EC-Asbestos*, AB Report, para. 99.

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

[83] *EC-Asbestos*, AB Report, para. 101; *see also Japan-Alcohol*, AB Report, at p. 20-21 ("it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.").

[84] H.R. Rep. No. 93-571, at 45 (1973); S. Rep. No. 93-1298, at 121-122 (1974) (US-3). While the ITC also may consider whether there are directly competitive products, the ITC determined that having identified articles like the imported articles they were not required to, and did not in this case, look further to consider articles that are directly competitive but not like the imported articles. *See, e.g.,* ITC Report, nn. 139, 179, 435, 893, and 1167.

determination.[85] No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the particular case. The decision regarding the like or directly competitive article is a factual determination.[86] The ITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations.[87]

85. In spite of Complainants' mischaracterizations, the factors considered by the ITC resemble the three criteria suggested by the Working Party on *Border Tax Adjustments* as an approach to analyzing like product. Two of the criteria, physical properties and uses, are the same. The third *Border Tax Adjustment* criterion, consumers' tastes and habits, seems to conflict with the purpose of a safeguards investigation.[88] Since the purpose of the Safeguards Agreement is to permit protection of a domestic industry under certain circumstances,[89] a focus on the subjective consumers' views of the product or market rather than those of the producers or both is one-sided and misplaced. The ITC has focused on more objective factors in its traditional analysis of like products such as the product's marketing channels and manufacturing process.[90]

86. A fourth criterion, customs treatment or tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, although it often has mistakenly been attributed to the Working Party. It, however, has been considered as a factor in a number of cases including those involved in dispute settlement proceedings.[91] While the "[t]ariff classification clearly

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

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

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

[88] The Appellate Body cautioned in *EC-Asbestos* that it may be important to consider "*from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products." *EC-Asbestos*, AB Report, para. 92.

[89] *US-Line Pipe*, AB Report, para. 82 (purpose of Safeguards Agreement is to permit a WTO Member to "resort[] to an effective remedy in an extraordinary emergency situation that . . . makes it necessary to protect a domestic industry temporarily."); *see also* ITC Report, p. 9 ("The purpose of section 201 either is to prevent or remedy serious injury to domestic productive resources from all imports.").

[90] *Accord Japan-Alcoholic Beverages 1987*, Panel Report, L/6216 (BISD 34S/116-117), adopted 10 November 1987, para. 5.7 ("*Japan-Alcoholic Beverages 1987*") ("Panel was of the view that the 'likeness' of products must be examined taking into account not only objective criteria (such as composition and manufacturing processes of products) but also the more subjective consumers' viewpoint (such as consumption and use by consumers)" but also recognized that "consumer habits are variable in time" and "traditional Japanese consumer habits with regard to shochu provided no reason for not considering vodka to be a 'like' product.").

[91] *See EC Asbestos*, AB Report, n. 74; *Japan-Alcohol*, AB Report, pp. 21-22.

reflects the physical properties of a product,"[92] the ITC found that consideration of customs treatment for purposes of the definition of the like product was not "a useful factor" given the large number of classification categories (612) applicable to this investigation. The fact is, in this case the numerous tariff classifications did not provide clear distinctions between products. For instance, each of the 33 data collection categories individually have from 2 to 65 tariff classifications.

87. There is no support in the Agreement or jurisprudence for Complainants' contentions that the primary basis for the ITC's like product definitions should have been tariff classification and, in any case, what they are proposing in this regard is not clear.[93] On the one hand, they seem to argue that the ITC should have defined separate like products for each of the 612 classifications using the 10-digit level.[94] On the other hand, they imply that clear product categories would have been apparent for like product definitions if the Commission had considered tariff classifications using the 4-digit level.

88. As the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[95] The tariff classifications are interrelated with the physical properties/characteristics criterion which the ITC clearly considered and found to be an important factor in its like product definitions. The ITC exercised its discretionary judgement to determine which factors were useful, and which were not, in examining the particular facts of this investigation. The ITC clearly found the physical characteristics factor to be useful but given the large number of tariff classifications found that tariff classifications provided no clear dividing lines between products.[96]

89. The facts also provide no support for Complainants' allegations that consideration of tariff classifications at the 4-digit level would have provided clear product distinctions.[97] For example, at the 4-digit level, there are nine separate tariff classifications covering the like product defined by the ITC as certain carbon flat-rolled steel. Of the nine 4-digit classifications, two classifications (7225 and 7226) apply to steel at four (hot-rolled steel, CTL plate, cold-rolled

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[92] *EC-Asbestos*, AB Report, para. 102; *see also Japan-Alcohol*, AB Report, p. 21

[93] *See Japan-Alcohol*, AB Report, pp. 21-22. In *Japan-Alcohol*, the Appellate Body considered that tariff classifications of products could be relevant as one of a series of factors in determining what are "like products," not as the primary factor. *Accord Japan-Alcoholic Beverages 1987*, Panel Report, para. 5.6.

[94] Norway also argues that the tariff classifications are too broad and that definitions should have been made as narrow as the requests for product exclusions. Norway first written submission, para. 223.

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

[96] For example, tariff classifications could be helpful in making a distinction between goods if the issue is whether the like product should be defined mor broadly to include domestic products corresponding to tariff classifications not subject to investigation. But that is not the case here, where none of the like products were not defined more broadly than tariff classifications for subject imports.

[97] *See, e.g.*, EC first written submission, para. 248 and CC-83; Korea first written submission, para. 52; China first written submission, para. 200.

steel, and coated steel) of the five stages of processing defined as CCFRS; one classification (7211) applies to three stages; two classifications (7208 and 7210) apply to two stages; and four classifications (7207, 7209, 7212, and 7224) apply to one stage of CCFRS.[98] Thus, rather than provide clear product category distinctions, tariff classifications at this level demonstrate an interrelationship between the physical properties of steel at different stages of processing which led to the ITC defining these types of steel collectively as certain carbon flat-rolled steel.

90. A fifth factor considered by the ITC in examining the evidence in order to make its like product definitions is the product's manufacturing process (*i.e.*, where and how it is made). In the context of the Safeguards Agreement where the purpose is the protection of the domestic industry, *albeit* temporarily and under certain circumstances, consideration of the manufacturing process for a product is an appropriate and objective factor.

91. In spite of Complainants' mischaracterizations, the Appellate Body also 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. In *US-Lamb Meat*, the Appellate Body expressed its reservations about the underlying Panel's examination, in considering the definition of the domestic industry, of the degree of integration of production processes. In this context, the Appellate Body stated:

> As we have indicated, under the *Agreement on Safeguards*, the determination of the "domestic industry" is based on the "producers . . . of the like or directly competitive products". The focus must, therefore, be on the identification of the *products*, and their "like or directly competitive" relationship, and not on the *processes* by which those products are produced.[99]

Complainants have stated erroneously the above finding by claiming that it concerned the like product definition (as opposed to "domestic industry") and ignored the Appellate Body's explicit recognition that consideration of production processes may be a relevant factor in defining like products. Specifically, the Appellate Body in *US-Lamb Meat* added the following statement in a footnote to the above quote:

> We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.[100] [101]

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[98] Calculated from ITC Report, pp. FLAT-1 - FLAT-3. The evidence shows a similar interrelationship if considered by stage of steel processing. For example, slab is covered by two tariff classifications at the 4-digit level, hot-rolled steel, cold-rolled steel, and coated steel are each covered by four classifications at the 4-digit level, and CTL plate is covered by five classifications at the 4-digit level. *Id*.

[99] *US-Lamb Meat*, AB Report, para. 94.

[100] *US-Lamb Meat*, AB Report, para. 94, n. 55. *See also Japan-Alcoholic Beverages 1987*, Panel Report (BISD 34S/116-117), para. 5.7 (Panel thought it was important to assess "likeness," as much as possible, on the basis

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

93. The Appellate Body in *US-Lamb Meat* also recognized that a like product definition may include both input products and end-products.[102] The Appellate Body recognized that when faced with products at various stages of production a relevant factor for determining the like product definition (as opposed to the domestic industry definition) was whether products at different stages of processing were different forms of a single like product or had become different products.[103]

5. Request or Petition Identifies Imports Within the Investigation; Starting Point for ITC is to Define Domestic Products Like Imports Already Identified

94. The President's request (as well as the Senate Committee on Finance's request) identified the imports that were subject to this investigation, *i.e.*, identified the specific imported products. In a U.S. safeguard investigation, the ITC's first step is to define the domestic products like the imported products identified in the request or petition. On that basis, it then proceeds to define the domestic industry(ies) in order to conduct its analyses and make its determinations regarding those industry(ies).[104] The ITC has no authority, under U.S. safeguards law, to add to or exclude imports that have been identified in the request or petition as within the investigation, from its injury analysis and determination(s).[105]

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[100] (...continued)
of objective criteria, including, in particular, composition and manufacturing processes of the product, in addition to consumption habits.).

[101] While Brazil recognized the Appellate Body's footnote, it also only provided a partial quote of the statement in the text of *US-Lamb Meat* so as to indicate erroneously that it applied to the definition of the like product rather than to the definition of the domestic industry. Brazil first written submission, para. 96.

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

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

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

Canada-Beef, *quoted* in *US-Lamb Meat*, AB Report, para. 92 and 94; *see also US-Lamb Meat*, Panel Report, para 7.95 and 7.96.

[104] 19 U.S.C. §§ 2252(b)(1)(A) and (c)(4). (US-2).

[105] *See* 19 U.S.C. § 2252. (US-2). If the ITC defines a like product/domestic industry and subsequently makes a determination; if it makes a negative determination with respect to this industry, no remedies can be
(continued...)

95. The ITC starts with the imported article (or articles) included within the investigation that has already been identified in the request or petition ("subject imports") and examines the evidence in order to define the domestic product(s) 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, in the first instance, whether and how to subdivide (or combine) the imported article or articles identified in the request into relevant sub-groupings.

96. The ITC's approach regarding the definition of the like product is consistent with the Safeguards Agreement. Complainants' alleged requirement to subdivide or identify separate import products prior to defining the like product has no support in the Agreement. It is apparent from Complainants' varied and often inconsistent allegations that their issue overall is more with the broad range of imports identified as subject to this investigation and the result of that investigation than with the ITC's approach to defining the like product. Moreover, it is not clear how subdividing or explicitly defining the imports as separate articles prior to defining corresponding domestic like products would have necessarily resulted in different like product definitions. Complainants' alleged support for such requirements and narrow definitions involves reading interpretations into the Agreement that are not supported by the text or purpose of the Agreement, and they rely on discussions of like products in a different context and involving very different facts and issues.

97. 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. As discussed above, *US-Lamb Meat* involved the definition of a domestic industry and whether producers of a product, live lambs, that had not been included in the definition of the like product, lamb meat, could be considered "producers" of the lamb meat like product and, thus, members of the domestic lamb meat industry. Of particular relevance in distinguishing this case, live lambs had not been identified as imports within the scope of investigation, *i.e.*, had not been identified as "specific imported products." Nor was there any question of whether domestic live lambs were "like or directly competitive" with the sole subject imported product, lamb meat. In the finding quoted by Complainants,[106] 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.[107] Referring to Article 2.1 of the Safeguards Agreement, the Appellate Body found that a safeguard measure may only be imposed if the imported product or *specific product* "is having the stated effects upon the 'domestic industry *that produces like or*

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[105] (...continued)
imposed on the imports corresponding to that like product. Beyond that, the authority to grant specific product exclusion requests remains with the President.

[106] *See, e.g.*, EC first written submission, para. 184.

[107] *US-Lamb Meat*, AB Report, para. 86.

directly competitive products.'"[108] This statement is about defining a domestic industry consisting of producers of like or directly competitive products and does not speak to separating subject imports into distinct categories prior to defining like products as Complainants allege. Furthermore, in the paragraph following this finding, the Appellate Body explicitly sets forth 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.[109]

98. 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 product are coextensive with the subject imports. In spite of the suggestions to the contrary, 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*.

99. While the rationale underlying the Safeguards Agreement may be that it is an exception to other obligations and there are statements in *US-Lamb Meat* regarding the prejudicial effects of imports on producers of domestic products not defined as like products, neither of these require a narrowly construed like product definition, as Complainants contend.[110] First, legally to the extent the Safeguards Agreement is an exception that aspect of it has already been comprehended in the text of the Safeguards Agreement. Members are neither directed or authorized to vary the balance of rights and obligations reflected in the Agreement by appending an unstated rule of construction on the negotiated language. Moreover, these arguments ignore the facts of this investigation which are very different from those in *US-Lamb Meat* as discussed above. 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. Complainants' arguments apparently are more about the range of products within the investigation than the ITC's like product approach.

100. 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."[111] In fact, their interpretation seems to

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[108] *US-Lamb Meat*, AB Report, para. 86.

[109] *US-Lamb Meat*, AB Report, para. 87. The Appellate Body also does not address requiring the definition of separate imported products even when it contemplates that there may be situations where there is more than a single like product. *See Id.*, para. 92 and para. 94, n.55.

[110] *See, e.g.*, EC first written submission, paras. 197-199; Korea first written submission, paras. 27-28; Japan first written submission, paras. 88 and 95.

[111] *See, e.g.*, EC first written submission, paras. 184-185; Japan first written submission, paras. 87 and 94; New Zealand first written submission, para. 4.32; China first written submission, paras. 126 and 131-135; Brazil first written submission, para. 87; Switzerland first written submission, paras. 164-166 and 170-171; Norway first written

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propose defining domestic like products more broadly than the very narrow and numerous definitions they propose for specific imported products. The ITC considered the evidence using well-established factors to define like products. Rather than consider the stated effects of Complainants' narrowly defined specific imports on more broadly defined like products as proposed by Complainants, the ITC appropriately considered the effects of subject imports corresponding to each like product on the domestic industry producing that like product.

101. Complainants' rationale for 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.[112] Complainants' proposed methodology has no basis in the Agreement. The premise underlying Complainants' methodology is that there is "universal agreement" on definitions for steel products. Otherwise, how else would the ITC know what individual specific imports to consider?[113] As discussed below, Complainants' conflicting views on such definitions alone clearly demonstrate that no such consensus on specific steel definitions exist. Moreover, it is ironic that Complainants, who have alleged incorrectly that the ITC's like product definitions, particularly CCFRS, were made in order to attain a desired result,[114] actually propose that the ITC should have conducted a results-oriented test prior to defining the like product. Complainants would have the ITC conduct an unwarranted and contrived test of whether imports increased first before defining a like product and an industry, so as to reach the results Complainants desired.

102. Complainants' use of vodka and shochu as examples for their rationale regarding the definition of "specific imported products" demonstrates the extent to which their theory has been manipulated. In *Japan-Alcohol*, the Appellate Body approved a panel finding that vodka and shochu were properly defined as like products pursuant to Article III:2 of the GATT 1994 and that Japan, by taxing vodka in excess of shochu, violated its obligations under Article III:2.[115]

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[111] (...continued)
submission, 168-170 and 174-176.

[112] *See, e.g.*, EC first written submission, paras. 184-188; Norway first written submission, para. 206.

[113] Complainants' proposal raises the question of how can you determine if specific imports have increased unless you know the corresponding like product and domestic industry. As discussed above, the Appellate Body has stated that the **first step is defining the like product**, not determining first whether imports have increased.

[114] Moreover, as certain Complainants have acknowledged regarding CCFRS, the import volume trends are not different for imports corresponding to four of the five stages of steel included in the like product, CCFRS. China first written submission, paras. 166 and 168. Regarding the one stage with different trends, the evidence clearly demonstrates that cut-to-length plate is like plate in coils, a variation of hot-rolled steel. ITC Report, pp. 40-45.

[115] *Japan-Alcohol*, AB Report, pp. 31-32. *Japan-Alcohol* addressed examining the first sentence of Article III:2 of GATT 1994 for conformity of an internal tax measure with Article III by determining,

> first, whether the taxed imported and domestic products are "like" and, second, whether the taxes applied to the imported products are "in excess of" those applied to the like domestic products. If the imported and domestic products are "like products", and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

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Specifically, Japan was found in violation for treating imports of vodka that correspond to a single like product pursuant to Article III:2, consisting of both vodka and shochu, differently from the like domestic product, shochu. Complainants' proposal here would seem inconsistent with the findings in *Japan-Alcohol* because they have proposed that the ITC should have looked separately at imports that comprise only part of the like product. In the context of a safeguards investigation, if both vodka and shochu have been identified as subject imports, than the first step for the ITC is to define the domestic product like the subject imports. The first step for the ITC is not, as Complainants allege, to determine whether different break-outs of the subject imports, that may or may not correspond to the definitions of the like product, have increased.

6. Definitions of Steel Products in Trade Remedies Investigations Are Not Predetermined, Begin With the Imports Subject to that Particular Investigation, Are Arrived at by Considering Factors Appropriate for the Context of the Investigation and Depend on the Facts of the Investigation

103. 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' varied and inconsistent arguments in their submissions to this Panel regarding the appropriate definitions of like product demonstrate that no such universal definitions exist. Complainants' proposals for appropriate like product definitions ranges from product definitions used in trade remedy cases under other statutes, to tariff classifications (612 classifications in all), to product descriptions contained in requests for product exclusions. Far from universal agreement, some Complainants even propose different definitions for the same item for different purposes, based on the issue contested and the desired result.[116] [117]

104. For example, tin mill products consist of a wide variety of flat-rolled carbon or alloy steel, plated or coated with tin or with chromium oxides or with chromium and chromium oxides.[118] Certain complainants would accept defining tin mill products as a single like product and others, such as Norway, appear to suggest that tin mill should have been defined far more

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[115] (...continued)
Id., pp. 18-19.

[116] *See, e.g.*, EC first written submission, paras. 209-213 (EC seems to argue both that the ITC should have defined like products as the 33 data collection categories and as in the "normal course of trade," or as 612 tariff classifications.); Norway first written submission, para. 223; New Zealand first written submission, para. 4.53.

[117] For example, each of the 33 product categories which were created by the ITC for data collection purposes themselves consist of pools of products of different grades, sizes, etc. as evident by the numerous requests regarding niche products or product exclusions. *See, e.g.,* Joint Respondents' Posthearing Flat-Rolled Steel Brief (October 1, 2001), pp. 22-23 (US-8). *Compare Certain Cameras*, Inv. No. TA-201-62, USITC Publication 2315, p. 9 (September 1990) (five like products defined) (US-9) ***with*** *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Publication 3261, p. I-10-11 (December 1999)(various sizes and grades defined as one like product)(US-6) ***and*** *Certain Steel Wire Rod*, Inv. No. TA-201-69, USITC Publication 3207, p. I-9-10 and I-35 (July 1999) (US-7).

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

narrowly as many like products corresponding to certain requests for product exclusions.[119] Moreover, Complainants who challenge the like product definition for certain welded pipe do not agree on what the definition should have been; Korea seems to propose two like products based on size and Switzerland seems to propose three like products based on function.[120]

105. Complainants' arguments seem to be based on a notion that definitions of the like product are made prior to the investigation. The ITC, however, does not predetermine its definitions of like product,[121] but rather gathers evidence during the investigation, conducts an analysis using the factors appropriate for the context of the type of investigation, and makes like product determinations based on the facts of the particular case. As discussed above, the starting point for the ITC's like product analysis is the imports identified as within the scope of the investigation. In the present case, the ITC began with subject imports, which included a range of steel products, and looked for clear dividing lines between the domestic steel that corresponded to these subject imports, using well-established factors. Contrary to the Complainants' allegations, the ITC was not required to begin with any predefined alleged like products, that may have been appropriate under different statutory standards based on the particular records of the cases in which they were defined, and make an array of comparisons.[122] Nor was the ITC required to discuss differences and similarities between the definitions used in this investigation and other cases. Rather, the ITC's approach is objective and consistent with the Safeguards Agreement and, as discussed below, with Article X:3(a) of GATT 1994.

106. Complainants' arguments that the ITC should have defined the various like products in the same manner and with the same results as it has in antidumping and countervailing duty investigations involving steel fails to recognize that those definitions (as it is in a safeguard

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[119] Norway first written submission, para. 223.

[120] Korea first written submission, paras. 41-44; Switzerland first written submission, paras. 209-225.

[121] Complainants' arguments may reflect practices in other countries which gather and report minimal information about any like product analysis and thus may in fact predetermine such definitions. *See, e.g.*, *European Communities - Provisional Safeguard Measures on Imports of Certain Steel Products*, Commission Regulation (EC) No. 560/2002 of 27 March 2002, paras. 8-11 and Annex 1 (US-10). The ITC's approach is consistent with the investigation requirements of Article 3 of the Safeguards Agreement and are objective and reasoned decisions consistent with Article X:3(a) of GATT 1994, as discussed below.

[122] EC first written submission, para. 200; *see also* Japan first written submission, para. 117; China first written submission, para. 175-177; Switzerland first written submission, para. 186. The ITC's like product analyses appropriately began with the range of steel products subject to investigation. The ITC examined the corresponding domestic products and looked for clear dividing lines. Complainants would have the ITC begin with some alleged product categories and make comparisons with other alleged categories. However, this begs the question of what would be the appropriate categories with which to begin such comparisons and how to modify those alleged categories if necessary. Complainants attempt to use like product definitions, or at least the ones they like, from past antidumping and countervailing duty investigations. The antidumping and countervailing duty investigations generally begin with a narrower group of subject imports for the scope, so the analysis frequently involves whether the like product should be defined more broadly than the narrow subject imports, *i.e.*, starts small and looks at whether to broaden rather than starting large and looking where to divide.

investigation) are dependent on the imports subject to that particular investigation.[123] If the imports identified as subject to one trade remedy investigation are different from those subject to another investigation, then the definition of the like product or products will not necessarily be the same since each begins with a different starting point, is conducted under different statutory standards, and are based on different evidentiary records. Contrary to Complainants' allegations, the ITC had no obligation nor reason to explain why its like product definitions in 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 with different imports subject to investigation and based upon different facts.

107. For example, hot-rolled steel is produced in a broad range of sizes, shapes, and thicknesses of carbon and alloy steel which certain Complainants maintain is a universally understood definition and therefore should be a separate like product.[124] However, contrary to Complainants' contentions, the ITC's like product definitions for hot-rolled steel have varied considerably among AD/CVD investigations and between safeguards investigations, and thus are not well-established. For example, hot-rolled steel has been defined both to include and exclude plate in coil form. Plate is a carbon and alloy flat-rolled steel having a thickness of 4.75 mm or more, which in coil form, was included in the hot-rolled data collection category in this investigation and, in flat form, was included in the CTL plate category.[125] While recent AD/CVD investigations conducted by the ITC have included plate in coil form as a hot-rolled product, and limited cut-to-length plate and discrete plate to the CTL plate category, these distinctions have been based, in part, on the scopes of subject imports presented to the Commission and the differing like product standards.[126] Moreover, in some earlier AD/CVD cases involving carbon

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[123] *See, e.g.*, Japan first written submission, paras. 125-148; Korea first written submission, paras. 34-44; New Zealand first written submission, para. 4.68; Brazil first written submission, para. 113-116. Complainants' propose that the ITC should have relied exclusively on evidence collected from cases which had different and more narrow scopes of investigation and were conducted for a different purpose; according to Complainants' proposal the ITC would not have needed to gather evidence or conduct an analysis regarding like products, but instead would simply announce the definitions without a reasoned explanation. If the ITC had conducted its analysis as proposed by Complainants, it would not have been consistent with the requirements of Article 3 of the Safeguards Agreement and the lack of a reasoned explanation would have been inconsistent with Article X:3(a) of GATT 1994.

[124] *See, e.g.*, Japan first written submission, paras. 132-140; EC first written submission, paras. 209-213; New Zealand first written submission, para. 4.53.

[125] ITC Report, p. FLAT-1-2. Moreover, in this investigation, all stainless steel plate whether in coil form or flat form (including cut-to-length) was included in the stainless steel plate data collection category and was defined as a single like product by the ITC. *Id.*, p. STAINLESS-2.

[126] *See Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Investigation Nos. 701-TA-404-408 and 731-TA-898-908 (Preliminary), USITC Publication 3381, pp. 3-4 and I-1 (January 2001) and *Hot-Rolled Steel Products from Argentina and South Africa,* Investigation Nos. 701-TA-404 and 731-TA-898 and 905 (Final), USITC Publication 3446, pp. 3-6 (August 2001) (US-11); *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353, 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Publication 2664

(continued...)

steel flat products, the ITC treated plate in coils and cut-to-length plate as one like product, *i.e.*, carbon steel plate,[127] but in others the ITC separated plate in coils from cut-to-length plate.[128] Thus, just as the evidence does not support that there are universally accepted definitions of steel products, likewise, it does not support that there are well-established definitions of steel products in Commission AD/CVD cases. Rather, each case is *sui generis* and the definition appropriately is based on the imports subject to investigation and the evidence in that particular investigation.

108. Complainants' contentions that the ITC should have used the same like product factors considered in antidumping and countervailing duty investigations fails to recognize these investigations are based on different Agreements (and statutes) with different definitions and standards and derive from a purpose that is different from that in a safeguards investigation.[129] First the Safeguards Agreement contains no reference to like product decision factors. Second, Complainants have mischaracterized the Panel's comments in *US-Lamb Meat* as applying to the similarity in like product factors between Antidumping and Subsidies Agreements and the Safeguards Agreement when the Panel's comments clearly were directed to the similarities in the definitions of the domestic industry.[130] Other dispute settlement panels have recognized that the "GATT drafting history confirms that 'the expression had different meanings in different contexts of the Draft Charter.'"[131] The Antidumping and Subsidies and Countervailing Measures Agreements include explicit definitions of what constitutes a "like product" for purposes of those

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[126] (...continued)
(August 1993), p. 12-14 (US-12); *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753-756 (Final), USITC Pub. 3076, p. 5-7 (December 1997) (US-13).

[127] *See, e.g.*, *Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela*, USITC Publication 1642, pp. 8-10 (US-14); *Certain Hot-Rolled Carbon Steel Plate from the Republic of Korea*, Investigation No. 731-TA-151 (Final), USITC Publication 1561, pp. 3-4 (August 1984) (US-15); *Certain Carbon Steel Products from Brazil*, Investigation No. 701-TA-205-207 (Final), USITC Publication 1538, pp. 3-5 (June 1984) (US-16); *Certain Flat-Rolled Carbon Steel Products from Brazil*, Investigation No. 731-TA-123, USITC Publication 1499, pp. 3-8 (March 1984) (US-17).

[128] *See, e.g.*, *Hot-Rolled Carbon Steel Plate from Brazil*, Investigation No. 701-TA-87 (Final), USITC Publication 1356, pp. 3-4 (March 1983) (US-18); *Certain Carbon Steel Products from the Republic of Korea*, Investigation No. 701-TA-170, 171, 173 (Final), USITC Publication 1346, pp. 3-5 (February 1983) (US-19); *Certain Carbon Steel Products from Spain*, Investigation No. 701-TA-155, 157, 158-160, 162 (Final), USITC Publication 1331, pp. 3-5 (December 1982) (US-20); *Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany*, Investigation Nos. 701-TA-86-144, 146, and 147, and 731-TA-53-86 (Preliminary), USITC Publication 1221, pp. 10-16 (US-21).

[129] *See, e.g.*, Japan first written submission, paras. 92 and 133; Brazil first written submission, para. 89.

[130] *US-Lamb Meat*, Panel Report, para. 7.75 ("the three Agreements' definitions of the industry producing a like product are essentially identical. . . . we consider that particularly in the present safeguard dispute, past panel reports **concerning industry definition** in the context of the SCM and AD Agreements are relevant to **our interpretation and application of the industry definition** under the Safeguards Agreement." (emphasis added)).

[131] *Japan-Alcoholic Beverages 1987*, para. 5.6 (BISD 34S/115), *citing to* EPCT/C II/65, page 2. *See, e.g.*, *Japan-Alcoholic Beverages 1987*, para. 5.6 (BISD 34S/115)("Panel was aware of the more specific definition of the term 'like product' in Article 2.2 of the 1979 Antidumping Agreement . . . but did not consider this very narrow definition for the purpose of antidumping proceedings to be suitable for the different purpose of GATT Article III:2.").

agreements.[132] The Safeguards Agreement includes different terminology, *i.e.*, "like or directly competitive products," and does not include an explicit definition. As discussed above, the Appellate Body in *EC-Asbestos* reaffirmed the importance of considering the purpose of the Agreement and not transposing factors automatically from one context to another.

109. Complainants fail to acknowledge that the ITC did not design new factors for its analysis in this case, but rather considered its long established practice for making its like product determinations in safeguards investigations. It is also ironic that these Complainants should challenge the ITC for not considering traditional like product factors applied by the ITC in antidumping investigations, which include manufacturing processes as one of six factors, and then also contend that the ITC's consideration of manufacturing processes as one of its well-established safeguard like product factors was wrong.[133] Moreover, application of similar but not identical factors does not necessarily result in the same like product definition when the evidence and subject imports are different.

110. Moreover, Complainants refer to like product definitions in past AD/CVD investigations but ignore ITC practice in past safeguards investigations.[134] In particular, Complainants fail to acknowledge the 1984 Steel safeguard case, where the imports involved a diversity of products and in which the ITC found nine products that were like or directly competitive with the imported articles. For example, one (sheet/strip) of the nine like products defined in 1984 Steel encompassed hot-rolled, cold-rolled, and coated products, each of which had been defined as a separate domestic like product in Title VII investigations.[135] While the ITC defined separate like products for plate and sheet/strip, this was due in large part to differences in production

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[132] Article 2.6 of the *Agreement on Implementation of Article VI of the GATT 1994* states:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Note 46 to Article 15.1 of the *Agreement on Subsidies and Countervailing Measures* sets forth the same definition for use in that Agreement.

[133] *See, e.g.*, Japan first written submission, paras. 92.

[134] The ITC has recognized that in the context of safeguards investigations the definition of like product and industry may be different and broader than that in countervailing and antidumping duty investigations. See Stainless *Steel and Alloy Tool Steel*, Inv. No. TA-201-48, USITC Publication 1377, p. 16, n.21 (May 1983) (US-23). *Accord* Prehearing Submission on Injury of the European Commission (September 10, 2001), pp. 3-4 (US-22) ("It is reminded that Article 2 of the Agreement on Safeguards requires that imported goods are confronted with the '*like or directly competitive product*'. While **this definition may be seen as larger in scope than similar definitions under the WTO anti-dumping and anti-subsidy legislation** . . . .") (emphasis added).

[135] *See, e.g., Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, USITC Publication 1553 (July 1984) ("1984 Steel") (US-24). *See also Bolts, Nuts, and Large Screws of Iron or Steel*, Inv. No. TA-201-37, USITC Publication 924, p. 4 (November 1978) (US-25); *Certain Headwear*, Inv. No. TA-201-23, USITC Publication 829, p. 5 (August 1977) (US-26).

processes; at that time, sheet/strip was produced on a continuous process while the production of plate generally was rolled piece by piece on reversing mills.[136]

111. Japan's contentions that the ITC's like product analysis was not consistent with Article X:3(a) of GATT 1994 are based on the mistaken view that Article X:3(a) applies to substantive decisions taken by a Member in applying its laws relating to international trade.[137] As discussed in section M below, 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.[138] The ITC provided an uniform, impartial, and reasonable like product analysis by applying the same legal standards to the distinct facts of this case and reached legal conclusions supported by the facts of this case.

112. Contrary to Complainants' allegations, definitions of steel products in trade remedies investigations are not predetermined. The ITC appropriately began its like product analysis with the imports subject to this particular investigation, and after considering the factors appropriate for the context of this investigation and the facts of this particular investigation, made its like product definitions.

7. Product-Specific Arguments

113. In this safeguard investigation, the President's request grouped the wide array of steel imports into four general categories: (1) certain carbon and alloy flat products, (2) certain carbon and alloy long products, (3) certain carbon and alloy pipe and tube products, and (4) certain stainless steel and alloy tool steel products. While the ITC was not bound in any way by these groupings, it found that they provided a useful starting point for its analysis of what is a like or directly competitive product since the broad array of products in each of the four groupings tend to share some common properties and uses, and share distinct differences from products in the other groupings. While 33 product categories were established by the ITC for the collection of data, these categories were not the starting point for and did not control the ITC's analysis.

114. The ITC defined 27 separate like products that correspond to all the 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,

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[136] USITC Pub. 1553 at 20 (US-24).

[137] *See, e.g.*, Japan first written submission, paras. 125-148.

[138] *See, e.g., Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, WT/DS155/R, adopted 16 February 2001, para. 11.70 ("*Argentina-Bovine Hides*"). As discussed in Section M below, Japan's reliance on *US-Shrimp* omits a key aspect of the reasoning in that case. The Appellate Body cited Article X:3 not in response to a claimed inconsistency with that Article, but as context for the interpretation of Article XX(g). *See United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para. 183 ("*US-Shrimp*").

tin mill products, and certain welded pipe.[139] Complainants' challenges regarding the ITC's definition of like product in many aspects is less about the approach or evidence considered than about the end-results – U.S. imposition of remedies on the imports corresponding to these like products -- and Complainants' opposition to those results. The U.S. submission responds below to the specific allegations regarding the ITC's definitions of like product not already addressed above in this section regarding general issues of interpretation and application.

115. The ITC considered the facts using long established factors and looked for clear dividing lines among the various types of 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.

a. Certain Carbon Flat-Rolled Steel

116. The ITC found that domestic certain carbon flat-rolled steel is like the corresponding imported certain carbon flat-rolled steel that is subject to this investigation and defined CCFRS as a single like product. The Safeguards Agreement includes no definition of "like product" nor addresses what factors to consider in determining whether to define separate like products and corresponding domestic industries. The ITC's methodology and definition of CCFRS as a single like product was adequate, reasoned and reasonable explanations were provided.

117. The ITC started this analysis with the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy flat products, the ITC found clear dividing lines so as to define three separate like products from this category.[140]

118. In comparing the domestic steel to the imported steel, the evidence indicated that imported certain carbon flat-rolled steel consists mainly of the same range of carbon steel as the

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[139] While the EC also alleges that the like product definition of carbon and alloy fittings is one of "the most egregious mistakes," neither they nor any other Complainants provide further arguments to the Panel on this like product definition. EC first written submission, para. 235.

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

domestic certain carbon flat-rolled steel.[141] [142] The ITC found that imported and domestic certain carbon flat-rolled steel share the same basic physical attributes and are generally interchangeable, have similar uses with the same metallurgic composition, thickness, width, and amount of processing, generally do not employ significantly different production processes, and have an overlap in the marketing channels for domestic and imported certain carbon flat-rolled steel. Thus, the ITC found that the domestic article, certain carbon flat-rolled steel, is like the imported certain carbon flat-rolled steel.

119. The ITC then applied its long established factors[143] in considering whether to analyze specific types of certain carbon flat-rolled steel separately or as a whole.[144] The ITC found that certain carbon flat-rolled steel at different stages of processing share certain basic physical properties and are interrelated to a certain degree.[145] Specifically, the ITC found that this steel has a common metallurgical base, with desired properties and essential characteristics embodied in the steel prior to the casting or semifinished stage.[146] The mix in metallurgy depends on the requirements of the end-use, whether the end-use is at the same or different stages of processing. Thus, the chemical content of such steel essentially is determined at the melt stage of processing with some reductions in carbon content possible through subsequent hydrogen annealing.

120. Certain carbon flat-rolled steel includes steel at any of the following five stages of processing: slab, hot-rolled steel (sheet/strip/plate in coils), cut-to-length ("CTL") plate, cold-rolled steel, and coated steel.[147] An important factor in the ITC's analysis, which Complainants' arguments ignore, was the fact that certain carbon flat-rolled steel at one stage of processing generally is feedstock for the next stage of processing. For example, slab is feedstock for hot-rolled steel (sheet, strip, and plate); hot-rolled steel is feedstock for cold-rolled steel and cut-to-

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

[142] The EC alleges that the ITC should have devoted more analysis to a comparison of the domestic and imported products rather than looking for clear dividing lines between the corresponding domestic carbon flat-rolled steel. Complainants, however, do not take issue with the ITC's findings regarding the comparison nor that the evidence showed that domestic and imported CCFRS consisted mainly of the same range of carbon steel. EC first written submission, paras. 223-233.

[143] The ITC traditionally has taken into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (*i.e.*, where and how it is made), its uses, and the marketing channels through which the product is sold in determining what constitutes the like product in a safeguards investigation. These are not statutory criteria and do not limit what factors the ITC may consider in making its determination. *Accord EC-Asbestos*, AB Report, para. 102 (general criteria "are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products."). No single factor is dispositive and the weight given to each individual factor (and other relevant factors) will depend upon the facts in the particular case. The decision regarding the like or directly competitive article is a factual determination. The ITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations. ITC Report, p. 30.

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

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

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

[147] ITC Report, p. 38.

length plate; and cold-rolled steel is feedstock for coated steel. The ITC acknowledged that the interrelationship between the products is most prominent at the earlier stages.[148]

121. Since earlier processed carbon flat-rolled steel is the feedstock for further processed steel, such steel is produced using essentially the same production processes at least at the initial stages, with downstream steel merely employing later stages of processing. The ITC's analysis provided a detailed discussion of the five stages of processing certain carbon flat-rolled steel. The manufacturing processes for carbon steel involve three distinct stages that include: (1) melting or refining raw steel; (2) casting molten steel into semifinished form, such as slab; and (3) performing various stages of finishing operations, including hot-rolling, cold-rolling, and/or coating.[149] All certain carbon flat-rolled steel is produced from slab, with the majority of such steel further processed into hot-rolled steel on hot strip or Steckel mills.[150] Substantial quantities of earlier processed steel are internally transferred for production of further processed steel.[151] This tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. As part of its consideration of the manufacturing process (*i.e.*, where and how it is made), the ITC also recognized that there is commonality of facilities and substantial vertical integration in the industry.

122. The ITC also considered the marketing channels and uses for certain carbon flat-rolled steel. As discussed above, the majority of certain carbon flat-rolled steel overall, and specifically for feedstocks products -- slab, hot-rolled, and cold-rolled -- is internally transferred. Thus, when certain carbon flat-rolled steel enters the commercial market, the primary marketing channel

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

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

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

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

generally is directly to end-users.[152] The ITC recognized that the interrelationship between the production processes and integration of the producers demonstrates that the market for each type of certain carbon flat-rolled steel is not isolated, but directly affected by the markets across the spectrum of types of certain carbon flat-rolled steel. The primary end-use applications for commercial shipments of certain carbon flat-rolled steel are the automotive and construction industries. Thus, the ITC found that all types of certain carbon flat-rolled steel are substantially affected by the collective demand of these two markets.

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

124. Many of the specific allegations raised by Complainants regarding the ITC's CCFRS like product definition are based on their erroneous interpretation of what factors the ITC was either "required or not permitted" to consider in making its like product definitions. Complainants can identify nothing in the Safeguards Agreement addressing what factors may or may not be considered in determining like products. They instead assert that the ITC was bound to use the four factors suggested by the Working Party on *Border Tax Adjustments*. These factors, which were suggested for use in border tax adjustments, were for a different purpose, and the Appellate Body has recognized that "[n]o one approach to exercising judgement will be appropriate for all cases."[153] Thus, the ITC was not required to consider the four factors derived from the Working Party that are urged by Complainants.

125. Complainants challenge the ITC's consideration of production processes in determining the "like product" on the basis that "the Appellate Body in *United States - Lamb Meat* had ruled out this criterion for the like product determination."[154] But, contrary to Complainants' contentions, as discussed above, the Appellate Body in *US-Lamb Meat* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products."[155]

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[152] In 2000, the marketing channels for certain carbon flat-rolled steel, except for CTL plate, ranged from 60 percent to 99.6 percent to end-users. ITC Report, Tables FLAT 12-15 and FLAT-17. The marketing channels for CTL plate were more evenly split with 45.2 percent to end-users and 54.8 percent to distributors. *Id*., Table FLAT-13.

[153] *EC-Asbestos*, AB Report, para. 88.

[154] EC first written submission, para 233; *see also* Korea first written submission, paras. 32 and 35; Japan first written submission, para. 103; China first written submission, para. 141; Brazil first written submission, para. 96; Switzerland first written submission, para. 179; Norway first written submission, para. 197. As discussed above, Japan both challenges the ITC's consideration of production processes and propose that the ITC should have used the like product factors in antidumping cases, which also include consideration of production processes. Japan first written submission, para. 92

[155] *US-Lamb Meat*, AB Report, para. 94, n.55.

126. Complainants mischaracterize the ITC's findings in defining CCFRS as a single like product. Complainants allege that the ITC's analysis focused on three findings, regarding shared basic physical properties, primary end-use applications in automotive and construction, and the same production processes at the initial stages, ignored evidence of differences in physical properties and end-uses, and considered the vertical integration of facilities more important.[156]

127. It is clear from the ITC's determination that it did not ignore evidence of differences in physical properties and end-uses and in fact generally acknowledged such evidence in its analysis. Rather, it is Complainants who ignore the evidence of the interrelationship of CCFRS at different stages of processing. Complainants fail to acknowledge, although they do not dispute, the fact that certain carbon flat-rolled steel at one stage of processing generally is feedstock for the next stage of processing, which tends to blur product distinctions until the processing reaches its final stages since earlier stages simply are feedstock for the next stage. This interrelationship between CCFRS at different stages is "product-oriented" rather than "producer-oriented" and clearly was an important factor in the ITC's analysis and finding.[157]

128. As discussed above, Complainants arguments that the ITC should have defined the like product the same as it has in certain prior antidumping and countervailing duty investigations fails to recognize that the definitions arrived at in those cases, as in safeguard investigations, are dependent on the imports subject to the particular investigation; thus the definitions have varied.[158]

129. The starting point for the ITC's like product analysis is the subject imports identified as within the investigation. In the present case, the ITC began with the subject imports which included a range of certain carbon and alloy flat steel and looked for clear dividing lines between the domestic steel that corresponded to these subject imports using well-established factors.

130. Moreover, contrary to the Complainants' allegations, the ITC was not required to begin with like product definitions found by the ITC in prior antidumping or countervailing duty cases, that may have been appropriate definitions in different contexts based on particular statutes and record, and make an array of comparisons. The antidumping and countervailing duty investigations generally begin with a more narrow starting point for the scope of subject imports so the analysis frequently involves whether the domestic like product should be defined more broadly than the subject imports, *i.e.*, it starts small and looks at whether to broaden rather than starts large and looks where to divide. Complainants also fail to acknowledge, as discussed above, that the antidumping and countervailing duty investigations have a purpose that is different from that in a safeguards investigation.

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[156] Japan first written submission, paras. 109, 115-116 and 121-122; Korea first written submission, para. 45-47 and 60; Brazil first written submission, para. 103-105; New Zealand first written submission, paras. 4.54-4.55; China first written submission, paras. 201-206; Brazil first written submission, paras. 103-105 and 109.

[157] *Accord US-Cotton Yarn*, AB Report, para. 86.

[158] *See, e.g.*, Japan first written submission, para. 125-148; Korea first written submission, paras. 34-44.

131. While Complainants rely on like product definitions in certain antidumping and countervailing duty investigations, they ignore the similar 1984 Steel safeguards case, which involved carbon flat steel at various stages of processing similar to those in this investigation.[159] The ITC defined like products in a manner similar in many respects to the present safeguards case and different from contemporaneous antidumping and countervailing duty decisions.

132. Specifically, in 1984 Steel, the ITC defined nine like products, each as discrete categories of closely-related products, that were like or directly competitive with the imported articles. Three of these categories involved carbon flat products: semifinished, which included slabs as well as ingots, blooms, billets, and sheet bars; plate; and sheet and strip, which included hot-rolled, cold-rolled and coated steel (each of which had been defined as separate domestic like products in AD/CVD investigations).[160]

133. As discussed above, the ITC recognized in the present case that there had been a number of technological changes in the steel industry since the 1984 Steel case. The advent of the continuous casting process for the production of slab rather than the ingot teeming process had resulted in less similarity among the semifinished products (slabs, ingots, blooms, and billets) and processes and more continuity in the production processes between slab and hot-rolled products.[161] Moreover, the evidence demonstrated that the distinction between the production of a semifinished and hot-rolled product had been further blurred due to the increased use of electric arc furnaces that produce "thin slabs" that continue immediately into hot-rolled production.

134. The ITC also recognized in this investigation that in defining separate like products for plate and sheet/strip, the ITC in 1984 Steel focused in part on differences in production. However, as discussed above, the evidence in this investigation shows that the production of plate, similar to the production of sheet/strip, has become more continuous, as the same or similar hot-strip or Steckel mills are often used to make both. Thus, the ITC found that the production processes and equipment for plate and sheet/strip products have become similar and slab production is less distinct with more continuity in the processing to the next hot-rolling stage than at the time of the 1984 Steel safeguards case.

135. Contrary to Complainants' proposals that the ITC should have applied certain like product definitions from antidumping and countervailing duty investigations, it is clear that if any other definitions should have been taken into account it would be those made for a safeguards

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

[160] USITC Publication 1553 at 10 and 15-23 (US-24).

[161] ITC Report, pp. OVERVIEW-8-9. Complainants' attempts to distinguish slab from CCFRS in other stages of processing fails to recognize that hot-rolled steel and cold-rolled steel also are primarily feedstocks or "semi-finished products" and the fact that technological advances have resulted in less similarity among such "semi-finished products" as slab, billets, ingots, and blooms than at the time of 1984 Steel. Japan first written submission, paras. 81 and 114; Brazil first written submission, para. 81; New Zealand first written submission, paras. 4.60-4.62.

case under the same provisions that also had a similar diversity of products within the investigation.

136. Contrary to Complainants' contentions, the ITC was not required to consider whether each type of CCFRS was substitutable with each other.[162] As discussed above, Complainants fail to recognize that the substitutability or competitive relationship was found to be relevant in the context of Article III of GATT 1994, as discussed by the Appellate Body in *EC-Asbestos*.[163] Protecting the competitive relationship between imports and domestic products is a purpose of Article III. However, it is not the purpose of the Safeguards Agreement, whose purpose is to permit protection of a domestic industry under circumstances.[164] Thus, the competitive relationship or substitutability of domestic and imported products is not a necessary factor regarding the like product definition in the context of the purpose of the Safeguards Agreement.[165] In considering uses for the types of CCFRS, the ITC recognized that similarity or interchangeability in uses were limited for CCFRS, as would be expected for feedstock or input products.[166] Complainants attempts to construe this recognition regarding uses of feedstock as consideration of a substitutability factor by the ITC is misplaced.

137. While the Working Party in *Border Tax Adjustment* suggested that consumers' tastes and habits may be a criterion to be considered in finding like products for purposes of border tax adjustments, contrary to Complainants arguments, this is not a required factor in a safeguard investigation, as discussed above.[167] The Panel in *Japan-Alcoholic Beverages 1987* recognized that consumer habits were variable in time and discounted consumer views in considering whether vodka was "like" shochu and thus whether the like product should consist of vodka and shochu.[168] The consideration of consumer tastes and habits seems to conflict with the purpose of

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[162] *See, e.g.*, Japan first written submission, paras. 79 and 101; Korea first written submission, paras. 38-39 and 58-59; EC first written submission, para. 240.

[163] Specifically, the Appellate Body in *EC-Asbestos* stated:

> . . . a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace. . . .

EC-Asbestos, AB Report, para. 99.

[164] *See US-Line Pipe*, AB Report, para. 82.

[165] Moreover, in this investigation the ITC made its definition on the basis of like product analyses and not on the basis of directly competitive analyses. Thus, while the consideration of substitutability may be relevant to the directly competitive analysis, it is not germane to, and should not be transposed to, the like product analysis.

[166] ITC Report, p. 44.

[167] Japan first written submission, para. 118; New Zealand first written submission, para. 4.64; Brazil first written submission, para. 107; EC first written submission, para. 245.

[168] *Japan-Alcoholic Beverages 1987*, Panel Report (BISD 34S/116-117), para. 5.7 ("Panel was of the view that the 'likeness' of products must be examined taking into account not only objective criteria (such as composition and manufacturing processes of products) but also the more subjective consumers' viewpoint (such as consumption and use by consumers)"but also recognized that "consumer habits are variable in time" and "traditional Japanese

(continued...)

a safeguard investigation.[169] Since the purpose of the Safeguards Agreement is to permit protection of a domestic industry under certain circumstances,[170] a focus on the subjective consumers' views of the product or market rather than producers or both is one-side and misplaced. The ITC instead focused on such objective factors in its traditional analysis of like products such as the product's physical properties, uses, marketing channels and manufacturing process.

138. Contrary to Complainants' allegations,[171] the ITC's definition of CCFRS as a single like product was not based solely on the vertical integration of the domestic CCFRS producers. It is clear from the ITC's determination, as discussed above, that it considered the factors it has traditionally used to evaluate like products in safeguard cases, and based its decision on all of the evidence before it.

139. The evidence supports the ITC's findings that CCFRS has shared physical properties, common end-uses, is generally distributed through the same marketing channels and essentially made by the same production processes (at least at the initial stages). That Complainants can point to evidence that detracts from the evidence which supports the ITC's decision and can hypothesize a basis for a contrary decision does not mean that they can establish a *prima facie* case that the ITC acted inconsistently with its obligations.

140. Complainants fail to acknowledge, although they do not dispute, the fact that certain carbon flat-rolled steel at one stage of processing generally is feedstock for the next stage of processing, which tends to blur product distinctions until the processing reaches its final stages since steel at the earlier stages simply are feedstock for the next stage. This interrelationship between types of CCFRS at different stages of processing clearly was an important factor in the ITC's analysis and finding, and is "product-oriented." The fact that the ITC recognized that substantial quantities of earlier processed steel are internally transferred for their production of further processed steel and that these substantial internal transfers of feedstock underscore the fact that domestic producers are highly integrated does not negate the ITC's entire like product analysis.[172] These are facts about the interrelationship of CCFRS and its manufacturing process.

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[168] (...continued)
consumer habits with regard to shochu provided no reason for not considering vodka to be a 'like' product.").

[169] The Appellate Body cautioned in *EC-Asbestos* that it may be important to consider "*from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products." *EC-Asbestos*, AB Report, para. 92.

[170] *US-Line Pipe*, AB Report, para. 82; *see also* ITC Report, p. 9.

[171] *See, e.g.*, Japan first written submission, paras. 121-122; Brazil first written submission, paras. 103-105; Korea first written submission, paras. 45-47 and 60; EC first written submission, paras. 249-254; New Zealand first written submission, paras. 4.54-4.55; China first written submission, paras. 201-206; Brazil first written submission, paras. 103-105 and 109.

[172] The evidence shows that domestic producers of hot-rolled steel shipped 94.7 percent of U.S. shipments of cold-rolled steel and 84.8 percent of coated steel in 2000. INV-Y-207 at Table X-1 (US-27). Conversely,
(continued...)

Contrary to Complainants' statements, the ITC appropriately considered relevant other factors[173] such as the vertical integration of the domestic producers of CCFRS in its analysis.[174]

141. Contrary to the EC's misleading allegations,[175] the ITC clearly considered data for the domestic industry defined as the producers of certain carbon flat-rolled steel, and considered the corresponding imports. The ITC repeatedly referred to tables, such as FLAT-ALT-7, in its opinion in the ITC Report. Many of these tables were not included in the published ITC Report, but were released later, although it is apparent from the references in the ITC Report that they were considered.

142. The ITC considered the facts using long established factors and looked for clear dividing lines among the various types of domestic certain carbon and alloy flat steel corresponding to imported certain carbon flat-rolled steel subject to this investigation. The methodology employed by the ITC is unbiased and objective based on data analyzed using a long-standing and transparent methodology and factors. The ITC's definition of certain carbon flat-rolled steel as a single like product is consistent with Articles 2.1 and 4.1 of the Safeguards Agreement and Articles X:3(a) of GATT 1994 and should not be disturbed by the Panel.

b. Tin Mill Products

143. The ITC started this analysis with the range of steel broadly categorized as certain carbon and alloy flat products, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). The ITC then applied its long established factors in considering whether to analyze specific types of certain

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[172] (...continued)
domestic producers of cold-rolled/coated steel shipped 89.1 percent of U.S. shipments of hot-rolled steel in 2000. INV-Y-207 at Table X-2 (US-27).

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

[174] As discussed above, contrary to Complainants' misstatements, *US-Lamb Meat* does not prohibit consideration of production processes and vertical integration as part of the like product analysis. Complainants ignore the Appellate Body's explicit recognition that consideration of production processes may be a relevant factor in defining like products. Specifically, the Appellate Body in *US-Lamb Meat* added the following statement in a footnote:

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

US-Lamb Meat, AB Report, para. 94, n. 55. *See also* note 37 *supra* and *Japan-Alcoholic Beverages 1987*, Panel Report (BISD 34S/116-117), para. 5.7 (Panel thought it was important to assess "likeness," as much as possible, on the basis of objective criteria, including, in particular, composition and manufacturing processes of the product, in addition to consumption habits.).

[175] EC first written submission, para 215.

carbon flat-rolled steel separately or as a whole. After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy flat products, four Commissioners subdivided this category into three separate like products, one of which was defined as tin mill products, and two Commissioners determined that the steel in this category, including tin mill, should be defined as a single like product.[176]

144. Tin mill products are cold-rolled steel that have been coated with tin or chromium or chromium oxides.[177] In defining tin mill products as a separate like product, Commissioner Miller found that the cold-rolled feedstock used to make tin mill products generally was further processed than was required to produce other finished products although she recognized that tin mill products shared common manufacturing processes with certain carbon flat-rolled steel and GOES.[178] Commissioner Miller also found that tin mill products were overwhelmingly sold directly to end users, were sold almost exclusively by long-term contract to those end users,[179] and were used in the production of containers, packaging and shipping materials.[180] She found that domestic and imported tin mill products shared the same physical attributes, generally were interchangeable, and were primarily sold to end-users under contract for the same uses.[181] In defining a single like product for carbon and alloy flat products, including tin mill, Commissioner Bragg found that these carbon flat products share certain basic physical properties, possess a common metallurgical base, and travel through similar channels of distribution.[182] She recognized that there was limited overlap in end-uses, but found that production was shifted among these products. In defining a single like product for all flat products, including tin mill, Commissioner Devaney found that there was a continuous manufacturing process for flat steel products. Regarding tin mill steel, he indicated that it was dedicated at the inception of production as tin mill steel and used cold-rolled steel as its feedstock.[183]

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

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

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

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

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

[181] ITC Report, p. 49.

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

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

145. Norway challenges both the definitions by two Commissioners of a single like product for carbon and alloy flat products,[184] including tin mill products, and the definition of tin mill products as a separate like product by the third Commissioner, whose three votes together resulted in the affirmative determination for tin mill products.[185] It is clear that the like product arguments raised by Norway regarding tin mill products have more to do with Norway's desire to see certain products excluded from the end result and less to do with the ITC's approach to defining the like product or the specific definitions.

146. The specific allegations raised by Norway regarding the ITC's like product definitions involving tin mill products are based on an erroneous interpretation of what factors the ITC was either "required or not permitted" to consider in making its like product decisions.[186] Norway fails to recognize, as discussed above, that the factors suggested by the Working Party on *Border Tax Adjustments*, with respect to tax adjustments, were for a different purpose, and that "[n]o one approach to exercising judgement will be appropriate for all cases."[187] Thus, the ITC was not required to consider the four factors derived from the Working Party that are urged by Norway.

147. Norway challenges the ITC's consideration of production processes in determining "like product" on the basis that this factor goes beyond what was permitted by the Appellate Body in *United States - Lamb Meat* for like product determinations.[188] But, contrary to Norway's contentions, as discussed above, the Appellate Body in *US-Lamb Meat* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products."[189]

148. Norway challenges the like product definitions by contending that "a flat product which is not coated with 'tin' cannot be 'like' another product which is so coated. . . .[and the] first

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[184] While the terms used by Commissioner Bragg ("carbon and alloy flat products") and Commissioner Devaney ("all flat products") for their like product definitions were different, the steel included in their definitions of this like product was the same and both of their definitions corresponded to the same subject imports. The terminology, "carbon and alloy flat products," has been used in this submission when discussing both of their definitions.

[185] The ITC's affirmative determination regarding tin mill products consisted of two Commissioners' determinations which based their analysis on a definition of a single like product for carbon and alloy flat products including tin mill with other types of carbon flat-rolled steel, and one Commissioner's determination which had defined tin mill products as a separate like product. *See* Section H for a detailed discussion of this mixed vote issue.

[186] *See* Norway first written submission, paras. 222-232.

[187] *EC-Asbestos*, AB Report, para. 88.

[188] Norway first written submission, para. 220. Norway erroneously alleges that the ITC included "other products produced at the same facilities" that were not included in the like product in definition of the domestic industry. *Id*., paras. 217 and 220. Norway is apparently confusing the definitions of like product and domestic industry, but the ITC did not. It first defined the like product and then defined each of the domestic industries in this investigation to consist only of the producers of that like product, it did not include in the industry products, or producers of products, not included in the like product definition.

[189] *US-Lamb Meat*, AB Report, para. 94, n.55.

minimum requirement is thus that the products be thus coated."[190] Norway's challenge, however, is directed not only to the definition of a single like product for carbon flat products, but also to the definition of tin mill as a separate like product. Norway, on one hand, points out that tin mill products could be defined as 6-13 different like product categories and, on the other hand, refers to the different product exclusions requested and granted to infer that each should have been defined as a separate like product. Thus, the issue for Norway goes beyond whether the flat product is coated with "tin." Moreover, contrary to Norway's allegations, the level of product distinction considered and necessary for a product exclusion does not warrant finding dozens of like products. The ITC looks for clear dividing lines in conducting its like product analysis which is far from the narrow or microscopic lines that Norway urges. While Norway alleges that there are different products within the tin mill group, it is not clear how narrow this Complainant would have the ITC consider the uses for the product. Norway also seems to ignore the fact that the ITC has no authority to exclude imports from those identified in the request or petition as subject to investigation.

149. As the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[191] The tariff classifications are interrelated with the physical properties/characteristics criterion which the ITC clearly considered and found to be an important factor in its like product definitions. The ITC exercised its discretionary judgement to determine which factors were useful, and which were not, in examining the particular facts of this investigation. While the Norway seems to allege that the ITC should have defined its like products using tariff classifications, the evidence does not comport with Norway's suggestions for 6 to 13 or more like products. There are four tariff classifications at the 10-digit level and two at the four-digit level covering tin mill products.

150. Norway's contentions that the ITC "exclud[ed] all informative tables regarding the domestic industry producing the like product"[192] is erroneous and grossly misleading. The essence of Norway's allegation is that because the ITC did not release confidential responses of individual producers of tin mill products, it must be assumed that the ITC did not limit its analysis to producers of tin mill products.

151. This allegation is only relevant to the determination of Commissioner Miller, since each of the definitions of like product and corresponding domestic industry made by Commissioners Bragg and Devaney considered data for the carbon and alloy flat products and not the tin mill specific data.

152. This complaint centers on one Table (Table FLAT-1) in the ITC Report which lists individual domestic producers responding to the Commission questionnaire and provides their

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[190] Norway first written submission, para. 223.
[191] *EC-Asbestos*, AB Report, para. 102.
[192] Norway first written submission, para. 239.

individual production data by type of carbon and alloy flat steel that they produce. Individual firm data provided in response to Commission questionnaires and the firms responding to the Commission questionnaires is considered confidential business information and not publicly released. Rather, the individual firm data generally is publicly released in aggregate form as it was here.

153. Norway ignores the fact that individual tin mill production data was combined and publicly released in aggregate form in Table FLAT-18.[193] Contrary to Norway's allegations, the fact that the ITC has not publicly released the identity of those responding to the questionnaires or the individual producer data does not provide a "strong presumption" that products other than tin mill products were included in ITC's domestic industry analysis.[194]

154. Norway fails to show how release of the individual firm data would show anything more than whether the ITC can simply add correctly. The Panel need not only have to rely on the ITC's representations alone concerning the proper aggregation of appropriate data on tin mill production. Parties to the underlying safeguards investigation did not challenge the ITC's aggregation of the tin mill data, including counsel to parties that had access to the contested table along with all other confidential business information, under Administrative Protective Order.[195]

155. The ITC considered the facts, using long established factors and looked for clear dividing lines among the various types of certain carbon and alloy flat steel corresponding to imports subject to this investigation. The methodology employed by the ITC is unbiased and objective. The ITC's like product definitions regarding tin mill products are consistent with Articles 2.1 and 4.1 of the Safeguards Agreement and should be upheld by the Panel.

c. Certain Welded Pipe

156. The ITC started this analysis with the range of steel broadly categorized as certain carbon and alloy pipe and tube, all of which had been identified as imports subject to this investigation in the President's request (as well as the Senate Committee on Finance's request). After examining the evidence and conducting its analysis regarding the corresponding domestic certain carbon and alloy pipe and tube, the ITC found clear dividing lines so as to delineate four separate like products.[196] Korea and Switzerland have challenged the ITC's like product definition

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[193] *See* ITC Report, Tables FLAT-10, FLAT-18, FLAT-26, FLAT-46, FLAT-57, FLAT-58, FLAT-59, FLAT-63, FLAT-75, FLAT-76, FLAT-78, FLAT-79, FLAT-80, and FLAT-C-8.

[194] Norway first written submission, para. 237.

[195] Under U.S. law, confidential business information is released to counsel for parties under administrative protective order.

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

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regarding certain welded pipe.[197] The ITC found that domestic certain welded pipe was like the corresponding imported certain welded pipe.[198]

157. The ITC applied its long established factors, as discussed above, in considering whether there existed clear dividing lines between specific types of certain carbon and alloy pipe and tube.[199] The ITC found that certain welded pipe included tubular products that have a weld seam that runs either longitudinally or spirally along the length of the product. Certain welded pipe is used in the conveyance of water, petrochemicals, oil products, natural gas, and other substances in industrial piping systems. The presence of a welded seam generally makes certain welded pipe slightly less reliable and durable than seamless tubular products. Thus, it is used to transport liquids at or near atmospheric pressure rather than for high pressure containment.[200] The various types of certain welded pipe in this investigation include standard pipe and pipe used primarily for mechanical, line, pressure, and structural purposes.[201] Certain welded pipe is generally produced on electric resistance weld (ERW) mills. The ITC found that the various forms of certain welded pipe are made by the same process, largely by the same firms, in the same facilities and on the same equipment and are used for the same purposes, namely the conveyance of steam, water, oil, gas, and other fluids at or near atmospheric pressure.

158. While both Korea and Switzerland challenge the ITC definition of certain welded pipe as a single like product, each Complainant has different proposals for what the appropriate definitions should have been. Korea contends this single like product should have been divided into at least two like products, primarily by diameter size, and Switzerland contends it should have been divided into at least three like products, primarily by function.

159. The specific allegations raised by Korea and Switzerland regarding the ITC's certain welded pipe like product definition are based on their erroneous interpretation of what factors the ITC was either "required or not permitted" to consider in making its like product definitions.[202] Complainants can identify nothing in the Safeguards Agreement addressing what factors may or may not be considered in determining like products. They instead assert that the ITC was bound to use the four factors suggested by the Working Party on *Border Tax Adjustments*. These

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[196] (...continued)
seamless; and 4) fittings, flanges, and tool joints. Commissioners Bragg and Devaney defined the following three separate like products: 1) carbon and alloy welded tubular products (including welded tubular other than OCTG and welded OCTG); 2) carbon and alloy seamless tubular products (including seamless tubular other than OCTG and seamless OCTG); and 3) carbon and alloy fittings, flanges, and tool joints.

[197] Korea first written submission, paras. 41-44, and 61-70; Switzerland first written submission, paras. 200-235.

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

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

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

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

[202] *See, e.g.*, Switzerland first written submission, paras. 207-233.

factors, which were suggested for use in border tax adjustments, were for a different purpose, and the Appellate Body has recognized that "[n]o one approach to exercising judgement will be appropriate for all cases."[203] Thus, the ITC was not required to consider the four factors derived from the Working Party that are urged by Complainants.

160. Complainants challenge the ITC's consideration of production processes in determining "like product" on the basis that the Appellate Body in *United States - Lamb Meat* had ruled out this criterion for the like product determination.[204] But, contrary to Complainants' contentions, as discussed above, the Appellate Body in *US-Lamb Meat* recognized that when confronted with the question of whether two articles are separate products, "it may be relevant to inquire into the production processes for those products."[205]

161. As discussed above, Complainants' arguments also fail to recognize that the like product definitions in antidumping and countervailing duty investigations, as in safeguard investigations, are dependent on the imports subject to that particular investigation and thus the definitions have varied.[206] The starting point for the ITC's like product analysis is the imports identified as within the investigation by the President's request. In the present case, the ITC began with the subject imports which included a range of certain carbon and alloy pipe and tube and looked for clear dividing lines between the domestic steel pipe and tube products that corresponded to these subject imports, using well-established factors.

162. The antidumping and countervailing duty investigations generally begin with a more narrow starting point for the scope of subject imports so the analysis frequently involves whether the like product definition should be defined more broadly than the subject imports, *i.e.*, it starts small and looks at whether to broaden rather than starts large and looks where to divide. Complainants also fail to acknowledge, as discussed above, that the antidumping and countervailing duty investigations have a purpose that is different from that in a safeguards investigation.

163. Korea appears to argue that the ITC should have defined at least two like products – certain welded large diameter pipe (16 inches or over) ("LDLP") and other welded pipe.[207] The ITC considered and rejected this argument in making its like product definition in this safeguard investigation.

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[203] *EC-Asbestos*, AB Report, para. 88.

[204] Korea first written submission, para. 41; Switzerland first written submission, para. 205.

[205] *US-Lamb Meat*, AB Report, para. 94, n.55.

[206] Korea first written submission, paras. 41-44.

[207] Korea also seems to argue that like product definition of certain welded pipe should have been divided into more than two like products. Korea first written submission, para. 61, n. 97.

164. Korea's argument, which focuses on the ITC's like product definitions in recent antidumping duty investigations,[208] fails to recognize that each of these investigations began with a very different scope of imports subject to investigation. In both of the antidumping investigations cited by Korea, the scope of subject imports was narrowly identified, in one investigation as LDLP and in the other investigation as circular welded non-alloy steel pipe. The ITC determined not to broaden the domestic like product in either of these investigations to include an array of other types of tubular products and defined each domestic like product as coextensive with the subject imports; the subject imports were different in each of these investigations.

165. Contrary to Korea's mischaracterization, the ITC did not have before it in either of these antidumping investigations the issue of a scope of subject imports that included both of these types of certain welded pipe as it did in this safeguard investigation and thus did not decide to treat them as separate domestic like products in a single investigation. Rather the ITC defined separate domestic like products in two separate investigations; each like product definition was coextensive with the narrow scope of imports subject to investigation.[209] The ITC did not consider whether it was appropriate to broaden the like product to include other types of certain welded pipe that did not correspond to the subject imports in either of these antidumping cases.

166. In this investigation, the ITC considered arguments that it should find that large diameter line pipe (pipe 16 inches or over in outside diameter) was a separate like product from other welded pipe.[210] The evidence showed that while welded large diameter line pipe generally is made on mills designed to make large pipe, these mills also are capable of producing other types of large diameter pipe, such as pipe for water transmission, piling, and structural members.[211] A substantial portion of welded large diameter line pipe is made by the ERW process,[212] which is

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[208] Korea inappropriately refers to the ITC's determinations regarding like product that are outside the record of this proceeding, *i.e.*, determinations that were made in November 2001 and July 2002 which were well after the record regarding the ITC's injury investigation closed in October 2001. *See* Korea first written submission, paras. 41-44, *citing*, CC-80 and CC-81.

[209] Contrary to Korea's allegations, the "ITC did not treat LDLP as a like product with standard pipe" in *Certain Welded Non-Alloy Steel Pipe from China* because it was not part of the scope of investigation in that antidumping case; the issue of whether to include LDLP in the domestic like product also was not raised by any parties to that investigation nor was it considered by the ITC. *Circular Welded Non-Alloy Steel Pipe from China, Indonesia, Malaysia, Romania, and South Africa*, Investigation Nos. 731-TA-943-947 (Preliminary), USITC Publication 3439, pp. 3-5 (July 2001) (US-28); *Circular Welded Non-Alloy Steel Pipe from China*, Investigation No. 731-TA-943 (Final), USITC Publication 3523, pp. 3-5 (July 2002) (CC-80); *see also Certain Welded Large Diameter Line Pipe From Japan and Mexico*, Inv. Nos. 731-TA-919-920 (Preliminary), USITC Publication 3400, pp. I-5-6 (March 2001) (US-29); *Certain Welded Large Diameter Line Pipe From Japan*, Inv. No. 731-TA-919 (Final), USITC Publication 3464 (November 2001) (CC-81).

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

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

[212] In 2000, 45.6 percent of domestic welded large diameter line pipe was produced by the ERW process as compared to 54.4 percent by the SAW process. *Certain Welded Large Diameter Line Pipe From Japan and Mexico*,

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the process used to make virtually all types of certain welded pipes.[213] Moreover, many of the firms that produce welded large diameter line pipe also produce other welded pipe that is less than 16 inches in outside diameter. Large and small diameter welded pipe also share common physical characteristics, particularly a weld seam that has an effect on its uses relative to other tubular products such as seamless pipe. Based on this evidence, the ITC found large and small welded pipe to be part of a continuum of certain welded pipe and saw no reason to define large diameter line pipe separately from other certain welded pipe.

167. Korea and Switzerland both mistakenly contend that the primary basis for the ITC's like product definitions should have been tariff classification.[214] [215] These Complainants focus on the products of interest to them in arguing that tariff classifications would have permitted the ITC to segregate these types of certain welded pipe. Under their approach, the ITC would arguably have had to define separate like products for each of the 40 classifications using the 10-digit level, despite similarities in physical characteristics, uses, marketing channels, and production processes for the continuum of certain welded pipe.[216]

168. As discussed above, the Appellate Body has stated, "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[217] In spite of Complainants' contentions, the ITC clearly considered all of the evidence pertinent to defining the appropriate like product. The tariff classifications are interrelated with the physical properties/characteristics criterion which the ITC clearly considered and found to be an important factor in its like product definitions. In particular, the physical characteristic of the welded seam was an important factor in the ITC's definition of certain welded pipe as a single like product. The ITC exercised its discretionary judgement to determine which factors were the most pertinent in examining the particular facts of this investigation. The ITC clearly found the physical characteristics factor to be useful but, given the large number of tariff classifications, found tariff classifications not to be useful because they provided no clear dividing lines between products.

169. Switzerland seems to contend that the ITC should have separated certain welded pipe into at least three separate like products, primarily by function or use – pipes used to conduct fluids,

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[212] (...continued)
USITC Publication 3400, pp. Table 1-2 (March 2001) (US-29). ERW pipe is normally produced in sizes from 2 3/8 inches through 24 inches outside diameter. Id. at I-5.

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

[214] Korea first written submission, paras. 64 and 65; Switzerland first written submission, paras. 220-223.

[215] As discussed above, customs treatment or tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments* although often has mistakenly been attributed to the Working Party.

[216] The two tariff classifications using the 4-digit level – 7305 and 7306 – for certain welded pipe are also used for seamless pipe and thus do not provide a clear dividing line.

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

mechanical tubes used for mechanical purposes, and precision tubes intended to conduct forces and used by the automotive industry.[218] However, it also seems to argue that separate like products should have been defined by tariff classification (40 like products),[219] different physical properties such as different chemical composition,[220] specific use in the automotive industry, particularly for precision tubes (8),[221] and consumer perceptions (8).[222]

170. It is clear that the arguments raised regarded the ITC's definition of certain welded pipe as a single like product have more to do with Complainants' desire to see certain products excluded from the end result and less to do with the ITC's approach to defining the like product or the specific definition.

171. The ITC considered the facts present in this investigation using long established factors and looked for clear dividing lines among the various types of certain carbon and alloy pipe and tube subject to this investigation. The methodology employed by the ITC is unbiased and objective. The ITC's definition of certain welded pipe as a single like product is consistent with Articles 2.1 and 4.1 of the Safeguards Agreement should be upheld by the Panel.

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

1. The Requirements of the Safeguards Agreement and Related Statements of the WTO Appellate Body and Panels

a. Relevant Provisions of the Safeguards Agreement

172. Article 2.1 of the Safeguards Agreement provides that:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that *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. (footnote omitted) (emphasis added).

173. Article 4.2(a) also addresses increased imports. It provides:

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[218] Switzerland first written submission, para. 210.

[219] Switzerland first written submission, para. 220-223.

[220] Switzerland first written submission, para. 209.

[221] Switzerland first written submission, para. 211-219. For example, they discuss eight types of precision tubes used in the automotive industry which they seem to imply should have been defined as separate like products. Based on their descriptions, it is evident that many of these precision tubes contain hydraulic fluid; the carrying of fluids, however, was used as a factor to allege that "pipes" could be distinguished as a separate like product.

[222] Switzerland first written submission, paras. 224-225.

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular *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 level of sales, production, productivity, capacity utilization, profits and losses, and employment. (emphasis added).

174. The Safeguards Agreement does not specify how long the period of investigation in a safeguards investigation should be, or whether or how that period should be segmented for purposes of analysis.[223]

b. Statements of WTO Appellate Body and Panels

175. The Appellate Body has addressed the "increased imports" requirement of the Safeguards Agreement in two cases, *Argentina--Footwear* and *US—Lamb Meat*. Panels have also addressed this question in *US—Wheat Gluten* and *US—Line Pipe*. As discussed below, the Complainants have largely misconstrued or ignored the reports in these disputes.

i. *Imports "In Such Increased Quantities . . . and Under Such Conditions as to Cause or Threaten to Cause Serious Injury"*

176. In *Argentina–Footwear* the Appellate Body noted that Article 2.1 of the Safeguards Agreement requires not just any increase in imports, but rather imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury."[224] The Appellate Body stressed this point, stating:

> [T]he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. . . . [T]he increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[225]

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[223] *US–Line Pipe*, Panel Report, para. 7.196.
[224] *Argentina-Footwear*, AB Report, para. 129 (citing Article 2.1 of the Safeguards Agreement).
[225] *Argentina-Footwear*, AB Report, para. 131 (emphasis in original).

177. The Complainants in this case 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. The Safeguards Agreement does not, however, set out absolute standards for how recent, sudden, sharp or significant an increase in imports must be.[226] Indeed, the Safeguards Agreement contains none of those descriptive terms at all. Consequently, the Appellate Body's use of those terms can only have been intended to provide a shorthand exposition of the requirement that any increased imports identified must ultimately be found to be enough to cause serious injury or threat to the relevant domestic industry. And in fact, the Appellate Body's report in *Argentina–Footwear* makes 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." 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.[227] 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). Article 2.1 of the Safeguards Agreement, which the Appellate Body was interpreting when it spoke of "recent enough, sudden enough, sharp enough, and significant enough," encompasses the entire investigative responsibility of competent authorities under the Safeguards Agreement.

ii. *The Requirement to Consider Import Trends*

178. In *Argentina–Footwear* the Appellate Body explained that Article 4.2(a) of the Safeguards Agreement-- which states that the "rate and amount of the increase in imports . . . in absolute and relative terms" should be examined — requires that competent authorities consider trends in imports over the period of investigation, rather than just comparing end points.[228] It should be noted that the Appellate Body did not state that a comparison of the end points of a period of investigation is entirely irrelevant or impermissible -- as many of the Complainants in this case assert -- but rather that a comparison of end points alone, without considering intervening trends, is insufficient.

179. The Complainants in this case further misconstrue what the Appellate Body said in *Argentina–Footwear* about considering trends in imports over the period of investigation. They would have the Panel believe that the direction to consider trends in imports over the period of investigation is of paramount importance. Complainants' interpretation is, however, not

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[226] Japan recognizes this. It argues that "not just any increase suffices . . . the increase itself must be big enough to cause the damage." Japan first written submission, para. 181.

[227] The word "enough" is defined as "in or to a degree or quantity that satisfies or is sufficient or necessary to satisfaction." *Webster's Third New International Dictionary*, p. 755.

[228] *Argentina-Footwear*, AB Report, para. 129. The EC suggests that the obligation to consider trends arises not only from Article 4.2(a) of the Safeguards Agreement but also from Article 2.1. EC first written submission, para. 272. However, paragraph 129 of the Appellate Body's *Argentina–Footwear* report (from which the EC selectively quotes) makes clear that the Appellate Body identified the obligation to consider trends as arising from Article 4.2(a) and not Article 2.1.

supported by the text of Article 4.2(a) of the Safeguards Agreement or by the *Argentina–Footwear* report. As explained by the Appellate Body, Article 4.2(a) requires an evaluation of "the *rate* and *amount* of the increase in imports."[229] Quite simply, trends (as embodied by the word "rate") do not trump the amount of imports -- both must be considered together, and as part of the determination of whether increased imports have caused or are threatening to cause serious injury.

180. Moreover, the Appellate Body in *Argentina–Footwear* 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.

181. Some of the Complainants propound an improperly narrow interpretation of the word "rate." For example, Japan insists that the use of the word in Article 4.2(a) means that imports must be increasing at an accelerating pace.[230] Japan cites to a dictionary definition of rate as "speed of movement, change, etc.; rapidity with which something takes place." This definition does not, however, necessarily require an acceleration, year after year, in the amount by which imports increase. The "rate" of an increase in imports can just as well be stated by observing that imports increased by a certain percentage from one year to the next.

iii. *How "Recent" Must the Increase in Imports Be?*

182. In *Argentina–Footwear* the Appellate Body stated that the use of the present tense in the phrase "is being imported" in Article 2.1 of the Safeguards Agreement suggests that competent authorities must examine recent imports.[231] The Appellate Body went further and explained that "the relevant investigation period should not only *end* in the recent past, the investigation period should *be* the recent past."[232]

183. The Appellate Body's statement in footnote 130 of the *Argentina-Footwear* report that the investigation period "should *be* the recent past" can be properly understood only if viewed in the context of other statements in that report and in its later report in *US -- Lamb Meat*.

184. In paragraph 129 of *Argentina-Footwear* the Appellate Body stated:

> Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing end points) under Article

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[229] *Argentina-Footwear*, AB Report, para. 129 (emphasis in original) and para. 144.
[230] Japan first written submission, para. 182
[231] *Argentina-Footwear*, AB Report, para. 130.
[232] *Argentina-Footwear*, AB Report, para. 130 n. 130 (emphasis in original).

> 4.2(a). As a result, we agree with the Panel's conclusion that "Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used."[233]

The investigation period in *Argentina-Footwear* consisted of the years 1991 through 1995.[234] (The Argentine authorities also gathered and analyzed data for 1996, although they did not treat this year as formally within the period of investigation.[235]) As the underscored part of the paragraph quoted above makes clear, the Appellate Body specifically endorsed an examination of import trends that began in 1994. Thus, it did not view the examination of data pertaining to 1994, 1995 and, perhaps also 1996, to be inconsistent with its admonition that the investigation period be "the recent past."

185. The Appellate Body's report in *US -- Lamb Meat* sheds further light on the Appellate Body's view of how recent the period of assessment should be, and how it should be viewed in the context of the entire period of investigation. In that case, the affirmative determination was based on threat of serious injury. The ITC had focused its analysis on the last 21 months of a five-year period of investigation. The Panel endorsed the examination of this more recent 21-month period, noting that "due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period."[236]

186. The Appellate Body disagreed and cautioned that a longer period than 21 months was appropriate. It agreed with the Panel that in a threat case -- where competent authorities are called upon to evaluate the likelihood of a future event – "in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry." However, the Appellate Body explained that "competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation." The Appellate Body explained further 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."[237]

187. The Appellate Body then addressed the question of how this guidance is to be reconciled with its statement in footnote 130 of *Argentina--Footwear* that "the investigation period should be the recent past." It explained:

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[233] Italicized text shows emphasis in original; underscored text shows emphasis added; footnotes omitted.
[234] *Argentina-Footwear*, Panel Report, para. 8.148.
[235] *Argentina-Footwear*, Panel Report, para. 8.160.
[236] *US– Lamb Meat*, Panel Report, para. 7.192.
[237] *US– Lamb Meat*, AB Report, paras. 137 and 138.

> We note that, at footnote 130 of our Report in *Argentina–Footwear* . . . we said that "the relevant investigation period should not only *end* in the very recent past, the investigation period *be* the recent past. In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with data from the beginning of the period. *The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.*[238]

188. It should be noted that *US -- Lamb Meat* involved a threat determination. As the Appellate Body recognized in that case, because of the future-oriented analysis involved in a threat determination, there is more reason to focus on recent data than there would be in a determination based on serious injury. Even so, the Appellate Body believed that 21 months was too short a period on which to focus. Presumably, then, the Appellate Body would countenance a considerably longer period in a serious injury determination.

189. The panel's finding in *US–Line Pipe* sheds further light on the term "recent." The panel explained that:

> The word "recent" -- which was used by the Appellate Body in interpreting the phrase "is being imported" -- is defined as "not long past; that happened, appeared, began to exist, or existed lately". In other words, the word "recent" implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation.[239]

190. The *US–Line Pipe* panel also noted that the use of the word "increased" in Article 2.1 of the Safeguards Agreement (instead of "increasing") indicates that it is not necessary to find that imports are still increasing in the period immediately preceding the competent authority's determination, or even up to the very end of the period of investigation. The panel explained that "an increase in imports before the date of a determination, but not sustained *at* the date of the determination, could still cause actual serious injury at the time of the determination."[240]

iv. *Conclusion*

191. In sum, the Appellate Body and panel reports addressing the question of increased imports and the temporal focus for data evaluation teach that:

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[238] *US– Lamb Meat*, AB Report para. 138 n. 88 (emphasis added).
[239] *US–Line Pipe*, Panel Report, para. 7.204 (footnote omitted).
[240] *US–Line Pipe*, Panel Report, para. 7.207 n. 176 (emphasis in original).

– Increases in imports must be evaluated in terms of whether they are recent, sudden, sharp, and significant *enough* to cause or threaten to cause serious injury. Such increases can exist without imports still increasing up to the end of the period of investigation.

– An end point-to-end point analysis of import levels is not enough; import trends during the period of investigation also must be examined, along with the "amount" of imports.

– While the recent period is important, it should be viewed in the context of the period of investigation.

2. Complainants' Claims That the United States Made Methodological Errors Are Without Merit

192. A number of the Complainants assert that the United States committed several methodological errors that were common to all of its findings of increased imports.

193. Contrary to Complainants' assertions,[241] 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. As will be shown below (in the "Product-Specific Arguments" section), the ITC considered such trends in imports over the 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.[242] Complainants seem to believe that any reference by the ITC to import levels at the end points of the period of investigation somehow constitutes a prohibited end points analysis. It should be noted that the Appellate Body in *Argentina— Footwear* did not say that end points are irrelevant, but that they should be considered together with trends and amounts of imports.[243]

194. Complainants' assertion that the ITC selected 1996 as a base year in order to achieve a particular result has no merit.[244] In its safeguards investigations the ITC routinely uses a period of investigation of five years plus whatever interim period is available, depending upon when the investigation was commenced,[245] and it followed that practice in this case. The ITC's investigation was instituted in June 2001, and thus the five full preceding years were 1996 through 2000. The ITC's methodology was unbiased and objective.

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[241] *E.g.*, EC first written submission, para. 283.

[242] The interim periods consisted of the first half of 2001 and the first half of 2000.

[243] *Argentina-Footwear*, AB Report, para. 129.

[244] *E.g.*, EC first written submission, para. 283; Norway first written submission, para. 254.

[245] *See, e.g.*, *US – Wheat Gluten*, Panel Report, para. 8.33 n. 40; *US – Line Pipe*, Panel Report, para. 7.197.

195. China's assertion that the ITC's period of investigation prevented the ITC from "considering fully the most recent imports"[246] is without merit. As noted above, the Safeguards Agreement does not specify how long an investigative period should be; and as the Appellate Body observed in *US–Lamb Meat* (para. 138 n. 88), this period must be long enough to draw appropriate conclusions regrading the state of the domestic industry.

196. Complainants contend that the ITC failed to give enough weight to interim 2001 import data when these showed a decrease in imports.[247] Complainants' criticism is unfounded. Complainants would have the ITC focus exclusively on import data in interim 2001, to the exclusion of the annual data in preceding years. Also, Complainants focus only on *trends* in interim 2001. As explained above, the trends examined should cover the period of investigation. If an end point-to-end point analysis, without considering the intervening context, is not acceptable, an analysis that focuses only on one end point is equally flawed. Also, as noted above, competent authorities must consider not only trends; the *amount* of imports is equally significant.

197. China maintains that the ITC's methodology is flawed because its period of investigation is divided into uneven parts (that is, five full years and one half year).[248] China misunderstands the purpose of gathering information for interim 2001. The ITC gathers partial year data for any interim period occurring at the end of the investigatory period so that it will have information available to it on the most current period possible (consistent with the need to close the record). The availability of data for the latest interim period is useful for analysis, however, only if the ITC also has available data of a comparable kind for a comparable earlier period. To ensure the availability of such data, information is also collected by the ITC for the same calendar year segment in the last full year of the investigatory period that corresponds to the calendar segment included in the interim period, *i.e.*. one, two, or three calendar quarters as the timing of the investigation permits. The selection and consideration of data for these corresponding interim periods are predicated on two reasonable principles. First, the use of a uniform analytical approach in all investigations establishes an objective and predictable methodology that is not susceptible to manipulation or distortion. Second, the reliance on comparable time periods in each year ensures to the extent possible that any variation in industry data that might be occasioned by sales or production cycles, or other conditions unique to a particular industry, would not result in a distortion in the analysis conducted by the competent authorities.

198. Complainants also accuse the ITC of failing to engage in "quantitative analysis" of the import data.[249] They suggest that stating the obvious is insufficient. If a competent authority states that imports on an absolute basis rose from, say 1.0 million tons to 1.3 million tons in the last two years of a period of investigation, it is clear that imports rose by 30 percent. Competent

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[246] China first written submission, para. 226.
[247] *E.g.*, EC first written submission, para. 287.
[248] China first written submission, paras. 227-228.
[249] *E.g.*, EC first written submission, paras. 288-289.

authorities are not required to engage in a multi-faceted quantitative analysis, when the data speak for themselves. Moreover, as explained above, the analysis that matters lies in the connection between the increased imports and the serious injury or threat thereof. Increased imports must be recent, sudden, sharp, and significant enough to cause or threaten serious injury. A quantitative analysis of the import data, considered by themselves, is relatively meaningless.

199. In addressing whether the ITC's increased imports analysis satisfies the requirements of Articles 2.1 and 4.2(a) of the Safeguards Agreement, Complainants focus only on the "Increased Imports" section for each product in the ITC Report and disregard the sections of the report entitled "Serious Injury" and "Substantial Cause." The ITC makes a threshold determination as to whether there have been increased imports before examining injury and causation. If in this threshold determination the ITC finds that there have not been increased imports, it does not proceed to the injury and causation analysis.[250] The "Increased Imports" section of the report is just the beginning of the ITC's analysis, and must be read together with the "Serious Injury" and "Substantial Cause" sections, to evaluate the ITC's determination that a product is "being imported . . . 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." In other words, an analysis of the "Increased Imports" section alone is not sufficient to determine whether the ITC has satisfied all the requirements of Articles 2.1 and 4.2(a) of the Safeguards Agreement. But it is enough to satisfy the "increased imports" component.

200. China maintains that the U.S. statutory framework for safeguards investigations and ITC practice are inconsistent with the Safeguards Agreement.[251] The United States notes that such a broad challenge to U.S. law and practice are outside of the Panel's terms of reference in this dispute.

3. The Panel Should Reject Complainants' Attempts to Expand the Period of Investigation to Encompass Full-Year 2001 Data

201. The ITC's investigation in this case began in early July 2001. As explained above, the ITC routinely uses a period of investigation of five years plus whatever interim period is available, depending upon when the investigation was commenced. Accordingly, the ITC's period of investigation consisted of the five-year period 1996 through 2000, plus the interim period of the first six months of 2001. (Data from that interim period were compared with data for the comparable period of the preceding year, as is the ITC's established practice.)

202. Most of the Complainants build their cases concerning the "increased imports" requirement on an expansion beyond the ITC's period of investigation to include full-year data for 2001 – data that are not on the record of the ITC's investigation. The Complainants attempt

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[250] For example, the ITC followed this methodology with respect to billets, for which it found that imports had not increased. ITC Report, p. 117.

[251] China first written submission, para. 222.

to justify this by asserting that full-year 2001 data would have been available to the ITC when it issued its supplementary report in February 2002, and available to the U.S. President when he made his decision in March 2002.[252] There are fundamental legal and practical reasons why the Panel should reject such an expansion of the period of investigation.

203. In the investigation in this case, the ITC gathered data during the period July to September 2001; hearings in the injury phase of the investigation were held in September and October 2001; and interested parties were given the opportunity to submit prehearing and posthearing briefs on September 10, 2001, and September 28 through October 9, 2001, respectively. On the basis of the record developed in the investigation, the ITC made its injury determination on October 22, 2001. The ITC would not have been able to obtain data that encompassed the July-September 2001 period until after the hearings, briefing and votes on injury and remedy were over.

204. 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 the "due process" provisions of Article 3.1 of the Safeguards Agreement. Article 3.1 specifies that there be "public hearings or other appropriate means in which importers, exporters, and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest."

205. Furthermore, it is clear from the text of the Safeguards Agreement that increased imports must be examined in the context of their effect on the domestic industry. Article 2.1 speaks of "such increased quantities . . . as to cause or threaten to cause serious injury to the domestic industry." 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. For this to be possible, enough time would have had to have elapsed after the end of 2001 for steel producers, exporters, importers, and purchasers to compile full-year data; then enough time would have to be allotted for these entities to respond to ITC questionnaires, for the ITC staff to compile and analyze the data (from over a thousand questionnaire responses), for interested parties to comment on the data, and for the ITC Commissioners to review the record and reach a fully informed determination.

206. By the time the ITC had gone through these steps, full-year 2001 data would no longer be the most current. The Complainants' suggestion that the ITC should have revisited its injury determination with full-year 2001 data would thus 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

[252] *E.g.*, EC first written submission, para. 286.

which 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 early July 2001.

207. Complainants suggest that the U.S. President should have taken into account full-year 2001 data, even if the ITC could not.[253] Complainants are essentially advocating severing the connection between the investigation by a Member's competent authorities and the Member's decision to take a safeguard measure. Severing this link would be inconsistent with the fundamental premise of the Safeguards Agreement that a measure should only be taken following a proper investigation by a Member's competent authorities. Complainants would surely be the first to protest if the situation were reversed and a Member decided to take a safeguard measure based on an *increase* in imports that occurred after an investigation by its competent authorities in which the authorities concluded that the conditions for the imposition of a safeguard measure were not present.

4. Product-Specific Arguments

a. CCFRS

i. *The ITC's Determination*

208. The ITC found that imports of CCFRS increased both on an absolute and a relative basis. The ITC focused its analysis on the surge in imports of CCFRS in 1998, the effects of that surge (which continued to reverberate throughout the remainder of the period of investigation) and on the continuation of imports at elevated levels in 1999 and 2000.

209. In absolute terms, imports increased from 18.4 million short tons in 1996 to 20.9 million short tons in 2000. In 1998 there was a rapid and dramatic increase, with imports rising to 25.3 million short tons, an increase of 37.5 percent over 1996 levels. While the volume of imports declined in 1999 and 2000, it remained significantly higher in those years than at the beginning of the period of investigation.[254]

210. On a relative basis, imports rose from the equivalent of 10.0 percent of domestic production in 1996 to 10.5 percent in 2000.[255]

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[253] *E.g.*, EC first written submission, para. 286.
[254] ITC Report, pp. 49-50.
[255] ITC Report, p. 50.

211. Imports of CCFRS on an absolute and relative basis are shown in the charts in Annex 1.[256]

212. The ITC found that the domestic CCFRS industry was seriously injured, and it traced the impact of the 1998 import surge, and the continuation of imports at elevated levels in 1999 and 2000, on the domestic industry.[257] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

ii. *Complainants' Arguments*

213. All of the Complainants except Norway and Switzerland specifically challenge the ITC's increased imports finding for CCFRS.[258] To the extent that Complainants' arguments are similar to each other, the United States will address them collectively.

214. Many of the Complainants assert that the ITC relied only on an end-points analysis, comparing import levels in 1996 with those in 2000.[259] This is patently untrue. Although the ITC stated what the absolute and relative import data were in the first and last full years of the period of investigation, it did not rely exclusively on such observations to evaluate the increased imports. As described above, the ITC quite clearly considered intervening years, focusing on the surge in imports in 1998, and the continuation of imports at elevated levels in 1999 and 2000.

215. Contrary to the assertions of many of the Complainants,[260] the import trends in the *Argentina-Footwear* case were not the same as those for CCFRS in this case. In *Argentina–Footwear* there was a *steady* decline (*i.e.*, a year-over-year decline) in imports (both on an absolute and on a relative basis) for two years, following an increase earlier in the period of investigation.[261] Thus, it was possible to discern a declining trend. In this case, by contrast, there was a three year increase in imports, with a dramatic surge in 1998, followed by a decline in

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[256] Annex I is contained in Exhibit US-66.

[257] ITC Report, pp. 50-65.

[258] In connection with the product-specific arguments that follow, the United States recognizes that some Complainants have adopted or associated themselves with the submissions of other Complainants.

[259] *E.g.*, Brazil first written submission, para. 132; Japan first written submission, para. 195; Korea first written submission, para. 76; and New Zealand first written submission, para. 4.84.

[260] *E.g.*, EC first written submission, para. 295; Japan first written submission, para. 196.

[261] The data in *Argentina–Footwear* were as follows:

	1991	1992	1993	1994	1995
Total imports (million pair)	8.86	16.63	21.78	19.84	15.07
Relative Imports	12%	22%	33%	28%	25%

source: *Argentina-Footwear*, Panel Report, paras. 8.151 and 8.273.

imports from 1998 to 1999, but then there was leveling off and even a slight increase in 2000. There was no clear declining trend.[262]

216. Many of the Complainants argue that the ITC did not show that the increase in imports was "recent, sudden, sharp and significant."[263] As explained above, the Safeguards Agreement does not set out absolute standards for how recent, sudden, sharp or significant an increase in imports must be.[264] Indeed, the Safeguards Agreement contains none of those descriptive terms at all, and the Appellate Body's use of those terms must can only have been intended to provide a shorthand exposition of the requirement that any increased imports identified must ultimately be found to be enough to cause serious injury or threat to the relevant domestic industry. The ITC goes on in its report to address and satisfy those requirements.

217. Several of the Complainants resort to their own end-points analysis and argue that the increase in relative import levels – from 10.0 percent in 1996 to 10.5 percent in 2000 – was insufficient. These Complainants overlook the fact that an increase in either absolute or relative import levels alone may satisfy Article 2.1 of the Safeguards Agreement. Moreover, the ITC did not rely on a simple end-points comparison, but rather on the surge in imports in 1998, and continued elevated levels of imports in the following two years.

218. Japan inappropriately reads an "acceleration" requirement into Article 4.2(a).[265] Because Article 4.2(a) states that competent authorities "shall evaluate . . the rate and amount of the increase in imports," Japan concludes that imports must be increasing at an accelerating rate for there to be serious injury.[266] The United States disagrees with Japan's interpretation for two reasons. First, the use of the word "rate" does not suggest that there needs to be a positive rate of acceleration over years. The "rate" of an increase in imports can be stated by observing that imports increased by a certain percentage from one year to the next.[267] More importantly, Article 4.2(a) does not require an accelerating rate of increase in imports for there to be an affirmative increased imports finding. The "rate and amount of the increase in imports" is but one of the "relevant factors of an objective and quantifiable nature" that competent authorities are required to take into account. Japan's interpretation would preclude an increased imports finding in a case where, for example, imports increased by 50 percent, 40 percent and 30 percent, respectively in the last three years of a period of investigation. Clearly, there is no support in the text of the Safeguards Agreement for such a restrictive interpretation of Article 4.2(a).

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[262] This difference in trends is shown in the graph in paragraph 196 of the first written submission of Japan.

[263] *E.g.*, Brazil first written submission, para. 133; EC first written submission, para. 293; Korea first written submission, para. 78; and New Zealand first written submission, para. 4.86.

[264] Japan recognizes this. It argues that "not just any increase suffices . . . the increase itself must be big enough to cause the damage." Japan first written submission, para. 181.

[265] Japan first written submission, para. 182.

[266] Japan recognizes that Article 4.2(a) addresses injury and causation, but Japan maintains that it "also informs the increased imports analysis."

[267] The word "rate" is defined as "a fixed relation (as of quantity, amount, or degree) between two things." *Webster's Third New International Dictionary*, p. 1884.

219. Japan argues that the increase in imports over the period of investigation could not have been significant because 38 percent of the increase in CCFRS imports consisted of slab, and the domestic industry imported much of this slab itself.[268] Japan's argument is premised on a simple end-points comparison of imports. As explained above, the ITC analyzed the impact on the domestic industry of the surge in imports in 1998 (when slab imports declined –see ITC Report, p. FLAT-8), and the continuation of imports at elevated levels in 1999 and 2000. Japan's argument also is premised on the notion that imports by the domestic industry should somehow not be "counted" as imports for purposes of satisfying the increased imports requirement. The Safeguards Agreement contains no such exclusion for imports by the domestic industry.

220. Korea contends that the ITC ignored the reason for the decline in imports of CCFRS after 1998, namely antidumping and countervailing duty cases in the United States.[269] Korea is mistaken; the ITC addressed this issue squarely in its analysis of causation, which is addressed elsewhere in this submission.

221. As set out above, 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 of CCFRS in such increased quantities, and under such conditions, as to cause serious injury to the domestic industry.

b. Tin Mill

i. *The ITC's Determination*

222. Three of the six Commissioners of the ITC made affirmative determinations for tin mill. Two of these Commissioners, Commissioners Bragg and Devaney, included tin mill as part of a like product encompassing certain carbon and alloy flat products.[270] The third Commissioner, Commissioner Miller, found tin mill to be a separate like product.[271] Accordingly, the import and injury data upon which the three Commissioners focused in making affirmative determinations were different, depending upon how they defined the like product.

223. The import data upon which Commissioners Bragg and Devaney based their determination (certain carbon and alloy flat products including tin mill) showed that imports rose from 18.85 million short tons in 1996, to 19.74 million short tons in 1997, and to 25.82 million short tons in 1998. Imports then fell to 21.54 million short tons in 1999, and declined slightly to

[268] Japan first written submission, para. 195.
[269] Korea first written submission, para. 81.
[270] ITC Report, pp. 71 n. 368 and 269.
[271] ITC Report, p. 48.

21.51 million short tons in 2000. Between interim 2000 and interim 2001 imports fell from 11.79 million short tons to 7.2 million short tons.[272]

224. The tin mill import data upon which Commissioner Miller based her determination showed that imports of tin mill increased both on an absolute and a relative basis. In actual terms, imports increased from 444,684 short tons in 1996 to a peak level of 698,543 short tons in 1999, and while they declined to 580,196 short tons in 2000, the overall increase from 1996 to 2000 was 30.5 percent. Imports of tin mill were 263,091 short tons in interim 2001, 11.1 percent lower than in interim 2000. The ratio of imports to domestic production increased during the period of investigation, from 12.0 percent to 17.4 percent in 2000. The ratio of imports to production was 20.1 percent during the import volume peak in 1999.[273]

225. Imports of tin mill on an absolute and relative basis, according to the like product definition applied by Commissioner Miller, and by Commissioners Bragg and Devaney, are shown in the charts in Annex 1.

226. The causal link between increased imports and serious injury to the domestic industry are described elsewhere in this submission.

ii. *Complainants' Arguments*

227. All of the Complainants except New Zealand and Switzerland specifically challenge the ITC's increased imports finding for tin mill. To the extent that Complainants' arguments are similar to each other, the United States will address them collectively.

228. Many of the Complainants argue that the ITC failed to show that the increase in imports that did occur was sharp, recent, sudden and significant.[274] These Complainants are applying an incorrect standard. Article 2.1 of the Safeguards Agreement speaks of whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury," and not whether imports were sharp, recent, sudden and significant in the abstract. The ITC Commissioners who made affirmative determinations with respect to tin mill satisfied this standard when they first focused on increased imports and subsequently found injury and a causal link.

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[272] ITC Report, p. 279.

[273] ITC Report, p. 71-72. The ITC recognized that these official import data for tin mill overstated the imports subject to its investigation to some degree because they included tin mill specifically excluded from the investigation. The ITC explained that adjusted data presented by respondents showed that imports of tin mill increased from 414,013 short tons in 1996 to a peak level of 642,353 short tons in 1999, and declined to 491,836 short tons in 2000. The overall increase from 1996 to 2000, using these data, was 18.8 percent. ITC Report, p. 71 n. 370.

[274] *E.g.*, Brazil first written submission, para. 257; and Norway first written submission, para. 273.

229. There is no merit to the argument of several of the Complainants who assert that the ITC relied only on an end-points analysis, comparing import levels in 1996 with those in 2000.[275] Commissioners Bragg and Miller discussed import levels during the period of investigation, and in the interim periods, and quite clearly focused on the increases in imports that occurred within the period of investigation.[276]

230. Some of the Complainants argue that the surge in tin mill imports in 1999 occurred in part because of the decision of one domestic producer, Weirton, to shut down a blast furnace and rely on imported slabs, thereby compromising its on-time performance in the delivery of tin mill.[277] Complainants' argument is premised on the notion that imports by the domestic industry should somehow not be "counted" as imports for purposes of satisfying the increased imports requirement. The Safeguards Agreement contains no such exclusion for imports by the domestic industry.

231. Several Complainants argue that the ITC failed to give adequate weight to the decline in imports since 1999.[278] The United States notes that, to the extent that Complainants' arguments are based on the views of ITC Commissioners who made negative determinations for tin mill, they are irrelevant. Of the Commissioners who made affirmative determinations for tin mill, only Commissioner Miller relied on the import data to which Complainants cite (*i.e.*, import data for tin mill alone). Commissioner Miller recognized that, after surging in 1999, imports volumes declined between 1999 and 2000, and between the interim periods, and she explained why these declines were not decisive in her causation analysis, as discussed elsewhere in this submission.[279]

232. In sum, the ITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record support the determinations of three ITC Commissioners that there were increased imports of tin mill (or in the case of Commissioners Bragg and Devaney, tin mill as part of a like product encompassing certain carbon and alloy flat products).

c. Hot-rolled Bar

i. *The ITC's Determination*

233. The ITC found that imports of hot-rolled bar increased both on an absolute and a relative basis. On an absolute basis, imports rose from 1.66 million tons in 1996 to 1.81 million tons in

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[275] *E.g.*, China first written submission , para. 288; Korea first written submission, para. 95.

[276] ITC Report, pp. 71-72 (Commissioner Miller); and p. 279 (Commissioner Bragg).

[277] China first written submission, para. 292; Korea first written submission, para. 96; and Norway first written submission, para. 269.

[278] *E.g.*, China first written submission, para. 288; Japan first written submission, paras. 209-210.

[279] The EC claims that the ratio of imports to domestic production declined in interim 2001. EC first written submission, para. 362. In fact, relative import levels were higher in interim 2001 (at 17.7 percent) than in interim 2000 (when they were 17.1 percent). ITC Report, p. 72 n. 373.

1997 and then to 2.34 million tons in 1998. They declined to 2.26 million tons in 1999, but increased in 2000 to 2.53 million tons. Imports were lower in interim 2001, at 952,392 tons, than in interim 2000, when they were 1.34 million tons. Imports increased by 52.5 percent from 1996 to 2000 and by 11.9 percent from 1999 to 2000.[280]

234. On a relative basis, imports of hot-rolled bar declined from the equivalent of 19.2 percent of U.S. production in 1996 to 18.4 percent in 1997, but then rose to 23.8 percent in 1998, 24.9 percent in 1999, and 27.5 percent in 2000. The ratio was lower in interim 2001, at 24.6 percent, than in interim 2000, when it was 27.0 percent.[281]

235. The ITC noted that imports were higher, both in absolute terms and relative to U.S. production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from 1999. While imports declined in the interim period comparison, the ratio of imports to U.S. production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.[282]

236. Imports of hot-rolled bar on an absolute and relative basis are shown in the charts in Annex 1.

237. The ITC found that the domestic hot-rolled bar industry was seriously injured, and it traced the impact of increased imports on the domestic industry.[283] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

238. The EC and China specifically challenge the ITC's increased imports finding for hot-rolled bar.

ii. *Arguments of the EC*

239. Addressing absolute levels of imports, the EC argues that the ITC failed to take into account a decline in imports shown by full-year 2001 data.[284] The reasons why full-year 2001 data were not, and should not be, considered have been explained above.

240. The ITC Report refutes the EC's contention that "the United States neither provided facts nor adequate explanations for justifying a determination that Hot-Rolled Bar is *being* imported at

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[280] ITC Report, p. 92.
[281] *Id.*
[282] *Id.*
[283] ITC Report, pp. 92-97.
[284] EC first written submission, paras. 311-312.

recently, sharply and significantly increased quantities."[285] First, the import data, which the ITC analyzed on a year-to-year basis, show substantial increases. Also, as the *US–Line Pipe* panel explained, it is not necessary to find that imports are still increasing up to the very end of the period of investigation.[286]

241. Secondly, the appropriate consideration under the Safeguards Agreement is not whether there were imports "at recently, sharply and significantly increased quantities" in the abstract-- as the EC suggests -- but rather whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury." The ITC satisfied this standard when it first focused on increased imports and subsequently found injury and a causal link.

iii. *Arguments of China*

242. China argues that the ITC failed to evaluate the rate and amount of increased imports in absolute and relative terms, and that it was not enough for the ITC to "simply state the import data for each year of the POI."[287] The United States disagrees with China. The ITC addressed the import data for each year of the period of investigation and for the interim periods. The ITC noted where the imports increased and where they decreased. The Safeguards Agreement does not require that competent authorities characterize the data in certain ways.[288]

243. China also contends that the ITC failed to determine whether the increase in imports was "recent enough, sudden enough, sharp enough and significant enough."[289] As explained above, the Safeguards Agreement requires an evaluation of whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury," and the ITC satisfied this standard when it first focused on increased imports and subsequently found injury and a causal link.

244. Addressing the actual import figures for hot-rolled bar, China argues that the ITC failed to recognize a decline in imports that "started in 2000 and lasted until the end of the POI."[290] China creates a declining trend by dividing 2000 into two halves, so that it can trace a decline from the first half of 2000, to the second half of 2000, and to the first half of 2001. The Panel should reject this attempt by China to carve up the investigation period to achieve its desired

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[285] EC first written submission, para. 315 (emphasis in original).

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

[287] China first written submission, para. 253.

[288] China complains that the ITC described the increase in imports in 2000 as "rapid and dramatic." According to China, "the ITC did not address the right question . . . since 'rapid and dramatic' was not the vocabulary chosen by the Appellate Body." China first written submission, para. 255. Again, competent authorities are not required to intone specific terminology, particularly where such terms are entirely absent from the Safeguards Agreement.

[289] China first written submission, para. 255.

[290] China first written submission, para. 258.

result. The ITC generally compares data for the most recent interim period (in this case, the first half of 2001) to the corresponding portion of the prior year (the first half of 2000). As explained above, the ITC compares comparable time periods in each year so that any variation in industry data that might be occasioned by sales or production cycles, or other conditions unique to a particular industry, would not result in a distortion in the analysis conducted by the competent authorities. Thus, the ITC did not compare data from the first half of 2000 with the second half of that year, or data from the second half of 2000 with data for the first half of 2001. As the panel in *US–Line Pipe* explained, the Safeguards Agreement does not specify how the period of investigation should be broken down – this is left to the discretion of investigating authorities; and in the absence of any evidence of manipulation or bias, the investigating authorities' methodology should be left undisturbed.[291]

245. Finally, China argues that the increase in imports of hot-rolled bar was not "recent" because the sharpest increase, both in absolute and relative terms, occurred in 1998.[292] China simply overlooks the fact that imports were at their highest level (both in absolute and relative terms) in 2000; and that there were significant increases in the last year-to-year comparison from 1999 to 2000 (both in absolute and relative terms).

246. In sum, 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 increased imports.

d. Cold-finished Bar

i. *The ITC's Determination*

247. The ITC found that imports of cold-finished bar increased both on an absolute and a relative basis. On an absolute level, imports increased from 206,272 tons in 1996 to 238,221 tons in 1997 and then to 272,972 tons in 1998. Imports then declined to 235,693 tons in 1999 but increased in 2000 to 314,958 tons. Imports were lower in interim 2001, at 134,971 tons, than in interim 2000, when they were 169,889 tons. Imports increased by 52.7 percent from 1996 to 2000 and by 33.6 percent from 1999 to 2000.[293]

248. As a ratio to U.S. production, imports declined from 17.6 percent in 1996 to 17.3 percent in 1997, rose to 19.5 percent in 1998, declined to 17.0 percent in 1999, and then rose to 23.7 percent in 2000. The ratio was higher in interim 2001, at 23.9 percent, than in interim 2000, when it was 23.6 percent.[294]

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[291] *US–Line Pipe*, Panel Report, paras. 7.196 and 7.203.
[292] China first written submission, para. 262.
[293] ITC Report, p. 101.
[294] ITC Report, pp. 101-102.

249. The ITC explained that imports were higher, both in absolute terms and relative to U.S. production, in 2000 than in any prior year of the period of investigation and showed a rapid and dramatic increase. Although import volumes declined in the interim period comparison, the ratio of imports to U.S. production in interim 2001 was higher than in any full year during the period examined.[295]

250. Imports of cold-finished bar on an absolute and relative basis are shown in the charts in Annex 1.

251. The ITC found that the domestic cold-finished bar industry was seriously injured, and it traced the impact of increased imports on the domestic industry.[296] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

ii. *Arguments of the EC*

252. The EC specifically challenges the ITC's increased imports finding for cold-finished bar. The EC attempts to dismiss the data on absolute import levels as "a one-year micro-development immediately compensated by a decrease in 2001."[297] This characterization is completely at odds with the reality of the data. First, full-year 2001 data were not, and should not be, considered, for the reasons explained above. Second, it is simply not accurate to call a 33.6 percent increase in imports in one year, that follows on the heels of increases in two out of the preceding three years, "a one-year micro-development." The Panel should reject the EC's attempt to gloss over the reality of the data on absolute imports of cold-finished bar.

253. Addressing relative import levels (which increased not only in the last full year of the period of investigation, but also over the interim periods), the EC merely states that:

> there is no justification why a mere six percent increase in the ratio between imports and domestic production could be seen as a sudden, sharp and significant surge in imports that is capable of causing injury to the domestic industry, particularly, since actual imports already showed a manifest decrease . . . [298]

254. The EC's rationale is unsupportable. Contrary to the EC's assertion that "there was no justification," the ITC did in fact explain the effect of the increase in imports in 2000 on the domestic industry.[299] Moreover, the 6.7 percentage point increase in relative import levels from 1999 to 2000 (from 17.0 to 23.7 percent) was in fact very significant; it represents an increase of

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[295] ITC Report, p. 102.
[296] ITC Report, pp. 102-107.
[297] EC first written submission, para. 319.
[298] EC first written submission, para. 321.
[299] ITC Report, p. 107.

39.4 percent in relative import levels. Finally, the EC's attempt to discount this increase by pointing to a decline in absolute import levels is unpersuasive for two reasons. First, the EC is comparing relative and absolute import levels in different periods -- the "six percent" increase in relative import levels occurred in 2000, the decrease in absolute import levels occurred in interim 2001 (when compared to interim 2000). Second, an increase in either absolute or relative import levels alone may satisfy Article 2.1 of the Safeguards Agreement. Thus, an increase in imports by one measure cannot be negated by a decline using the other measure.

255. In sum, 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 increased imports of cold-finished bar.

e. Rebar

i. *The ITC's Determination*

256. The ITC found that imports of rebar increased both on an absolute and a relative basis. On an absolute basis, imports increased from 581,731 tons in 1996 to 701,303 tons in 1997 and then to 1.2 million tons in 1998. Imports further increased to 1.8 million tons in 1999 and then declined slightly to 1.7 million tons in 2000. Imports were lower in interim 2001, at 852,488 tons, than in interim 2000, when they were 985,991 tons.[300]

257. As a ratio to U.S. production, imports rose from 11.7 percent in 1996 to 12.8 percent in 1997, 19.9 percent in 1998, and 29.1 percent in 1999. This ratio then declined to 25.2 percent in 2000. The ratio was lower in interim 2001, at 24.3 percent, than in interim 2000, when it was 30.9 percent.[301]

258. The ITC noted that, notwithstanding the decline from 1999 levels, imports in 2000 were substantially higher than they were during earlier portions of the period examined, reflecting the rapid and dramatic increase in the prior two years. The quantity of imports in 2000 was 187.0 percent above the 1996 quantity and 35.8 percent over the 1998 quantity, and the ratio of imports to U.S. production in 2000 was more than double the ratio in 1996. By the same token, import quantities for the first six months of 2001 were higher than the quantities for the full years of either 1996 or 1997, and the ratio of imports to U.S. production in interim 2001 was higher than that for any year from 1996 to 1998.[302]

259. Imports of rebar on an absolute and relative basis are shown in the charts in Annex 1.

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[300] ITC Report, p. 109.
[301] *Id.*
[302] *Id.*

260. The ITC found that the domestic rebar industry was seriously injured, and it traced the impact of increased imports on the domestic industry.[303] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

261. The EC and China specifically challenge the ITC's increased imports finding for rebar.

ii. *Arguments of the EC*

262. The EC argues that the ITC failed to take into account the decline in rebar imports in 2000 and 2001.[304] The EC's argument is unpersuasive. First, full-year 2001 data were not, and should not be, considered, for the reasons explained above. Second, the ITC recognized that there had been a decline from 1999 to 2000, and between interim 2000 and interim 2001. But the ITC observed that imports in 2000 and in interim 2001 were nonetheless at levels that were substantially higher than in earlier years of the period of investigation before 1999.

263. The EC claims that the observation that imports were higher in 2000 than in 1996 is irrelevant because it is based on an end-point-to-end-point comparison.[305] The EC overlooks the fact that the ITC also: (i) compared 2000 import levels to those in 1998 (and found that 2000 imports were 35.8 percent higher); (ii) compared interim 2001 imports levels to 1996 and 1997 (and found that imports in the first six months of 2001 exceeded *full-year* levels in 1996 and 1997); (iii) compared the relative import ratio in interim 2001 to 1996, 1997 and 1998 (and found that it was higher than in any of those prior years). In short, the ITC's analysis was hardly based on a simple end-points comparison. Moreover, as explained above, an end-points analysis is not irrelevant, but rather must be viewed in the context of trends within the period of investigation.

264. The EC argues that recent absolute import levels are irrelevant if the most recent trend shows a decrease in imports.[306] The EC's argument is not supported by the text of the Safeguards Agreement. As explained above, Article 4.2(a) does not focus on trends to the exclusion of the amount of imports -- both must be considered, among other relevant factors in the injury and causation analysis. Moreover, as the panel in *US–Line Pipe* recognized, it is not necessary that imports be increasing up to the very end of the period of investigation for a competent authority to find that an increase in imports caused serious injury to the domestic industry at the time of it determination.[307]

iii. *Arguments of China*

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[303] ITC Report, pp. 109-115.
[304] EC first written submission, paras. 323-328.
[305] EC first written submission, para. 327.
[306] *Id.*
[307] *US–Line Pipe*, Panel Report, para. 7.207.

265. China maintains that the ITC did not satisfy the requirement to consider the rate and amount of the increase in imports by simply stating the import data for each year of the period of investigations.[308] China's critique is without foundation. The ITC recognized that imports had declined between 1999 and 2000, and between the interim periods, and it explained why these declines were not decisive to its analysis. Competent authorities are not required to articulate an intricate trends analysis. The ITC addressed the import data for each year of the period of investigation and for the interim periods. It noted where the imports increased and where they decreased. The Safeguards Agreement does not require that competent authorities characterize the data in certain ways.

266. China argues that the ITC failed to determine whether the increase in imports of rebar was "recent enough, sudden enough, sharp enough and significant enough."[309] Again, China is applying an incorrect standard. The ITC analyzed the surge in imports in 1999 and the continued high levels of imports in 2000 in the context of their ability to cause serious injury, and the ITC Report contains an adequate, reasoned and reasonable explanation of how the facts in the record supported the ITC's determination with respect to increased imports.

f. Certain Welded Pipe

i. *The ITC's Determination*

267. The ITC found that imports of certain welded pipe increased both on an absolute and a relative basis. Imports increased from 1.57 million short tons in 1996 to 1.86 million short tons in 1997 and 2.26 million short tons in 1998, declined slightly to 2.12 million short tons in 1999, and then surged to 2.63 million short tons in 2000. Imports increased by 24.2 percent in quantity between 1999 and 2000, which was the largest annual percentage increase of the period examined, and in 2000 were at their highest level of the period examined. Imports continued at a very high level in interim 2001, only slightly (1.7 percent) below the level of the same period of 2000. Imports were 1.41 million short tons in interim 2001, compared to 1.44 million short tons in the same period of 2000.[310]

268. Imports of certain welded pipe relative to domestic production were 33.8 percent in 1996, 36.4 percent in 1997, 41.9 percent in 1998, 40.8 percent in 1999, and 55.0 percent in 2000. The ratio of imports to domestic production declined slightly from 56.8 percent in 2000, to 55.9 percent in interim 2001.[311]

269. Imports of certain welded pipe on an absolute and relative basis are shown in the charts in Annex 1.

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[308] China first written submission, paras. 266-267.
[309] China first written submission, paras. 269.
[310] ITC Report, p. 157
[311] ITC Report, p. 158.

270. The ITC found that the domestic industry producing certain welded pipe was threatened with serious injury, and it traced the impact of increased imports on the domestic industry.[312] The threat of serious injury to the domestic industry and causal link between increased imports and that threat are described elsewhere in this submission.

271. The EC and Switzerland specifically challenge the ITC's increased imports finding for certain welded pipe.

ii. *Arguments of the EC*

272. The EC argues that the ITC failed to show that the increases in imports of certain welded pipe were "sudden and sharp." Again, the EC misstates the standard under Section 2.1 of the Safeguards Agreement.

273. The EC complains that the United States has:

> throw[n] a large amount of data together with one punctual bit of information at other WTO Members and Panels thereby forcing them to check through complex volumes of facts to determine whether there are adequate explanations and to do what the United States should have done: measuring the overall trends, including annual percentage increases so as to determine whether the micro-bit of information on which the ITC relied withstands critical scrutiny in the light of other relevant facts.[313]

This is nothing more than obfuscation by the EC, in an attempt to avoid what the import data clearly show. What "large amounts of data" and "complex volumes of facts" are involved here? The import data, and their link to the threat of serious injury to the domestic industry, are described in the ITC Report in a clear and straightforward manner.

iii. *Arguments of Switzerland*

274. Switzerland argues that because imports of certain welded pipe increased steadily throughout the period of investigation, the increase was not "sudden, sharp and significant."[314] Switzerland also misstates the standard under Article 2.1 of the Safeguards Agreement. Moreover, even if there were an absolute standard of what constitutes "sudden, sharp and significant," the United States submits that it was met by the increase in imports of almost 25 percent in the last full year of the period of investigation.

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[312] ITC Report, pp. 158-166.
[313] EC first written submission, para. 338.
[314] Switzerland first written submission, para. 253-254.

275. According to Switzerland, even if the Panel finds that the 24.2 percent increase in imports in 2000 was recent and sharp enough, the United States failed to provide an adequate and reasonable explanation of how the facts in the report support its findings and to demonstrate the relevance of the factors examined.[315] This is nothing more than a bald assertion of error by Switzerland. In fact, the ITC stated the import data for each year of the period of investigation and for the interim periods, and noted where imports increased and decreased. After establishing the existence of increased imports, the ITC went on to find a threat of serious injury and a causal link.

276. In sum, 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 increased imports of certain welded pipe.

g. FFTJ

i. *The ITC's Determination*

277. The ITC found that imports of FFTJ increased in both absolute terms and relative to domestic production. Imports increased by 30.8 percent from 1996 to 2000, including 15.3 percent between 1999 and 2000. Imports were 32.1 percent higher in interim 2001 than in the same period of 2000.[316]

278. The ratio of imports to U.S. production also increased significantly during the period examined, rising from 50.5 percent in 1996 to 69.7 percent in 2000 (its highest full-year level in the period of investigation). The ratio in interim 2001 (88.8 percent) was substantially above the level of the same period of 2000 (59.4 percent).

279. Imports of FFTJ on an absolute and relative basis are shown in the charts in Annex 1.

280. The ITC found that the domestic industry producing FFTJ was seriously injured, and it traced the impact of increased imports over the period of investigation on the domestic industry.[317] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

ii. *Arguments of the EC*

281. The EC specifically challenges the ITC's increased imports finding for FFTJ. It argues that the ITC improperly aggregated dissimilar products into one like product category, and that

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[315] Switzerland first written submission, para. 256.
[316] ITC Report, p. 171
[317] ITC Report, pp. 171-178.

the ITC failed to provide an adequate and reasoned explanation as to why the "steady" increase in imports satisfied the conditions for imposing safeguard measures.[318]

282. The question of whether the ITC properly defined the like product is addressed elsewhere in this brief. In arguing that the increase in imports was steady, rather than sharp and significant, the EC again applies the wrong standard. As explained above, the Safeguards Agreement requires an evaluation of whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury," and the ITC satisfied this standard when it first focused on increased imports and subsequently found injury and a causal link.

h. Stainless Steel Bar

i. *The ITC's Determination*

283. The ITC found that imports of stainless steel bar increased both on an absolute and a relative basis, with the largest increase occurring in the last full year of the period of investigation. On an absolute basis, imports increased by 53.8 percent during the five full years of the period of investigation, growing from 97.9 thousand short tons in 1996 to 150.6 thousand short tons in 2000. Although the quantity of imports fluctuated somewhat (declining slightly in 1998 and 1999 from its level in 1997), a rapid and dramatic increase in import quantity occurred during 2000, when imports of stainless bar grew by 44 thousand short tons. Imports declined between interim 2000 and interim 2001, dropping from 83.4 thousand short tons to 69.2 thousand short tons.[319]

284. As a ratio to U.S. production, of imports of stainless steel bar increased from 51.8 percent in 1996 to 84.1 percent in 2000, with the largest single percentage increase in the ratio (19.3 percentage points) occurring in 2000. The ratio of imports to domestic production decreased from 87.9 percent in interim 2000 to 84.6 percent in interim 2001.[320]

285. Imports of stainless steel bar on an absolute and relative basis are shown in the charts in Annex 1.

286. The ITC found that the domestic stainless steel bar industry was seriously injured, and it traced the impact of increased imports particularly in the last two-and-a-half years of the period of investigation on the domestic industry.[321] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

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[318] EC first written submission, para. 342-345.
[319] ITC Report, pp. 205-206.
[320] ITC Report, p. 206.
[321] ITC Report, pp. 206-213.

ii. *Arguments of the EC*

287. The EC specifically challenges the ITC's increased imports finding for stainless steel bar. The Panel should not be misled by the EC's characterization of the rise in imports in 2000 as "a mere blip."[322] The EC points to a decline in imports in 2001, but full-year 2001 data were not, and should not be, considered, for the reasons explained above. It is readily apparent from the data that the increase in imports in 2000 was sharp and substantial. More significantly, however, the ITC explained how these increased imports were linked to the serious injury suffered by the domestic industry.

288. In sum, 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 increased imports of stainless steel bar.

i. Stainless Steel Rod

i. *The ITC's Determination*

289. The ITC found that imports of stainless steel rod increased both on an absolute and a relative basis, with the largest increase occurring in the last full year of the period of investigation. On an absolute basis, imports of stainless steel rod increased by 36.1 percent during the period of investigation, growing from 60.5 thousand short tons in 1996 to 82.3 thousand short tons in 2000. Although the quantity of imports fluctuated somewhat during the period of investigation, the largest increase in terms of quantity occurred in 2000, when import quantities increased by more than 25 percent, growing from 65.9 thousand short tons to 82.3 thousand short tons. The quantity of stainless rod imports declined by 31.3 percent between interim 2000 and 2001, falling from 45.6 thousand short tons to 31.4 thousand short tons. In connection with this decline in the absolute level of imports over the interim periods, the ITC noted that the market share of imports remained essentially stable in interim 2001.[323] This is an important observation because it underscores the fact that the decline in imports in interim 2001 was accompanied by a substantial decline in consumption in interim 2001.[324]

290. On a relative basis, imports of stainless steel rod to domestic production also increased significantly during the period of investigation. The actual data are business confidential, but the ITC explained that the largest single increase in the ratio of imports to domestic production

[322] EC first written submission, para. 348.

[323] ITC Report, p. 214-215.

[324] The ITC Report (p. 217) explains: "[w]ith the overall decline in the economy in interim 2001, apparent consumption of stainless rod also declined . . . ."

occurred in 2000. The ITC also noted that there was a decline in relative import levels between interim 2000 and interim 2001.[325]

291. Imports of stainless steel rod on an absolute basis are shown in the chart in Annex 1. (Imports relative to domestic production cannot be presented in chart form because these data are business confidential.)

292. The ITC found that the domestic stainless steel rod industry was seriously injured, and it traced the impact of increased imports on the domestic industry.[326] The injury to the domestic industry and causal link between increased imports and that injury are described elsewhere in this submission.

293. The EC and China specifically challenge the ITC's increased imports finding for stainless steel rod.

ii. *Arguments of the EC*

294. The EC argues that the ITC failed to consider trends in imports over the period of investigation. According to the EC, these trends show that imports of stainless steel rod increased twice during the period of investigation (by 29.4 percent in 1997 and by 25 percent in 2000), and that each surge was followed by a decline in the following year.[327]

295. The EC's argument rests on the use of full-year 2001 data. These data were not, and should not be, considered, for the reasons explained above. When viewed within the ITC's period of investigation, imports show a clear rising trend over the last two full years, with the largest increase -- of over 25 percent on an absolute basis -- occurring in 2000. Moreover, even if imports followed a pattern of successive surging and receding, this could cause serious injury to the domestic industry, such as to warrant a safeguard measure.

296. In sum, 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 increased imports of stainless steel rod.

iii. *Arguments of China*

297. There is no merit to China's argument that the ITC failed to evaluate the rate and amount of increased imports in absolute and relative terms.[328] The ITC noted the amount of the increase in imports from the first full year to the last full year of the period of investigation; and it noted

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[325] ITC Report, p. 215.
[326] ITC Report, pp. 215-222.
[327] EC first written submission, para. 353-353.
[328] China first written submission, paras. 275-276.

the trends during the period of investigation (some fluctuation, with a sharp increase at the end). It did this for both the absolute and relative import levels. The rate and amount of increased imports is clear from the Commission's description of the trends. The Safeguards Agreement does not require that competent authorities describe the data in certain ways.

298. China complains that the ITC failed to consider the most recent period because it failed to take into account a decline in imports in interim 2001.[329] China misconstrues what is meant by "recent." As the *US–Line Pipe* panel recognized, it is not necessary that imports be increasing up to the very end of the period of investigation for a competent authority to find that an increase in imports caused serious injury to the domestic industry at the time of its determination.[330]

299. China contends that the ITC failed to determine whether the increase in imports was "recent enough, sudden enough, sharp enough and significant enough."[331] As explained above, the Safeguards Agreement requires an evaluation of whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury," and the ITC satisfied this standard when it first focused on increased imports and subsequently found injury and a causal link.

300. China makes the same argument as the EC, and maintains that the surge in imports in 2000 mirrored a similar surge in 1997, and that import levels declined in 2001, just as they had previously.[332] The United States' response is the same as to the EC's argument. Full-year 2001 data should not be considered. When viewed within the ITC's period of investigation, imports show a clear rising trend over the last two full years, with the largest large increase -- of over 25 percent on an absolute basis -- occurring in 2000.

301. Addressing the actual import figures for stainless steel rod, China argues that the ITC failed to recognize a decline in imports that "started in 2000 and lasted until the end of the POI."[333] China creates a declining trend by dividing 2000 into two halves, so that it can trace a decline from the first half of 2000, to the second half of 2000, and to the first half of 2001. The Panel should reject this attempt by China to carve up the investigation period to achieve its desired result. The ITC generally compares data for the most recent interim period (in this case, the first half of 2001) to the corresponding portion of the prior year (the first half of 2000). Thus, it did not compare data from the first half of 2000 with the second half of that year, or data from the second half of 2000 with data for the first half of 2001. As the panel in *US–Line Pipe* explained, the Safeguards Agreement does not specify how the period of investigation should be broken down – this is left to the discretion of investigating authorities; and in the absence of any

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[329] China first written submission, para. 277.

[330] *US–Line Pipe*, Panel Report, para. 7.207; *see also*, *US–Lamb Meat*, AB Report, para. 138 (competent authorities must assess data from the most recent past in the context of data for the entire period).

[331] China first written submission, para. 278.

[332] China first written submission, para. 281.

[333] China first written submission, para. 278.

evidence of manipulation or bias, the investigating authorities' methodology should be left undisturbed.[334]

302. In sum, 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 increased imports of stainless steel rod.

j. Stainless Steel Wire

i. *The ITC's Determination*

303. Three of the six ITC Commissioners made affirmative determinations for stainless steel wire. Two of these Commissioners, Chairman Koplan and Commissioner Bragg, found that the relevant domestic industry was threatened with serious injury, and one Commissioner, Commissioner Devaney, found that the relevant domestic industry was seriously injured. [335]

304. One of the Commissioners making an affirmative determination, Chairman Koplan, defined the domestic like product as consisting of stainless steel wire; the other two Commissioners, Commissioners Bragg and Devaney, defined the domestic like product as stainless steel wire products, including stainless steel wire and rope. Accordingly, the import and injury data upon which the three Commissioners focused in making affirmative determinations were different, depending upon how they defined the like product.

305. Chairman Koplan found that imports of stainless steel wire increased both on an absolute and a relative basis, with the largest increase occurring in the last full year of the period of investigation. In quantity terms, imports of stainless wire increased from 27.3 thousand short tons in 1996 to 31.3 thousand short tons in 2000. The quantity of stainless wire imports fluctuated somewhat during the period, increasing from 27.3 thousand short tons in 1996 to 29.9 thousand short tons in 1997 and then to 30.7 thousand short tons in 1998. The quantity of imports then declined by 19.4 percent, to 24.7 thousand short tons, in 1999. However, the single largest increase in import quantity occurred between 1999 and 2000, when imports increased by 26.5 percent, from 24.8 thousand short tons to 31.3 thousand short tons. The quantity of stainless wire imports increased between interim 2000 and 2001, as import volumes grew from 16.0 thousand short tons to 16.5 thousand short tons.[336]

306. As a ratio to U.S. production, the import data that Chairman Koplan relied on showed a similar trend. The ratio remained relatively stable (between 31 and 32 percent) during the first three years of the period but then declined to 23.9 percent in 1999. The ratio of stainless wire imports to domestic production then increased by 5.5 percentage points, to 29.4 percent, in 2000.

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[334] *US–Line Pipe*, Panel Report, paras. 7.196 and 7.203.
[335] ITC Report, pp. 256, 288-289, and 342.
[336] ITC Report, p. 235.

The ratio of imports to domestic production increased to its highest level during the period, 38 percent, in interim 2001, rising from 28.3 percent in interim 2000.[337]

307. Imports increased on both an absolute and a relative basis, measured according to the like product definition adopted by Commissioners Bragg and Devaney. On an absolute basis, imports rose from 33,647 short tons in 1996, to 34,701 short tons in 1997, to 40,287 short tons in 1998, then fell to 33,141 short tons in 1999, before increasing to 40,758 short tons in 2000. Between the interim periods, imports declined slightly, from 21,654 short tons in interim 2000, to 21,052 short tons in interim 2001.[338]

308. Imports relative to domestic consumption, measured according to the like product definition adopted by Commissioners Bragg and Daveney, also increased. Commissioner Devaney noted that relative imports surged twice during the period of investigation, once between 1996 and 1998, and then again from 1999 to interim 2001. The actual relative import data are confidential.[339]

309. Imports of stainless steel wire on an absolute and relative basis, according to the like product definition applied by Chairman Koplan, and by Commissioners Bragg and Devaney, are shown in the charts in Annex 1.

310. The injury, or threat of injury, to the domestic industry and causal link between increased imports and that injury, or threat, are described elsewhere in this submission.

311. The EC and China specifically challenge the ITC's increased imports finding for stainless steel wire.

ii. *Arguments of the EC*

312. The EC argues that the sharp increase in imports in 2000 merely corrected a sharp decrease in imports in 1999. The EC characterizes the 2000 increase in imports as a "blip development."[340]

313. The EC overlooks the fact that two of the ITC Commissioners making affirmative determinations found a *threat* of serious injury. In doing so, they focused not only on the increase in imports in 2000, but particularly on conditions in interim 2001.[341] Chairman Koplan noted the rapid increase in relative import levels in interim 2001, and the deterioration of the

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[337] *Id.*

[338] ITC Report, pp. 280 and 343.

[339] ITC Report, p. 343.

[340] EC first written submission, paras. 369-372.

[341] As the Appellate Body recognized in *US–Lamb Meat* (para. 137), because of the future-oriented analysis involved in a threat determination, it is especially important to focus on more recent data.

domestic industry's condition in interim 2001.[342] Commissioner Bragg noted the increase in absolute import levels in 2000, and the fact that these declined only slightly between interim 2000 and interim 2001.[343] She focused on the deterioration of the domestic industry's condition in interim 2001.[344] Commissioner Devaney, who found that the domestic industry was seriously injured, noted that the quantity of imports increased in 2000, and remained steady between the interim periods.[345] He also described the deterioration in the condition of the domestic industry between interim 2000 and interim 2001.[346] Thus, the EC's assertion that the ITC relied only on a "blip development" in imports in 2000 is not borne out by the facts.

iii. *Arguments of China*

314. China's arguments regarding increased imports are based only on the data that was considered by Chairman Koplan (who defined the like product as stainless steel wire); they do not address the analysis of increased imports performed by the other two Commissioners who made affirmative determinations with respect to stainless steel wire (who defined the like product more broadly).[347]

315. China acknowledges that imports of stainless steel wire increased during the period of investigation and that there was a trend of increasing imports.[348] Nonetheless, China argues the upward trend in imports was "smooth," and that the ITC failed to explain the trend in imports. As detailed above, the ITC Commissioners making affirmative determinations described the import data in a detailed and straightforward fashion. They noted the increases in imports, especially over the interim periods. China's assertion that the ITC's analysis of the import trends was deficient is without merit.

316. China also contends that the ITC failed to determine whether the increase in imports was recent enough, sudden enough, sharp enough and significant enough.[349] As explained above, there are no absolute standards for how recent, sudden, sharp or significant an increase in imports must be. Increases in imports must be analyzed in the context of their ability to cause or threaten serious injury, and the three ITC Commissioners making affirmative determinations satisfied this standard when they first focused on increased imports and subsequently found serious injury or threat, and a causal link.

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[342] ITC Report, pp. 256-259.
[343] ITC Report, p. 280.
[344] ITC Report, p. 288-289.
[345] ITC Report, p. 343.
[346] ITC Report, p. 344.
[347] China first written submission, para. 295.
[348] China first written submission, para. 300.
[349] China first written submission, para. 302.

317. In sum, 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 increased imports of stainless steel wire.

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

318. After determining that certain 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.

1. The Methodology that the ITC Used to Determine that the Pertinent Industries Were Seriously Injured or Threatened with Serious Injury Is Consistent with the Requirements of Articles 2.1, 4.1 and 4.2 of the Safeguards Agreement

319. The ITC's serious injury and threat of serious injury analyses were based largely on data it obtained as a result of questionnaires it circulated in the investigation, although it also relied on other data it obtained during the course of the investigation. The ITC mailed producer questionnaires to approximately 825 U.S. firms it believed to produce one or more of the steel products within the scope of the investigation. The ITC identified these firms based both on information it received in prior steel products investigations and on other public data.[350] The questionnaire instructions instructed producers to report data separately for each of 33 separately-defined product categories.[351]

320. The ITC received questionnaire responses from 281 producers. The questionnaire responses accounted for a majority, and often a considerable majority, of estimated production in each of the industries for which the ITC made an affirmative serious injury or threat of serious injury determination.[352]

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[350] ITC Report, p. OVERVIEW-2.

[351] See General Information, Instructions, and Definitions for Commission Questionnaires (US-32).

[352] Questionnaire responses accounted for virtually all estimated production of stainless steel wire, over 80 percent of estimated production of CCFRS, tin mill, and stainless steel rod, over 70 percent of the estimated production of hot-rolled bar, rebar, and stainless steel bar, and over 60 percent of the estimated production of cold-finished bar and certain welded pipe. Public data on overall production of FFTJ were not available. ITC Report, pp. FLAT-4, LONG-4, TUBULAR-3, STAINLESS-5.

321. 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."

322. 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.[353]

323. While the factors expressly articulated in Article 4.2(a) are "of an objective and quantifiable nature," the factors are not all quantifiable in the same manner. For example, imports, sales, and production will be measured in units of output, employment will be measured in numbers of workers, profits and losses will be measured in units of currency, and capacity utilization and productivity are ratios.

324. Consequently, when conducting its analysis under Article 4.2(a), an investigating authority cannot derive a single injury "measure." Indeed, there is no requirement that it do so. The evaluation must be based on the factors as a whole.[354] Moreover, the authority may find serious injury even if not every single factor it examines concerning the industry's condition is declining. Instead, "it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination."[355] The "overall picture" of industry factors must demonstrate significant overall impairment.[356]

325. In conducting its analysis of serious injury an authority may examine factors not expressly referenced in Article 4.2(a). An authority can and should examine additional "factors of an objective and quantifiable nature having a bearing on the industry" that it has concluded are relevant.[357] For several industries, the ITC evaluated additional factors it deemed to be relevant. One such factor concerned whether producers had declared bankruptcy. While several Complainants have questioned the relevancy of this factor,[358] its significance is clear. Those firms that declare bankruptcy but remain in operation frequently restructure their operations as part of the bankruptcy process. Consequently, bankruptcies can indicate declines in 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

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[353] No complainant has argued to the contrary.
[354] *US -- Lamb Meat*, AB Report, para. 144.
[355] *US -- Wheat Gluten,* Panel Report, para. 8.85.
[356] *Argentina -- Footwear*, AB Report, para. 139.
[357] *US -- Wheat Gluten*, AB Report, para. 55.
[358] *See* China first written submission, paras 320-21; Switzerland first written submission, para. 273.

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. Similarly, an entire industry's viability may be in question when several producers within that industry declare bankruptcy.

326. Only the EC has raised an issue concerning the general methodology the ITC used in analyzing serious injury and threat of serious injury.[359] The EC complains that the manner in which the ITC reported data for the industries it examined focused only on a discrete segment of each industry.

327. The United States does not dispute the general proposition, explained at some length by the EC, that Articles 4.1(a), 4.1(c), and 4.2(a) of the Safeguards Agreement require that an authority's finding of serious injury pertain to the entire domestic industry. It acknowledges jurisprudence that an investigating authority cannot discuss the Article 4.2(a) factors for only one segment of the industry without explaining how the factor is significant for the industry as a whole.[360]

328. The ITC's analysis focused on each industry as a whole consistent with U.S. law and this jurisprudence. With one exception, the ITC did not engage in a segmented analysis for any of the domestic industries it examined. For that industry, the ITC used its analysis of the various segments to support its conclusions concerning serious injury to the industry as a whole.[361]

329. The EC does not dispute this, but its submission seeks to confuse the issue by providing an extensive discussion of the Appellate Body's report in *US – Hot-Rolled Steel*.[362] There the Appellate Body addressed the consistency with the Antidumping Agreement of a provision of U.S. antidumping and countervailing duty law directing the ITC to focus primarily on merchant market sales in certain circumstances.[363]

330. That particular provision of U.S. law is not applicable to safeguards investigations and was never invoked by the ITC here. Indeed, the portions of the ITC report discussing serious injury do not refer to "merchant market" or "captive consumption" segments. Indeed, the data provided concerning each industry's shipments, production, and market share were all computed on the basis of the entire industry.

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[359] The EC has also disputed, in the context of its argument on serious injury, the manner in which the ITC discussed and presented confidential information in its report. *See* EC first written submission, paras. 380-88, 407-21. These arguments are discussed in section Nbelow.

[360] *Korea -- Dairy,* Panel Report, para. 7.58.

[361] The one exception was the CCFRS industry, which contained several discrete product segments. For several Article 4.2(a) factors, the ITC examined both industry-wide data and data pertaining to each product segment. ITC Report, pp. 52-54.

[362] *United States -- Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, WT/DS184/AB/R, adopted 23 August 2001, paras. 181-215 ("*US -- Hot-Rolled Steel*").

[363] EC first written submission, paras. 397-402.

331. This is also true of the data the ITC used to analyze the financial performance of the various industries. 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.

332. 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. As previously stated, 281 U.S. producers submitted responses to the questionnaires. Many of these producers made products in several of the 33 different categories on which the questionnaire requested data. 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. By contrast, presenting financial data based on as many as 281 different schemes for computing transfer values for internal transfers of product could have seriously compromised the objectivity of the data reported.[364]

333. Moreover, had the ITC instructed the producers to attempt to determine values 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 merchant sales values. This is particularly true for the numerous domestic industries where internal transfers constituted a very small percentage of overall production.[365]

334. The data collected by the ITC purported to provide, and did in fact provide, information pertaining to the entire industry. Consequently, the ITC satisfied the obligation under Articles 4.1 and 4.2(a) of the Safeguards Agreement to render its analysis of serious injury or threat of serious injury based on information pertaining to each domestic industry at issue.

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[364] Although the ITC instructed domestic producers to report valuation data for their internal transfers, to enable questionnaires to be completed fully and promptly, it did not specify use of a specific transfer valuation terminology. Consequently, the shipment data pertaining to internal transfers provided in the ITC report were not necessarily computed on a uniform basis.

[365] According to the EC's own table, internal transfers accounted for less than 15 percent of total 2000 production for all but three of the domestic industries on which the ITC made affirmative injury determinations for which data were available. For four of the industries, the percentage of internal transfers was less than 5 percent. *See* EC first written submission, Figure 30.

2. The ITC Properly Evaluated the Criteria Set Forth in Article 4.2(a) of the Safeguards Agreement in Concluding that Pertinent Industries Were Seriously Injured or Threatened With Serious Injury

335. 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.

336. Further details concerning the ITC's serious injury findings concerning CCFRS, hot-rolled bar, cold-finished bar, and rebar are provided in the sections below, in which we respond to the Complainants' arguments concerning these findings. No complainant has made any challenge to the ITC's determinations of serious injury to the industries producing tin mill, FFTJ, stainless steel bar, or stainless steel rod. Consequently, Complainants have not satisfied their burden of presenting a *prima facie* case of a violation of section 4.2(a) with respect to the findings concerning these industries.[366]

337. For both certain welded pipe and stainless steel wire -- the two industries on which it found threat of serious injury -- the ITC provided a detailed, fact-based explanation why a significant overall impairment in the state of the industry was clearly imminent. An explanation of the ITC's findings and responses to the Complainants' arguments concerning these findings are provided below.

a. CCFRS

338. In its discussion of the CCFRS industry, the ITC acknowledged that not every single factor it examined pertinent to the industry's condition was in decline. As previously discussed, there need not be a decline in each Article 4.2(a) factor for there to be a finding of serious injury. The ITC specifically found, however, that improvements in certain factors "do not offset the significant declines exhibited by other indicia of the industry's condition with respect to the issue of whether the industry is suffering serious injury."[367] These declines, which are not disputed by any party, include:

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[366] *Korea - Dairy*, Panel Report, para. 7.24 (complainant must submit *prima facie* case of violation of the Safeguards Agreement). *See generally* section A above.

[367] ITC Report, p. 55.

a. Significant idling of productive capacity – Several producers of CCFRS had shut down operations during the period of investigation. For the industry as a whole, capacity utilization declined from 91.0 percent in 1996 to 85.1 percent in 2000.[368]

b. Sharp deterioration in financial performance – Operating performance of the CCFRS industry declined sharply after 1997, and the industry experienced operating losses in 1999, 2000, and interim 2001. Ten producers, a group which included integrated producers, specialty producers, and minimills, went bankrupt.[369]

c. Significant unemployment – The number of production workers, which remained stable during the beginning of the period of investigation, declined significantly thereafter.[370]

339. The ITC specifically discussed the factors that Complainants China and New Zealand claim that it did not properly examine: capacity, production and productivity.

340. The ITC acknowledged that productive capacity increased by 15.9 percent for the domestic CCFRS industry from 1996 to 2000, although capacity fell 0.8 percent between interim 2000 and interim 2001. It also observed that production increased by 8.4 percent from 1996 to 2000.[371]

341. The ITC report provided several reasons why the increases in production and capacity were consistent with a finding of serious injury. First, the ITC explained that increases from 1996 to 2000 occurred at a time when apparent domestic consumption of CCFRS was increasing.[372] One would normally expect production and capacity to increase in a growing market. Indeed, the increase in production from 1996 to 2000 was only incrementally greater than the increase in U.S. apparent consumption of CCFRS during the same period.[373]

342. Second, the ITC emphasized that the increased capacity was not being utilized. Instead, capacity utilization for the domestic CCFRS industry had declined steadily from 1996, when it was 91.0 percent, to 2000 when it was 85.1 percent. Capacity utilization fell sharply, by 9.8 percentage points, between interim 2000 and interim 2001. The ITC emphasized that declines in capacity utilization were apparent in each of the particular product categories within the industry, as well as in the industry as a whole.[374]

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[368] ITC Report, p. 51.
[369] ITC Report, pp. 51, 53.
[370] ITC Report, pp. 54-55.
[371] ITC Report, p. 52.
[372] ITC Report, p. 52.
[373] ITC Report, p. 52.
[374] ITC Report, pp. 51-52.

343. Third, the overall picture in the industry was not one of steady expansion. As the ITC found, ten U.S. producers of certain carbon flat-rolled steel declared bankruptcy during the period of its investigation and several shut down and ceased production altogether.[375]

344. In light of this, the ITC thoroughly explained why the positive trends with respect to capacity and production did not outweigh other negative trends concerning idling productive resources in the industry. Moreover, Article 4.2(a) does not expressly mention changes in capacity as a factor that an investigating authority must consider in evaluating whether there is serious injury. Instead, it references changes in "capacity utilization." As previously stated, the ITC emphasized that while the domestic industry's capacity increased commensurately with changes in U.S. demand over the period of investigation, its capacity utilization did not keep pace, and in fact declined.

345. The ITC also acknowledged that productivity in the CCFRS industry increased from 1996 to 2000. The ITC considered the effect of this increase on employment levels in the industry and concluded that the increase in productivity "may have offset to some degree the declines in employment."[376]

346. Thus, contrary to the arguments of China and New Zealand, it is clear that the ITC considered the increase in productivity but concluded that it did not outweigh or entirely explain the declines in employment. Indeed, the annual trends in productivity do not correlate with the trends in employment. Productivity for the CCFRS industry increased during every full year during the period of investigation. This included years in which employment was relatively stable as well as those in which it declined.[377]

347. Moreover, increased productivity could only explain declining employment at a particular facility where production continues on an ongoing basis. (In other words, more efficient use of productive resources at a particular productive facility could result in less need for employees at that facility.) It cannot explain declines in employment attributable to production facilities shutting down operations. The decline in employment for the CCFRS industry, however, occurred at a time when several productive facilities closed entirely. Thus, there were losses of employment at facilities where productivity essentially declined to zero.

348. Increases in productivity also cannot explain the financial results of the CCFRS industry. Increased productivity would generally be expected to lead to improved financial results as a particular producer can make more output with the same amount of labor. However, trends in financial performance did not track productivity. Instead, the financial results of the CCFRS

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[375] ITC Report, p. 51.

[376] ITC Report, p. 55 n.219.

[377] ITC Memorandum INV-Y-209, Table FLAT-ALT7 (US-33). Moreover, both productivity and employment were lower in interim 2001 than in interim 2000. *Id.*

industry declined sharply after 1997, and the industry recorded overall operating losses in 1999, 2000, and interim 2001.[378]

349. Consequently, the ITC both acknowledged the increases in capacity, production, and productivity in the CCFRS industry and examined the implications of the increases. The ITC fulfilled its obligation under Articles 2.1 and 4.2(a) by concluding that these isolated increases did not detract from its finding of serious injury in light of all pertinent factors having a bearing on the state of the industry.

350. New Zealand additionally claims that the ITC's analysis was insufficient because it "failed to investigate the extent to which the negative effects they perceived to be affecting the domestic industry differed as between integrated producers and more modern efficient minimills."[379] This claim must fail.

351. Under both Articles 2.1 and Article 4.2(a), an investigating authority must determine whether "a domestic industry" is experiencing serious injury or is threatened with serious injury. Nothing in these provisions require an authority further to determine that each discrete segment that may exist within a particular industry is seriously injured. Having determined that the pertinent domestic industry was the one producing CCFRS, the ITC's obligation was to assess serious injury on an industry-wide basis. This is precisely what it did.

352. Even if a sectoral analysis of the CCFRS were required -- which it is not -- the ITC engaged in such an analysis as well. The analysis, however, was conducted on the basis that the ITC found would be the most analytically useful -- on the basis of the pertinent product categories (*i.e*, slab, plate, hot-rolled, cold-rolled, and galvanized) on which the producers and importers were requested to provide data. The ITC found that its conclusions concerning declines in capacity utilization and financial performance were applicable for each product category as well as for the industry as a whole.[380]

353. In any event, the impact of minimills was pertinent, if at all, to the issue of causation rather than to the issue of whether the entire CCFRS industry – in which minimills were responsible for a much smaller share of production than were integrated producers[381] – was incurring serious injury. As explained in section E below, in its analysis of causation the ITC fully examined the effects of the minimill industry, both in terms of the effect of increased

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[378] ITC Report, p. 53.

[379] New Zealand first written submission, para. 4.107.

[380] ITC Report, pp. 52-54.

[381] Minimills only accounted for approximately one-third of total CCFRS production in the United States. *See* Schagrin Associates Prehearing Brief at I-1 (public version, Sept. 12, 2001) (US-34).

capacity over the period of investigation (which was largely a function of minimills) and in terms of minimills' cost advantages over domestic producers.[382]

b. Hot-Rolled Bar

354. In determining that the hot-rolled bar industry was seriously injured, the ITC cited a wide variety of data indicating that the industry was in a significantly impaired condition. These included:

a. Declines in production, shipments, and capacity that had occurred in the industry since 1998. Sales quantities and revenues declined every year after 1997.[383] Additionally, the industry's market share declined by 6.5 percentage points from its peak in 1997 to 2000.[384]

b. That three U.S. producers declared bankruptcy and shut down production in early 2001, idling productive facilities.[385]

c. That the industry had sharply declining financial performance since 1998, and incurred overall operating losses in 2000 and interim 2001.[386]

d. That there were declines in employment during the latter portion of the period of investigation.[387]

e. That capital expenditures and research and development expenditures declined throughout the period of investigation.[388]

355. China, ignoring both these pervasive declines and the reasoning the ITC used to support its serious injury conclusion, instead chooses to direct a number of scattered criticisms concerning the ITC's analysis. China's criticisms, in addition to being factually incorrect, do not demonstrate that the United States failed to comply with its obligations under Articles 2.1 and 4.2(a).

356. China criticizes the ITC's analysis of production and shipments. China emphasizes that production and shipments for the hot-rolled bar industry were each higher in 2000 than they were in 1996. But these comparisons -- which the ITC fully acknowledged -- cannot be dispositive.

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[382] *See* ITC Report, pp. 63-65.
[383] ITC Report, pp. 92-93.
[384] ITC Report, p. 94.
[385] ITC Report, p. 92.
[386] ITC Report, p. 94.
[387] ITC Report, p. 94.
[388] ITC Report, p. 94.

Article 4.2 does not permit an investigating authority to rely exclusively on an endpoint to endpoint analysis in assessing serious injury, contrary to China's apparent belief.[389]

357. Thus, the ITC did not stop with an endpoint-to-endpoint analysis. It also examined trends within the period of investigation. This examination demonstrated that production, shipments, and sales quantities and revenues pervasively declined over the latter portion of the period of investigation. Moreover, shipments and sales quantities declined, and production increased only minimally from 1999 to 2000, when U.S. apparent consumption of hot-rolled bar increased.[390] Consequently, this was not a situation where the rate of increase merely slowed during the period of investigation, as China appears to posit. The ITC's thorough examination and explanation of trends within its period of investigation further indicates that the declines in output-related indicators were not merely functions of changes in U.S. apparent consumption.

358. The declines in production, shipments, and sales during the latter portion of the period of investigation were significant for two other reasons. First, they were the most recent data available and clearly probative of current impairment in the position of the domestic industry. Second, they were coincident with other negative trends on which the ITC relied -- namely, the industry's deteriorating operating performance. The industry experienced operating losses in both 2000 and interim 2001, in contrast to its profitability from 1996 to 1999.[391]

359. China next criticizes the ITC's reliance on bankruptcies and plant closures. We explained above why bankruptcies within an industry are highly probative to an examination of serious injury. China contends that the ITC's finding that hot-rolled producers had gone bankrupt "is not supported by all the relevant and sufficient data."[392] The basis for China's objection is unclear. Bankruptcies of U.S. firms are a matter of public record. The public ITC report identifies four hot-rolled bar producers that declared bankruptcy: Republic Technologies International (RTI), GS Industries, CSC Ltd., and Qualitech Steel. The report also indicates that each of the firms other than RTI had shut down all or a portion of their production operations in 2001.[393] China does not and cannot challenge the accuracy of this data.

360. China finally criticizes the fact that the ITC relied on all the data in its record in making findings concerning capacity and employment in the hot-rolled bar industry. As the ITC stated in its report, because not all the bankrupt hot-rolled bar producers responded to its questionnaire, the ITC referred to public data concerning these firms in its analysis of capacity and employment trends for the hot-rolled bar industry.

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[389] *See Argentina – Footwear*, AB Report, para. 129.
[390] ITC Report, pp. 92-93.
[391] ITC Report, p. 94.
[392] China first written submission, para. 320.
[393] ITC Report, Table OVERVIEW-11.

361. China appears to believe that the ITC could only use information it obtained from the questionnaire responses it received in its analysis of serious injury. China cites no provision of the Safeguards Agreement as imposing such a requirement. None exists; the Safeguards Agreement does not even mention questionnaires. To the contrary, Article 3.1 of the Safeguards Agreement requires investigating authorities to provide "public hearings or other appropriate means in which importers, exporters, and other interested parties could present evidence and their views. . ." Presumably Article 3.1 would not require investigating authorities to permit interested parties to submit evidence pertinent to the investigation if the investigating authorities could not consider such evidence once it were submitted.

362. Interested parties that supported the imposition of safeguards remedies for hot-rolled bar presented information concerning certain hot-rolled bar producers that did not respond to the ITC's questionnaire. This included the capacity of certain firms that had ceased operations, and the number of employees affected by each shutdown. Parties that opposed the imposition of remedies had the opportunity to challenge the accuracy or reliability of this data.[394] None did before the ITC, and China does not do so before the Panel. The ITC found the data to be reliable and probative. Consequently, it acted in a manner fully consistent with the Safeguards Agreement by relying on all data in its record concerning the hot-rolled bar industry.

363. There is consequently no basis for China's assertion that "the USITC did not fully address the nature and complexity of the data."[395] To the contrary, the ITC's report fully explains both the nature of the data the ITC used in analyzing serious injury to the hot-rolled bar industry and why that data supported its conclusion of serious injury. That conclusion satisfies the obligations of Articles 2.1 and 4.2(a) of the Safeguards Agreement.

c. Cold-Finished Bar

364. In finding that the cold-finished bar industry was seriously injured, the ITC identified the industry's poor financial performance and loss of market share as particularly pertinent. Industry operating income increased from 1996 to 1997 and the operating margin increased from 3.9 percent to 6.5 percent. The operating income and margin in 1998 were close to 1997 levels. Thereafter, operating income was significantly lower, and the operating margin was only 1.2 percent in 1999, 2.8 percent in 2000, and negative in interim 2001. No firms reported operating

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[394] They also could have submitted any public data of which they were aware pertaining to hot-rolled bar producers that did not respond to the ITC's questionnaire.

[395] China first written submission, para. 325. China criticizes the ITC report in several instances because it has not "responded. . . to the interpretations of that data by China." *E.g.*, China first written submission, para. 309. China appears to imply that it provided interpretations of the data to the ITC in the investigation to which the ITC did not respond. This is not correct. We also observe that Article 3.1 merely directs authorities to provide "findings and reasoned conclusions on all pertinent issues of fact and law;" it does not further require authorities to respond directly to all arguments that are in fact raised by parties to the investigation. We nevertheless demonstrate in this and the following sections that the ITC report contains sufficient reasoning to respond to the criticisms China is now articulating to the Panel.

losses in 1996, 1997, and 1998, but three did in 1999, four did in 2000, three did in interim 2000, and nine did in interim 2001. The industry's market share dropped by 4.5 percentage points from 1996 to 2000. Its sales revenues declined each year after 1998, and were lower in 2000 than in 1996. The ITC also cited declines in the industry's capacity, shipments, and production during the last three full years of its period of investigation, and its low levels of capacity utilization.[396]

365. China criticizes the ITC's analysis on the same basis that it attacked the analysis of hot-rolled bar; namely, that certain output-related factors increased from 1996 to 2000. This fact, however, was expressly acknowledged by the ITC, as the excerpt of the ITC report quoted in paragraph 327 of China's first written submission confirms. As discussed above, analysis of serious injury is not merely a question of endpoint-to-endpoint comparisons.

366. China hypothesizes that "[t]he recent decline in factors had to be evaluated with consideration for the unusual increase that had taken place just before."[397] China does not explain what was "unusual" about the increases in shipments and production that the ITC acknowledged occurred between 1996 and 1998. In fact, these increases merely followed increases in domestic consumption. Apparent consumption also increased from 1999 to 2000, yet the domestic industry's shipments and production declined during this period.[398] The ITC appropriately concluded that, although the U.S. cold-finished bar industry was able to increase its output to reflect changes in apparent consumption at the beginning of the period of investigation, it was not able to do so at the conclusion of the period.

367. China also posits that "the recent decline in some factors is only demonstrating that factors are stabilizing."[399] Yet, as discussed above, the cold-finished bar industry's financial condition was not "stabilizing" at the conclusion of the period of investigation. Instead, financial indicators declined sharply after 1998. The deterioration of the industry's financial performance, which the ITC explained was "[t]he most pertinent indicator of the industry's condition,"[400] is simply ignored by China.

368. Consequently, the ITC objectively examined all pertinent factors and provided a reasoned explanation for its conclusion that the cold-finished bar industry was seriously injured. The United States therefore satisfied its obligations under Articles 2.1 and 4.2(a) of the Safeguards Agreement.

d. Rebar

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[396] ITC Report, pp. 102-04.
[397] China first written submission, para. 329.
[398] ITC Report, pp. 102-05.
[399] China first written submission, para. 329.
[400] ITC Report, p. 104.

369. In finding that the rebar industry was seriously injured, the ITC emphasized the industry's poor financial performance during the latter portion of the period of investigation. Its financial condition deteriorated sharply between 1999, when it had an operating margin of 5.0 percent, and 2000, when it had a operating margin of negative 1.6 percent. One producer declared bankruptcy in 2001. Additionally, the domestic industry's capital expenditures declined during each year of the period of investigation, and the 2000 expenditures were less than half the 1996 level. The domestic industry's market share was considerably lower in 2000, when it was 79.4 percent, than it was in 1996, when it was 89.4 percent.[401]

370. China complains that several of the factors analyzed by the ITC were positive, and that "the USITC had the obligation to explain how the negative factors outweighed the positive factors and why the overall situation of the industry was nevertheless severely impaired."[402] Yet this is precisely what the ITC did. In its opinion, it acknowledged that "several indicators pertaining to the rebar industry, such as capacity, production, and employment, increased during the period examined." It found, however, that these increases reflected strong increases in U.S. apparent consumption.[403] Indeed, apparent consumption increased during each year of the period of investigation, and was 48.1 percent higher in 2000 than it was in 1996. Apparent consumption also was higher in interim 2001 than in interim 2000.[404]

371. U.S. producers' shipments did not increase commensurately with apparent consumption, however, notwithstanding increases in the domestic industry's productive capacity. Consequently, as the ITC emphasized, the domestic industry lost substantial market share during the period of investigation. By 2000, the market share of the imports had increased to 20.6 percent, which was nearly double the 10.6 import market share in 1996.[405] Contrary to China's assertions, by 2000 import market share was not "low" in either an absolute or relative sense. Relying on this consideration was clearly consistent with Article 4.2(a), which specifically references "the rate and amount of the increase in imports of the products concerned in absolute and relative terms" as a pertinent factor in evaluating serious injury.

372. The ITC further explained that it was highly pertinent that the domestic rebar industry had sharply deteriorating financial performance during the latter portion of the period of investigation, notwithstanding its increases in output. China hypothesizes that "it may well be that the losses incurred by the industry towards the end of the POI are just part of a cycle."[406] Yet there was no evidence in the record for finding that the domestic industry's financial performance was a reflection of a business cycle. The record did not show an industry with cyclical patterns -- it showed one that had continued and sustained increases in demand for its product throughout

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[401] ITC Report, pp. 110-11.
[402] China first written submission, para. 335.
[403] ITC Report, p. 111.
[404] ITC Report, p. 112.
[405] ITC Report, p. 110.
[406] China first written submission, para. 334.

the period of investigation. Rebar producers' inability to operate profitably during a time of record demand was a clear indication of serious injury.

373. Again, the ITC objectively considered all the pertinent data and provided a reasoned basis in finding that the rebar industry was seriously injured. That finding is consistent with Articles 2.1 and 4.2(a) of the Safeguards Agreement.

e. Certain Welded Pipe

374. The ITC's determination on certain welded pipe was based on threat of serious injury. While the ITC found that the industry producing certain welded pipe was not seriously injured, it characterized its overall condition as "weak."[407] It concluded that serious injury appeared imminent on the basis of the following considerations:

a. Production had declined since 1998 despite generally stable U.S. apparent consumption. Production was lower in 2000 than in any prior year of the period of investigation except 1996. It was also lower in interim 2001 than in interim 2000. Domestic producers' U.S. shipments declined in 2000 and in interim 2001.[408] Two production facilities closed in 2000 and 2001.[409]

b. Capacity utilization fell sharply in 1999 and 2000, and in 2000 was at its lowest level of any full year in the period of investigation. Capacity utilization was lower in interim 2001 than in interim 2000.[410]

c. After fluctuating during the first four years of the period of investigation, U.S. producers' market share fell sharply in 2000, and declined further in interim 2001.[411]

d. Domestic producers' operating income was at its lowest full-year level in 2000. The industry's operating margin fell sharply in 2000, and was lower in interim 2001 than in interim 2000. The number of producers reporting operating losses increased from five of 32 firms in 1998, to 12 of 32 firms in 1999 and 2000, and 11 of 32 firms in interim 2000 and interim 2001.[412]

e. Employment in the industry fell in 1999 and 2000, and was close to the lowest level of the period of investigation in 2000. Wages showed similar trends. Interim 2001

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[407] ITC Report, p. 159.
[408] ITC Report, p. 160.
[409] ITC Report, p. 161.
[410] ITC Report, p. 160.
[411] ITC Report, p. 161.
[412] ITC Report, p. 161, Table TUBULAR-18.

employment levels were above those of 2000, but wages and the number of hours worked were not.[413]

375. In challenging the ITC's analysis of Article 4.2(a) factors for the industry producing certain welded pipe, China and Switzerland do not address the totality of the analysis. Instead, they focus on isolated findings of the ITC with which they disagree. As demonstrated below, these arguments are without merit and the ITC objectively examined all relevant data and fully explained the basis for its conclusions concerning the situation of the industry.

376. China contends that the ITC did not adequately consider that demand for certain large diameter pipe products manufactured by the domestic industry producing certain welded pipe was likely to increase. This is not correct. The ITC acknowledged in its report that there had been a recent increase in demand for large diameter line pipe and that continued growth in this market segment was likely.[414]

377. The ITC provided two reasons why this fact did not detract from its conclusion of threat of serious injury. It first observed that large diameter line pipe accounted for only 20 to 30 percent of the entire industry producing certain welded pipe.[415]

378. While China argues that this factor is "very important,"[416] the ITC was justified in concluding that it should not have been dispositive. The ITC was analyzing serious injury on the basis of the industry as a whole.[417] In making an analysis for 100 percent of the industry, the ITC was not compelled to conclude that increased demand in 20 percent of the industry outweighed the remaining 80 percent facing different conditions of competition.

379. This relates to the second reason that the ITC did not find the increase in demand for large diameter line pipe to be dispositive. As the ITC noted, demand for this product had already begun to increase. Consequently, whether the increase in demand for large diameter line pipe would affect demand in the entire industry would be apparent in the data collected in the ITC investigation.

380. However, overall demand for certain welded pipe had not increased appreciably during the latter portion of the period of investigation. Instead, as the ITC observed, it had remained

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[413] ITC Report, p. 161.
[414] ITC Report, p. 166.
[415] ITC Report, p. 166.
[416] China first written submission, para. 342.
[417] As previously stated, there was consequently no obligation for the ITC to engage in any sectoral analysis. Certainly there was no obligation on the ITC to engage in a separate analysis of very minor segments of the industry, such as the precision tube segment identified by Switzerland. *See* Switzerland first written submission, para. 268.

generally stable since 1998.[418] Apparent U.S. consumption of certain welded pipe had declined 0.4 percent from 1998 to 1999, increased 0.8 percent from 1999 to 2000, and was 0.2 percent higher in interim 2001 than in interim 2000.[419]

381. Consequently, although the increases in demand for large diameter line pipe observed at the conclusion of the period of investigation had been sufficient to stabilize overall U.S. demand for certain welded pipe, it had not been sufficient to prevent the declines in shipments, production, and capacity utilization observed during these periods. Insofar as the ITC concluded that demand conditions for the imminent future would be the same as those observed during the latter portion of the period of investigation, it was justified in finding that the unfavorable trends in output-related factors for the entire industry producing certain welded pipe it had observed during these periods would continue.

382. Switzerland also challenges the ITC's findings of threat of serious injury pertaining to the industry producing certain welded pipe. However, in requesting establishment of a Panel, Switzerland did not include a claim that the U.S. findings of serious injury or threat of serious injury was inconsistent with Articles 2.1 and 4.2 of the Safeguards Agreement.[420] Thus, this claim is outside the Panel's terms of reference, and there is no basis for the Panel to address it. However, if the Panel decides to address this issue, it should find that the Complainant has failed to meet its burden of proof.

383. Switzerland criticizes the ITC's determination on the basis that certain factors, such as employment and U.S. shipment quantity, were higher in 2000 than in 1996, and that the operating income of the industry producing certain welded tubular products remained positive. This argument overlooks that the ITC's determination was based on threat of serious injury rather than serious injury. The ITC acknowledged that the industry's condition was not at the level of serious injury.

384. Instead, the ITC found that the industry's condition would imminently deteriorate to the level of serious injury. In so doing, the ITC put particular emphasis on declines since 1998 in many factors -- in particular production, shipments, capacity utilization, financial performance, and employment. This is fully consistent with the statement of the Appellate Body that, for purposes of the Safeguards Agreement, "data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury."[421]

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[418] ITC Report, p. 158.

[419] ITC Report, table TUBULAR-C-4.

[420] Switzerland's challenges under Article 4.2 concerned only increased imports, parallelism, and causal link. WT/DS253/5, paras. 2, 4, 5.

[421] *US – Lamb Meat*, AB Report, para. 137.

385. The Appellate Body has also instructed that "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."[422] Consistent with this instruction, the ITC did not rely solely on the fact that important indicators of industry performance had declined during the latter portion of the period of investigation. Instead, it emphasized that in 2000 several of these indicators were at their lowest full-year level during the period of investigation (*i.e.,* capacity utilization, market share, operating income), or were only marginally higher than the period lows (*i.e.,* production, employment).[423] The ITC thus fully explained why the declines it observed during the latter portions of the period of investigation demonstrated an imminent threat of serious injury.

386. Finally, Switzerland appears to criticize the ITC for failing to consider in its analysis of threat of serious injury whether "the relevant US domestic industry actually failed to adapt to the adjustment process of the steel industry world wide." While Switzerland does not identify the nature of the "adjustment process" it believes the U.S. industry should have followed, its argument may relate to the nature of investment policies followed and capacity expansion undertaken by the domestic industry producing certain welded pipe.[424]

387. The ITC did explain in its report that growth in capacity largely tracked increases in U.S. apparent consumption of certain welded pipe from 1996 to 2000.[425] This discussion appears pertinent to the inquiry contemplated under Article 4.2(a) of the Agreement with respect to "relevant factors of an objective and quantifiable nature having a bearing on the situation of [the domestic] industry."

388. Switzerland does not explain why a more generalized discussion of "the adjustment process of the steel industry worldwide" is required under Article 4.2(a). This topic clearly does not pertain to any factor expressly listed under Article 4.2(a). Nor is the topic even analogous to any factor listed under Article 4.2(a). The focus in that provision is on objective, empirical factors "having a bearing on the situation" of the pertinent domestic industry. These factors describe or indicate the state of the industry, as opposed to considerations not subject to quantification that may have an effect on the domestic industry. By contrast, an analysis of the effects of worldwide conditions of competition would appear more properly to relate to the evaluation of the causal link between increased imports and serious injury required under Article 4.2(b).[426] The ITC's consideration of all the factors expressly listed in Article 4.2(a), together

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[422] *US – Lamb Meat*, AB Report, para. 138.

[423] ITC Report, pp. 160-61.

[424] *See* Switzerland first written submission, paras. 269-71.

[425] ITC Report, p. 160.

[426] *Cf. Canada -- Countervailing Duties on Grain Corn from the United States*, Panel Report, BISD39S/411, adopted 26 March 1992, para. 5.2.9 (finding, in dispute under Tokyo Round Subsidies Agreement, that effects on domestic industry of worldwide market conditions pertinent to issue of causal link). Indeed, the ITC's analysis of causal link for the industry producing certain welded pipe specifically discussed capacity trends in the

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with several other empirical factors relevant to evaluation of the condition of the domestic industry producing certain welded tubular pipe, fully satisfies the requirements of that provision.

f. Stainless Steel Wire

389. As discussed in section H below, the determinations of the three ITC Commissioners (Koplan, Bragg, and Devaney) that cast affirmative votes on domestic industries including stainless steel wire constitute the determination of the United States with respect to that product.

390. Chairman Koplan made an affirmative determination of threat of serious injury based on a domestic industry producing stainless steel wire. He emphasized pervasive declines in many industry indicators between interim 2000 and interim 2001. These included shipments, production, market share, productivity, employment, wages and financial performance. Shipments and production fell at a rate far exceeding the decline in apparent consumption between interim 2000 and interim 2001. Several of the other factors were already at low levels or well below period peaks before they declined in interim 2001. For example, operating income, which declined rapidly between interim 2000 and interim 2001, was previously at "low" levels from 1996 to 2000. Employment indicia had declined throughout the entire period of investigation. Capital expenditures had declined sharply since 1998.[427] Commissioner Bragg based her determination on a domestic industry producing both stainless steel wire and stainless steel wire rope. She likewise cited pervasive declines in industry performance from interim 2000 to interim 2001.[428] Commissioner Devaney also found that the pertinent domestic industry produced both stainless steel wire and stainless steel wire rope. He found this industry to be seriously injured, citing inadequate profitability and declines in market share, employment, and capital expenditures.[429]

391. China's argument that there is "a lack of reasoned and adequate explanation" in the opinion of the affirmative-voting Commissioners is baseless.[430] Each of the affirmative-voting Commissioners provided a lengthy analysis of the Article 4.2(a) factors, and explained how these factors supported their affirmative conclusions.[431]

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[426] (...continued)
United States and worldwide. *See* ITC Report at 164-65. This issue is discussed in more detail below in the discussion of causation.

[427] ITC Report, pp. 256-57.

[428] ITC Report, pp. 288-89.

[429] ITC Report, pp. 344-45. China, the sole Complainant to challenge the ITC's serious injury findings with respect to stainless steel wire, does not meaningfully address the rationale of Commissioner Devaney, and thus fails to make a *prima facie* case with respect to his serious injury finding.

[430] China first written submission, para. 346.

[431] China inquires whether the affirmative voting Commissioners "rebutted the interpretations and conclusions of the three commissioners that voted in the negative." China first written submission, para. 346. However, the determinations of those Commissioners who voted in the negative with respect to stainless steel wire were determined by the President not to be the determination of the ITC. WTO Members are entitled to establish
(continued...)

392. China's additional argument, that affirmative threat determinations were not warranted in light of "slight" declines in indicators during the latter portion of the period of investigation and the condition of the industry was "overall positive," mischaracterizes and fails to address or acknowledge the findings that Commissioners Koplan and Bragg actually made. Neither Commissioner found the current condition of the industry to be "overall positive." Chairman Koplan emphasized the low operating margins of the industry.[432] Commissioner Bragg characterized industry performance as "not strong."[433] Both Commissioners noted significant declines between the interim periods in production, capacity utilization, market share, and employment.[434]

393. Consequently, both Commissioners Koplan and Bragg evaluated the declines in industry indicators during interim 2001 in the context of the industry's lackluster performance overall during the period of investigation as a whole. As a consequence, both their analyses and explanations of threat of serious injury with respect to domestic industries producing stainless steel wire satisfy the requirements of Articles 2.1 and 4.2(a).

E. The ITC's Causation Analysis Was in Accordance with the Requirements of the Safeguards Agreement

394. The ITC's causation analysis was fully in accordance with Articles 2.1 and 4.2 of the Safeguards Agreement. For each of the ten products for which it found that increased imports had caused or threatened to cause serious injury to the industry, the ITC thoroughly and objectively analyzed the record evidence and then established unambiguously that there was a "genuine and substantial" causal link between increased imports and serious injury. In addition, for all ten products, the ITC ensured that the injury caused by other factors was not attributed to increased imports, and provided a detailed analysis to support this finding. By doing so, the ITC satisfied its obligation to separate and distinguish the effects of imports from the effects of other injury factors.

395. Accordingly, the arguments made by Complainants to the contrary have no merit and should be rejected by the Panel. We discuss these issues in detail below.

1. The Causation Requirements of the Safeguards Agreement

a. Articles 2.1 and 4.2 of the Safeguards Agreement

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[431] (...continued)
their own decision-making processes for reaching determinations in applying safeguard measures. *US -- Line Pipe*, AB Report, para. 158. In particular, there is nothing in the Safeguards Agreement requiring competent authorities in their report to respond to the views of persons or entities who may participate in the investigation, but are not part of the authority that has made the serious injury determination.

[432] ITC Report, p. 257.

[433] ITC Report, p. 288.

[434] ITC Report, pp. 256-57, 288-89.

396. Articles 2.1 and 4.2 of the Safeguards Agreement contain the basic requirements that are applicable when the competent authority of a Member analyzes whether there is a "genuine and substantial" causal link between increased imports and the serious injury, or threat thereof, that is suffered by an industry.[435]

397. Article 2.1 of the Safeguards Agreement provides that a Member may only apply a safeguard remedy 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."

398. Article 4.2(b) sets forth the general analytical parameters that are applicable to a competent authority's causation analysis in a safeguards proceeding. Article 4.2(b) first provides that 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."

399. Article 4.2(a) of the Safeguards Agreement provides a more specific discussion of the causation analysis that is expected under Articles 2.1 and 4.2. In particular, Article 4.2(a) states that, when determining "whether increased imports have caused or are threatening to cause serious injury to a domestic industry," a competent authority shall evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry," including:

- 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; and
- changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.[436]

400. The Safeguards Agreement contains no other provisions directly identifying or explaining the nature of the causation analysis that must be conducted by a competent authority before imposing a safeguards measure.

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[435] *See US - Wheat Gluten*, AB Report, para. 69; *US - Lamb*, AB Report, para. 179.
[436] Safeguards Agreement, Article 4.2(a).

b. The Appellate Body's Description of the Causation Requirements of the Safeguards Agreement

401. The Appellate Body has described the basic requirements applicable to a causation analysis under the Safeguards Agreement on several occasions.[437] As a general matter, the Appellate Body has stated that Article 4.2(b) of the Safeguards Agreement contains "two distinct legal requirements" that must be satisfied for a safeguard action to comply with the Agreement.[438] First, as indicated in the first sentence of Article 4.2(b), the authority must demonstrate the "'existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.'"[439] Second, as set forth in the second sentence of Article 4.2(b), the competent authority must ensure that the "injury caused by factors other than the increased imports [is] . . . not . . . attributed to increased imports."[440]

i. *Existence of the Requisite Causal Link between Imports and Serious Injury*

402. The Appellate Body has consistently stated that the "primary objective" of a Member when conducting a safeguards investigation is to "determine whether there is 'a genuine and substantial relationship of cause and effect' between increased imports and serious injury and threat thereof."[441] Accordingly, when interpreting Article 4.2(a) and 4.2(b), first sentence, of the Agreement, the Appellate Body has stated that the "central" consideration in a causation analysis is assessing whether there is a "'relationship between the movements in imports (volume and market share) and the movement in injury factors."[442]

403. However, the Appellate Body has indicated that, even in the absence of a "coincidence between an increase in imports and a decline in the relevant injury factors," a competent authority is not precluded from finding that there is the requisite causal link between increased imports and serious injury;[443] instead, the competent authority may still find the causal link needed to justify a safeguard action if the authority provides a "compelling analysis of why causation is still present."[444]

ii. *The Requirement Not to Attribute to Imports the Effects of Other Injurious Factors*

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[437] *See US - Line Pipe*, AB Report, paras. 200-222; *US - Lamb Meat*, AB Report, paras. 162-188; *U.S. - Wheat Gluten*, AB Report, paras. 60-92; *Argentina - Footwear*, AB Report, paras. 140-47.

[438] *US - Line Pipe*, AB Report, para. 208.

[439] *US - Line Pipe*, AB Report, para. 208.

[440] *US - Line Pipe*, AB Report, paras. 208.

[441] *US - Lamb Meat*, AB Report, para. 179.

[442] *Argentina – Footwear*, AB Report, para. 144.

[443] *Argentina - Footwear*, AB Report, para. 144.

[444] *Argentina - Footwear*, AB Report, para. 144.

404. Under the second sentence of Article 4.2(b) of the Safeguards Agreement, a competent authority must also ensure that the "injury caused by factors other than the increased imports . . . [is] not . . . attributed to increased imports."[445] Although the Appellate Body has explained this requirement in different ways in its prior safeguard reports,[446] it made its clearest statement about the requirements of this provision in its *US - Line Pipe* report.[447] In that report, the Appellate Body reiterated its prior statements that the second sentence of Article 4.2(b) requires that:

> In a situation where several factors are causing injury "at the same time," a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated . . . . The non-attribution language in Article 4.2(b) . . . [thus] 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.[448]

405. In light of this, the Appellate Body continued, the competent authorities should "identify the nature and extent of the injurious effects of the known factors other than increased imports," and "explain satisfactorily" how they have distinguished the effects of those factors from the effects of increased imports.[449] Accordingly:

> [T]o fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must established explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[450]

iii. *Other Considerations*

406. In addition to the foregoing, it is important for the Panel to keep in mind several other critical aspects of the causation analysis required under the Safeguards Agreement as it reviews the ITC's causation analysis in this proceeding.

407. First, the Appellate Body has consistently found that imports need not be the "sole cause of serious injury" under Article 4.2(b).[451] Instead, the Appellate Body has stated that the Agreement's requirement of a "genuine and substantial" causal link between imports and serious

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[445] *US - Line Pipe*, AB Report, para. 208.
[446] *See, e.g., US - Wheat Gluten*, AB Report, para. 70.
[447] *US - Line Pipe*, AB Report, paras. 200-217.
[448] *US - Line Pipe*, AB Report, para. 211 (quoting *US - Lamb Meat*, AB Report at para. 179).
[449] *See US - Line Pipe*, AB Report, para. 213. The lack of textual basis for a requirement of an "explicit" finding is discussed in Section F.
[450] *US - Line Pipe*, AB Report, para. 217.
[451] *US - Line Pipe*, AB Report, paras. 209; *US - Wheat Gluten*, AB Report, para. 67.

injury is satisfied if imports simply "contribute to 'bringing about,' 'producing' or 'inducing' the serious injury" being suffered by an industry.[452] In other words, "the causation requirement of Article 4.2(b) can be met where the serious injury [suffered by an industry] is caused by the interplay of increased imports and other factors."[453] Thus, it is permissible under the Agreement for a competent authority to conclude that increased imports are causing serious injury to an industry, even if other factors are also causing injury, so long as imports themselves contribute substantially to bringing about serious injury.

408. Second, the requirement to conduct a detailed assessment of the nature and extent of the injury caused by both imports and other non-import factors is not applicable to a factor if that factor is not contributing to serious injury.[454] Accordingly, to the extent that the ITC finds that a factor was not contributing significantly to serious injury, the sole issue for review is whether the ITC's conclusion in this regard was reasoned and supported by the record, not whether the ITC performed the non-attribution analysis described by the Appellate Body in the *US - Wheat Gluten* case.

409. Third, the Appellate Body has stated that a competent authority must examine all "relevant factors" that are "objective and quantifiable" which "have a bearing on the state of the industry" when assessing whether imports have caused serious injury to an industry under the Safeguards Agreement.[455] As a corollary of this basic principle, it is clear that it is not enough for a reviewing Panel to find -- or a complainant to argue -- that the ITC's causation analysis is flawed simply because one or two indicia of the industry's condition have improved during a period when imports were increasing. Such an approach would not properly reflect the complexity of the economic analysis performed by the ITC in this proceeding, or the scope of the analysis required by the Safeguards Agreement.

410. Fourth, neither the Appellate Body nor previous Panels have required 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).[456] To the contrary, the *US - Lamb Meat* and *US - Wheat Gluten* panels have both stated specifically that a "Member is not necessarily required to quantify on an individual basis, the precise extent of 'injury' caused by each other possible [injurious] factor."[457] Indeed, in its most recent discussions of the attribution issue, the Appellate Body has explained that the Safeguards Agreement requires only a "reasoned and adequate explanation,"not a "quantitative" valuation, of the effects attributable to imports

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[452] *US - Wheat Gluten*, AB Report, para. 67 (emphasis added).
[453] *US - Line Pipe*, AB Report, para. 209.
[454] *See US - Line Pipe*, AB Report, para. 211; *US - Lamb Meat*, AB Report, para. 179.
[455] SA, Article 4.2(a); *US - Wheat Gluten*, AB Report, para. 51.
[456] *See, e.g., US - Line Pipe*, AB Report, paras. 200-217; *US - Wheat Gluten*, AB Report, paras. 60-92.
[457] *US - Lamb Meat*, Panel Report, para. 7.247; *US - Wheat Gluten*, Panel Report, para. 8.142.

and other factors.[458] Thus, the Agreement plainly permits a qualitative, rather than quantitative, assessment of the "nature and extent" of the injury caused by both imports and other factors in its causation analysis.

411. Indeed, the United States notes there is a sound rationale for not requiring a competent authority to "quantify" the effects of imports and other factors on the industry in a safeguards analysis. The Safeguards Agreement specifically requires that the competent authority consider a number of different factors in its causation analysis, including such factors as the rate and amount of the increase in imports in absolute and relative terms, the share of the domestic market taken by increased imports, and changes in the industry's level of sales, production, productivity, capacity utilization, profits and losses, and employment.[459] In addition, under the Agreement, the competent authority must take into account all other "relevant factors" of an "objective and quantifiable" nature having a bearing on the state of the industry.

412. To fulfill these requirements, which are also reflected in the U.S. statute,[460] the ITC considers a large number of individual indicators of industry condition in its causation analysis. For example, the ITC's summary charts for each product contain 32 separate indicia relating to the condition of the industry, including the industry's market share levels, production, production capacity, various employment indicia, net unit sales values, shipment and sales quantities, costs of goods sold, sales, general and administrative expenses, gross profits and operating income levels, among other things.[461] The summary charts also contain summaries of basic data concerning import competition in the market, including import quantities, market share, and average unit pricing.[462] Of course, these summary charts do not contain all of the data examined by the ITC in its analysis; the ITC's report also contains a broad array of other statistical data reflecting competition in the marketplace.[463] However, these summary charts show that, to meet the requirements of the Safeguards Agreement and the U.S. statute, the ITC collects, collates, and analyzes a broad range of data relating to the factors relevant to the effect of imports on the industry's condition.

413. Given the significant number of industry and import factors that must be considered under the Safeguards Agreement and the U.S. statute, it is clear that, to "quantify" the effects of imports and other factors, a competent authority would need to develop an economic model to address -- that is, "quantify" – the effects of imports and other factors on all factors required to be considered under the Safeguards Agreement and the U.S. statute. In other words, such a model would need to "quantify" the effect of imports and other non-import factors on the industry's prices, production levels, capacity and capacity utilization levels, revenue and profitability levels,

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[458] *US - Line Pipe*, AB Report, para. 217.
[459] Safeguards Agreement, Article 4.2(a).
[460] 19 U.S.C. §2252(c)(1) & (2).
[461] *See, e.g.,* INV-Y-209, Table FLAT-ALT7 (US-33).
[462] *See, e.g.,* INV-Y-209, Table FLAT-ALT7 (US-33).
[463] *See, e.g.,* ITC Report, Tables FLAT-14, FLAT-22, FLAT-36-38, FLAT-58-65, & FLAT-68-69.

productivity levels, employment levels, and capital investments levels, among other things. Moreover, the model would need to perform this analysis for each year of the period of investigation in order to assess the year-to-year changes attributable to imports and other factors during the period.[464]

414. The ITC has developed economic models to aid its analysis in safeguards and antidumping/countervailing duty proceedings. However, these models generally calculate the effects of unfairly traded imports or of tariffs, quotas or other remedies on one to three separate indicators of an industry's condition. For example, the comparative static model developed by the ITC for use in antidumping and countervailing duty proceedings generates estimates of the impact of dumped or subsidized imports on the volume, price, and revenue levels of an industry. However, the ITC's comparative static model does not generate a quantitative estimate of the impact of imports on such important factors as the profitability or cost levels of the industry, nor does it quantify the impact of imports on certain factors that are affected by discretionary business decisions, such as industry decisions to reduce employment or capital investment levels, enter bankruptcy, or shut down facilities.[465] As a result, these sorts of models do not result in a quantitative estimate of all factors that must be considered under the Safeguards Agreement or the U.S. statute.

415. In fact, the ITC is unaware of any existing individual economic model and analytical structure that accurately and effectively quantifies the effects of imports and other factors on all of the industry indicia that must be analyzed under the Safeguards Agreement or the U.S. statute. Moreover, to date, no representative of any party has offered such a model to the ITC during the course of its safeguards proceedings, or even during the course of proceedings before WTO panels. In other words, no one has yet presented to the ITC a single economic model that would

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[464] Moreover, if the Appellate Body or a panel were to conclude that the Agreement requires the ITC to quantify the effect of imports and other factors on these indicia, it would literally require the competent authority to perform such a calculation hundreds of separate times. For example, if there were three other causal factors in the market in addition to imports, the requirement would cause the authority to calculate -- at a minimum -- injury "quantifications" with respect to thirty-two injury criteria for four different causal factors (i.e., imports and the three other causal factors) for seven separate temporal periods -- that is, eight hundred and ninety six separate injury attribution calculations. Moreover, the competent authority would also have to perform a reasoned and adequate explanation of the manner in which it analyzed these quantifications in its finding of serious injury and causal nexus.

[465] It is also important to note that the ITC's comparative static model does generate a specific, "quantitative" estimate of the effects of dumped or subsidized imports on domestic revenues. However, this "quantitative" estimate is itself heavily dependent upon the use of a number of inputs into the model that essentially reflect "qualitative" assessments of particular conditions of competition in a market, such as the elasticity of supply, substitution and demand. Accordingly, although the model does generate "quantitative" assessments of import effects, it is nonetheless dependent on a set of qualitative inputs. Further, the model only incorporates a limited number of actual market statistics; it generally does not include all of the required industry indicia set forth in the Safeguards Agreement or the U.S. statute.

adequately and accurately address in a consistent fashion all of the individual industry factors that must be assessed under the Safeguards Agreement and the U.S. statute.[466]

416. Moreover, the conclusion that a competent authority must quantify the effects of imports and other factors for only one or two selected criteria of industry condition would not be consistent with the requirement under Article 4.2(a) that the competent authority assess the effects of imports on all relevant factors having a bearing on the condition of the industry, including its employment levels, productivity levels, or profitability levels. Indeed, picking a criterion (like profits or revenues or production) as a "proxy" for the overall injury being suffered by an industry simply places weight on that particular factor to the exclusion of other important indicia of the industry's condition (such as employment, capacity utilization, or capital investments). The Safeguards Agreement does not permit such a restricted analysis. Given the foregoing, it is clear that the Panel should not find that the ITC is required to "quantify" the effects of imports on the industry because it would reflect only an imprecise measurement of the overall level of injury suffered by an industry.

417. Finally, the United States notes that, to date, the Appellate Body has issued four reports which describe the general principles applicable to a causation analysis in a safeguards proceeding.[467] Nonetheless, the Appellate Body has specifically conceded 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)."[468] Thus, it is clear that the Appellate Body has left to the discretion of the competent authority the job of developing the appropriate analytical methodologies needed to satisfy the requirements of Article 4.2(b).

418. Any review of the ITC's causation analysis in the steel determination must take these considerations into account in order to ensure that the review is consistent with the requirements of the Safeguards Agreement, as construed by the Appellate Body and prior WTO panels.

2. The ITC's Analytical Methodology

419. 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

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[466] To the extent that Complainants assert that they did provide such a model to the ITC in the steel investigation, the ITC correctly rejected it as an accurate assessment of the effects of imports on the industry because it had "serious" methodological flaws. ITC Report, p. 59, n.260. The United States discusses these flaws in more detail below.

[467] *US - Line Pipe*, AB Report, paras. 200-217; *US - Wheat Gluten*, AB Report, paras. 65-79; *US - Lamb Meat*, AB Report, paras. 162-181; *Argentina - Footwear*, AB Report, paras. 140-145.

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

industry producing an article like or directly competitive with the imported article."[469] In order to assess whether imports are a substantial cause of serious injury or threat to the industry, the statute first 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.[470]

420. The statute then directs the ITC to consider in its causation analysis any "factors other than imports which may be a cause of serious injury, or the threat of serious injury, to the domestic industry" in question.[471] 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.[472] Accordingly, the ITC may only reach an affirmative finding in a safeguards proceeding (i.e., a finding that imports have caused serious injury), 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.[473]

421. Because of this statutory structure, the ITC has generally conducted a two-step analysis when performing its causation analysis in a safeguards proceeding.[474] As the first step in this process, the ITC conducts a thorough, detailed, and objective examination of all relevant economic data for the market in question,[475] focusing in particular on changing trends in the volume and pricing movements of imports and trends in the financial and trade indicia of the industry.[476] Moreover, the ITC examines the relevant economic factors in light of the particular conditions of competition that characterize that market.[477] 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.[478] As can be seen from the steel determination, the ITC has clearly described this entire process in its steel determination[479]

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[469] 19 U.S.C. §2252(b)(1)(A).
[470] 19 U.S.C. §2252(c)(1)(C) & (c)(2)(A).
[471] 19 U.S.C. §2252(c)(2)(B).
[472] 19 U.S.C. §2252(b)(1)(B).
[473] ITC Report, p. 34.
[474] This two step process follows, of course, the ITC's assessment of whether there have been increased imports during the period of investigation and whether the industry has been seriously injured or threatened with serious injury. *See* ITC Report., pp. 32-34. We note that, while this two step analysis is generally applied by members of the ITC, it is not necessarily the only methodology that could be applied consistent with the statute.
[475] *See, e.g.,* ITC Report, pp. 56-63 (certain carbon flat-rolled steel analysis); *see also* ITC Report, p. 34.
[476] *See, e.g.,* ITC Report, pp. 59-63.
[477] *See, e.g.,* ITC Report, pp. 56-58.
[478] *See, e.g.,* ITC Report, pp. 59-63.
[479] ITC Report, pp. 29-35.

and conducted such an analysis for each of the steel products for which the President imposed a remedy.[480]

422. 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. [481] 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.[482] 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.[483]

423. As is consistent with the requirements of the Safeguards Agreement,[484] the ITC does not attempt to place a numerical value (that is, "quantify") on the amount of the injury caused by imports or any other factor.[485] Instead, the ITC closely examines all of the data relating to the nature and extent of the injury caused by imports and any alternative factors causing injury, 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.[486] Only by doing so is the ITC is able to assess -- as required by U.S. law[487] – whether increased imports contributed as importantly to injury as any other factor causing injury.[488] As a result, the ITC may only make an affirmative finding if it finds that imports are the most important cause of injury to the industry, or at the least, as important as the most important alternative factor causing injury.

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

424. As described in detail below, the ITC's causation analyses in the steel determinations were fully in accordance with the requirements set forth in Articles 2.1 and 4.2 of the Safeguards Agreement, as construed by the Appellate Body.

425. For the ten steel products for which the President imposed a safeguard remedy, the ITC considered all of the record evidence and concluded that there was a genuine and substantial

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

[481] *See, e.g.,* ITC Report, pp. 63-65.

[482] *See, e.g.,* ITC Report, pp. 63-65.

[483] *See, e.g.,* ITC Report, pp. 63-65.

[484] *US - Lamb Meat*, Panel Report, para. 7.247; *US - Wheat Gluten*, Panel Report, para. 8.142.

[485] *See, e.g.,* ITC Report, pp. 59-65.

[486] *See, e.g.,* ITC Report, pp. 63-65 (certain carbon flat-rolled steel).

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

[488] *See, e.g.,* ITC Report, pp. 63-65.

relationship of cause and effect between increased imports of the product and serious injury to the industry producing the like product. In each case, the ITC found that there was a clear correlation between the volume and price trends of imports and declines in the overall condition of the industry. Moreover, for each product, the ITC also conducted a detailed and well-reasoned discussion of the ample record evidence showing that there was a genuine and substantial correlation between increased imports and serious injury.

426. Moreover, for each of these products, the ITC established explicitly, in a well-reasoned and detailed manner, that it did not attribute injury caused by non-import factors to increased imports. As can be seen, and consistent with the conclusions of the Appellate Body, the ITC appropriately identified and distinguished the effects of imports from those of other factors when performing its causation analysis. By doing so, it ensured that it did not attribute the injurious effects of those factors to imports when finding that there was a "genuine and substantial" causal link between increased imports and the serious injury being suffered by the industry. Moreover, its conclusions with respect to the nature and extent of injury attributable to these causes are supported by ample record evidence.

427. The United States discusses these issues below for each of the individual steel products in question. Because Complainants make a number of general arguments that apply to all ten of the products for which a remedy was imposed, the United States first addresses the significant flaws in these broader comments. The United States then addresses in detail the arguments made by Complainants that are specific to each of the ten steel products in question.

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

428. In challenging the ITC's causation analyses in this proceeding, Complainants make a number of general points that apply across the range of steel products for which the President imposed a remedy. All of these general arguments are flawed because they mischaracterize or ignore the findings in the ITC's determination, misconstrue prior findings and recommendations of the Appellate Body, or misinterpret the requirements of the Safeguards Agreement and U.S. law. According, their arguments should be rejected by the Panel.

i. *The Commission Has Not Ignored or Flouted the Appellate Body's Prior Legal Findings On Causation*

429. First, almost all of the Complainants assert that the United States has ignored or "flouted" the Appellate Body's three prior reports addressing the ITC's causation analysis[489]

[489] That is, in *US - Wheat Gluten*, AB Report, paras. 60-92; *US - Lamb*, AB Report, paras. 162-188; *US Line Pipe*, AB Report, paras. 200-222.

when performing its analysis in the steel investigation.[490] These Complainants assert that the United States has improperly persisted in performing the same causation analysis utilized in prior safeguards proceedings, even though the Appellate Body has supposedly found that analysis to be inconsistent with the Safeguards Agreement.[491] Indeed, Japan goes so far as to assert that this "flouting"of the Appellate Body's "unmistakable" guidance on causation shows a lack of "good faith" on the part of the United States or a lack of "respect" for its WTO obligations.[492]

430. Complainants' arguments on this score are meritless. Their arguments simply reflect an incorrect understanding of the Appellate Body's previous findings, and a flawed understanding of the Appellate Body's role in construing the causation requirements of the Safeguards Agreement.

431. First, as can be seen from an examination of the explicit language of the Appellate Body's three prior reports, the Appellate Body has never stated -- as Complainants argue -- that the ITC's two step causation methodology is inconsistent with the basic requirements of Article 4.2(b).[493] Instead, on the three occasions that it addressed the ITC's causation analysis, the Appellate Body has faulted the ITC not for its choice of a particular causation analysis or for applying the "substantial cause" standard set forth in the statute, but because the ITC did not perform a "reasoned and adequate" explanation of the nature and extent of the injury caused by non-import factors in those particular cases, in the view of the Appellate Body.[494]

432. For example, in its *US -Wheat Gluten* report, the Appellate Body did not find that the ITC's two-step analysis causation was inconsistent with the Agreement.[495] Instead, the Appellate Body found that the ITC's discussion of causation was flawed because it linked the industry's capacity utilization declines to imports without assessing whether the declines were due to the industry's decision to increase capacity during the period.[496] Similarly, in the *US - Line Pipe* and *US - Lamb Meat* reports, the Appellate Body found the ITC's analysis flawed not because it relied on the two-step analysis described above, but because the ITC did not perform a sufficiently thorough explanation of its non-attribution findings.[497] Given this, it is clear that these cases do not stand for the proposition -- as argued by several Complainants -- that the United States' entire causation analysis is inherently flawed under the Agreement. Instead, in

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[490] *See* Japan First written submission, para. 227, 249 & 250; EC First written submission, paras. 435, 454, & 459; Brazil First written submission, para. 158; New Zealand First written submission, para. 4.120; Switzerland First written submission, paras. 278 & 297; Norway First written submission, paras 298-301.

[491] *See* Japan First written submission, para. 227, 249 & 250; EC First written submission, paras. 435, 454, & 459; Brazil First written submission, para. 158; New Zealand First written submission, para. 4.120; Switzerland First written submission, paras. 278 & 297; Norway First written submission, paras 298-301.

[492] Japan First written submission, para. 227.

[493] *US - Lamb Meat*, AB Report, paras. 162-188; *US - Line Pipe*, AB Report, paras. 200-222; *US - Wheat Gluten*, AB Report, para. 60-92.

[494] *US - Lamb Meat*, AB Report, paras. 184-188; *US - Line Pipe*, AB Report, paras. 217-222; *US - Wheat Gluten*, AB Report, para. 91.

[495] *US - Wheat Gluten*, AB Report, paras. 80-92.

[496] *US - Wheat Gluten*, AB Report, paras. 80-92.

[497] *US - Lamb Meat*, AB Report, paras. 186; *US - Line Pipe*, AB Report, paras. 220-222.

these reports, the Appellate Body has simply found that the ITC should have discussed in more detail its analysis of the causal nexus between imports and injury.

433. In fact, the Appellate Body has actually approved the ITC's general analytical approach in several significant respects. For example, in *US - Lamb Meat*, the Appellate Body explicitly noted that, by "examining the relative causal importance of different causal factors" as required under the U.S. statute, the ITC clearly engages in the sort of "process to separate out, and identify, the effects of the different factors, including increased imports . . ." that has been required by the Appellate Body in *US - Wheat Gluten*.[498] Although the Appellate Body went on to state that it was, nonetheless, required to examine the ITC's reasoning in detail to assess whether it complied with the analytical guidelines announced in *US - Wheat Gluten*, it is clear from this statement that the Appellate Body does not believe that the "substantial cause" test set forth in the statute and applied by the ITC is inherently inconsistent with the Safeguards Agreement.

434. Similarly, the Appellate Body has approved the U.S. statute's definition of causal link between imports and injury that is required to make an affirmative finding in a safeguards proceeding. In this regard, the Appellate Body has twice firmly rejected arguments that the statutory "substantial cause" standard is inherently inconsistent with the Safeguards Agreement because it does not require increased imports to be the "sole" or a "sufficient" cause of serious injury.[499] In rejecting these arguments, 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.[500] In other words, "the causation requirement of Article 4.2(b) can be met where the serious injury [suffered by an industry] is caused by the interplay of increased imports and other factors."[501] Accordingly, the Appellate Body has clearly found no fault with the U.S. statute's "substantial cause" test insofar as it permits the ITC to make an affirmative causation finding if increased imports have made an "important" contribution to serious injury, rather than requiring them to be the "sole" cause of serious injury.[502]

435. Moreover, the Appellate Body has left undisturbed two Panel findings that a competent authority is not required to "quantify" the precise amount of injury attributed to imports or other

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[498] *US - Lamb Meat*, AB Report, para. 184.

[499] *US - Lamb Meat*, AB Report, paras. 162-170; *US - Wheat Gluten*, AB Report, paras. 67-79.

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

[501] *US - Line Pipe*, AB Report, para. 209; *US - Wheat Gluten*, AB Report, para. 67-68 (emphasis added).

[502] Given these clear findings by the Appellate Body, the United States notes that a number of the Complainants are simply wrong when they suggest that Articles 2.1 and 4.2(b) require a competent authority to find that increased imports are themselves the sole cause of serious injury. *See, e.g.,* EC First written submission, para. 438; Norway First written submission, para. 283; Switzerland First written submission, para. 280. As the Appellate Body has stated, the requisite level of causation to serious injury is satisfied if increased imports contribute to bringing about, producing, or inducing the serious injury. *US - Line Pipe*, AB Report, para. 209; *US - Wheat Gluten*, AB Report, para. 67-68. Imports need not be the sole cause of that injury.

injurious factors as part of its non-attribution analysis under Article 4.2(b).[503] In this regard, as we noted previously, the *US - Lamb Meat* and *US - Wheat Gluten* panels both stated specifically that a "Member is not necessarily required to quantify on an individual basis, the precise extent of 'injury' caused by each other possible [injurious] factor."[504] Given this, it is clear that the Commission's analytical process of performing a qualitative, rather than quantitative, assessment of the "nature and extent" of the injury caused by both imports and other factors in its causation analysis is not inconsistent with the requirements of Article 4.2(b).[505]

436. Finally, it is important to note that the Complainants' arguments reflect a flawed understanding of the Appellate Body's role in reviewing the causation requirements of the Safeguards Agreement. As the Appellate Body has stated, the Safeguards Agreement simply does not allow it to dictate a particular "method and approach [that] WTO Members [must] choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors" when performing its causation analysis.[506] Moreover, even though the Appellate Body outlined in *US - Wheat Gluten* a sequence of analytical steps that a competent authority should perform as part of its non-attribution analysis,[507] it later took pains to emphasize that the analytical steps outlined in *US - Wheat Gluten* "simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b)."[508] The Appellate Body did not state that other processes or approaches were impermissible. Indeed, it acknowledged that the *Wheat Gluten* guidelines were not actually "legal 'tests' mandated by the text of the Agreement on Safeguards," and that it was not "imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities."[509] Accordingly, the Appellate Body has clearly confirmed that the Agreement does not require a particular causation approach or methodology, thus undermining what is clearly a core premise of Complainants' arguments.

437. In sum, the United States has not ignored the Appellate Body's prior findings in its analysis. Those findings have not directed the United States or the ITC to change the United States' overall causation methodology nor have they found the ITC's two-step analysis to be inconsistent with the requirements of the Agreement. Instead, these findings have simply either criticized the ITC's factual findings on causation or the thoroughness of the ITC's discussion of the injury caused by imports and other factors. In light of this, the Complainants' argument that the ITC has failed to bring its analytical approach into "compliance" with prior Appellate Body guidance is meritless.

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

[504] *US - Lamb Meat*, Panel Report, para. 7.247; *US - Wheat Gluten*, Panel Report, para. 8.142.

[505] In this regard, as discussed above, the quantification of serious injury presents significant legal and analytical issues under the Safeguards Agreement.

[506] *US - Lamb*, AB Report, para. 181.

[507] *US - Wheat Gluten*, AB Report, para. 69.

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

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

ii. *The United States's "Substantial Cause" Standard is Actually A More Rigorous Requirement than That Contained in the Safeguards Agreement*

438. In addition to complaining that the United States has ignored the Appellate Body's prior rulings, several Complainants assert that the "substantial cause" standard set forth in the U.S. statute will inherently lead to a violation of Articles 2.1 and 4.2(b) of the Agreement because it requires a "relative comparison" of the injurious effects of imports and non-import factors and does not therefore require the "separation and distinction" of the injurious effects of other factors,[510] as required by the Appellate Body.[511] Again, Complainants misconstrue the United States' practice in this area and the requirements of the Articles 2.1 and 4.2(b) of the Agreement.[512]

439. As an initial matter, it is clear that the "substantial cause" test set forth in the U.S. safeguards statute does not merely require the ITC to perform a "relative comparison" of injury caused by imports and non-import factors, as Complainants assert. Instead, the U.S. statute requires the ITC to make two separate findings when analyzing the nature and extent of the injury caused by imports and other factors. First, the ITC must determine that increased imports are -- in and of themselves -- an "important" cause of serious injury to the domestic industry.[513] Secondly, the ITC must also determine that imports are as "important" or more "important" a cause of injury than any other factor.[514] Accordingly, it is clear that it is not sufficient under the U.S. statute for the ITC to find simply that imports are causing more injury than other factors, as Complainants would have it. Instead, the U.S. statute specifically requires that the ITC must find that imports are an "important" cause of serious injury as well.

440. In light of these requirements, it is also clear that the "substantial cause" test does, in fact, require the ITC to identify the nature and extent of the individual factors causing injury to the industry, including increased imports. As set forth above, the statute first requires the ITC to identify the nature and extent of the injury caused by imports by assessing whether increased imports are an "important" cause of serious injury.[515] The statute also requires the ITC to "examine factors other than imports" that are causing injury and to compare the "importance" of

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[510] *See, e.g.,* EC First written submission, paras. 454-459; New Zealand First written submission, paras. 4.120-4.122; Switzerland First written submission, para. 297; Norway First written submission, para. 298-300.

[511] In this regard, the United States notes that none of the Complainants assert that they are challenging the statute as being inconsistent with the Safeguards Agreement on its face. They are instead challenging the statute as applied in this case. *See* EC First written submission, para. 454; Switzerland First written submission, para. 297; Norway First written submission, para. 298.

[512] In this regard, the United States notes that it has previously discussed the fact that the Appellate Body has affirmed significant aspects of the ITC's causation methodology in its prior reports.

[513] 19 U.S.C. §2252(b)(1)(B).

[514] 19 U.S.C. §2252(b)(1)(B).

[515] 19 U.S.C. §2252(b)(1)(B) & (c)(1)(C); *see also* ITC Report, p. 34.

that injury to that caused by imports.[516] 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. In fact, as noted above, the Appellate Body obviously recognized this when it stated in *US --Lamb Meat* 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 . . ."[517] Accordingly, it is clear that the "substantial cause" test of the U.S. statute not only permits, but in fact 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. Complainants are simply wrong on this matter.

441. It is important to point out several other aspects of the "substantial cause" test as well. First, it is clear that the "substantial cause" test of the statute is fully consistent with the basic requirements of Articles 2.1 and 4.2(b) of the Agreement insofar as it permits the ITC to make an affirmative causation finding if imports "contribute" in an "important" manner to serious injury. As the United States previously noted, the Appellate Body has twice stated that increased imports need not be the "sole" or "only" cause of serious injury.[518] Instead, the Appellate Body has affirmed that increased imports need only be found to "contribute to 'bringing about,' 'producing' or 'inducing' the serious injury" being suffered by an industry.[519] Or, as further explained by the Appellate Body, "the causation requirement of Article 4.2(b) can be met where the serious injury [suffered by an industry] is caused by the interplay of increased imports and other factors."[520] Accordingly, it is well-settled under the Safeguards Agreement that the ITC may make an affirmative causation finding if increased imports and other non-import causes are both causing serious injury to an industry at the same time, so long as the contribution of imports to that injury is "important."

442. Second, by requiring the ITC to 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 find there is a "genuine and substantial" causal link between imports and serious injury before issuing an affirmative safeguards finding, as the Appellate Body has stated.[521] In this regard, the United States notes that the standard dictionary definitions of the words "substantial" and "important" show that the words have essentially the same meaning when used to defined the degree of weight that must be given a particular factor in a decision or analysis.[522] For example, 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

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[516] 19 U.S.C. §2252(b)(1)(B) & (c)(2)(B); *see also* ITC Report, p. 34.
[517] *US - Lamb Meat*, AB Report, paras. 184.
[518] *US - Wheat Gluten*, AB Report, para. 67 (emphasis added).
[519] *US - Wheat Gluten*, AB Report, para. 67 (emphasis added).
[520] *US - Line Pipe*, AB Report, para. 209; *US - Wheat Gluten*, AB Report, para. 67-68.
[521] *US - Lamb Meat*, AB Report, para. 179.
[522] The New Shorter Oxford English Dictionary, 1993 Edition, pp. 1324 & 3124.

"important" as "[h]aving great significance; carrying with it great or serious consequences; *weighty*, momentous."[523] There is, simply, no meaningful distinction between these two definitions.[524] Given the ordinary meaning of these two words, it is clear that, by requiring imports to be an "important" cause of serious injury, 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 a safeguards proceeding, as required by the Safeguards Agreement.

443. Finally, the United States notes that, in one respect, the "substantial cause" test is a more rigorous causation standard than that set forth in the Safeguards Agreement. In this regard, the Safeguards Agreement contains no language indicating that increased imports must be the "most important" injury factor, or "equal in importance" to any other cause of serious injury to an industry, as does the U.S. statute, nor has the Appellate Body construed the Agreement to contain such a requirement. Instead, the Appellate Body has found that the Agreement requires that increased imports "contribute" to "bringing about" or "producing" serious injury in a "genuine and substantial" way, which indicates that imports may be found to have the requisite link to serious injury even when they are not the most important cause of such injury.[525] Because the Safeguards Agreement would therefore permit a competent authority to find imports are causing the requisite level of serious injury even when they are not the most important cause of such injury, it is clear that, in this respect, U.S. law contains a more rigorous causation standard than the Safeguards Agreement.

444. In sum, the "substantial cause" test does, in fact, require the ITC to identify the nature and extent of the injury caused by imports and non-import factors and to separate and distinguish their effects qualitatively. Moreover, unlike the Safeguards Agreement, the "substantial cause" test permits the ITC to make an affirmative finding only if the effects of imports are more important than, or as important as, the injury caused by other factors. Accordingly, the "substantial cause" test is fully consistent with the causation standard contained in the Safeguards Agreement.

iii. *Complainants' Analyses of the Coincidence of Trends Between Imports and the Industry's Condition Are Focused on Too Narrow A Time Frame and Are Based on Misleadingly Selective Data*

445. Throughout their briefs, Complainants argue that the ITC failed to establish a substantial coincidence of trends between movements in import trends and changes in the industry's condition for the products covered by the President's remedy. Aside from containing a number of flaws specific to their arguments for individual products (which the United States discusses below), their arguments also share several critical fundamental flaws. As an initial matter, the

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[523] The New Shorter Oxford English Dictionary, 1993 Edition, pp. 1324 & 3124.

[524] If anything, the definitions suggest that the U.S. statute's "important" cause standard requires more weight than the "substantial" cause standard of the Safeguards Agreement, as interpreted by the Appellate Body.

[525] *US - Line Pipe*, AB Report, para. 209; *US - Wheat Gluten*, AB Report, paras. 67, 69.

arguments focus in many instances on an overly narrow time period when contending that there is no correlation between import and industry trends. Moreover, on a number of occasions, they ignore that declines in industry performance criteria can result from changes in both import volume and import pricing patterns. Finally, many of their arguments rely on an examination of a limited and selective set of industry trends that give a misleading picture of the overall condition of the industry and fail to recognize that a broader assessment of the industry and imports establishes a clear correlation between increased imports and declines in the industry's condition.

446. First, although Complainants correctly recognize that the Appellate Body has indicated that there should "normally" be a "'relationship between the movements in imports (volume and market share) and the movement in injury factors,'"[526] their arguments in this regard generally focus almost exclusively on an analysis of correlations in import and industry trends within the same calendar year. Complainant's approach fails to appreciate that the full impact of an increase in import volumes or a decline in import prices in one calendar year may not be fully reflected in the condition of the industry until the next calendar year, or even the year after. To take perhaps the most obvious example of this sort of flawed analysis, Japan asserts that there was simply no correlation between increases in imports of certain carbon flat-rolled steel during the period of investigation and the incidence of steel industry bankruptcies, citing in support of this contention the fact that eight of ten steel companies who entered bankruptcy in the last three years of the period of investigation did so in 2000 and 2001,[527] which was at least two years after the largest import increase of the period, in 1998.[528]

447. Of course, companies who begin experiencing financial difficulties -- as a result of lost market share and lowered prices due to import competition, for example -- would not be expected to immediately seek bankruptcy protection in the first year in which those difficulties occurred. Instead, due to the negative ramifications associated with bankruptcy (e.g., inability to obtain credit, imposition of higher credit costs, reluctance of suppliers to provide materials, and inability to attract other forms of capital), most companies spend several years struggling to regain their competitive footing before eventually entering the bankruptcy process. Indeed, because of the lag between initial declines in financial performance and a company's entry into bankruptcy, the fact that eight of ten companies entered bankruptcy in 2000 and 2001, rather than 1998, shows that there was, indeed, a likely correlation between the surge in low-priced imports that occurred in 1998 and thereafter and these bankruptcies. This one issue presents a good example of the erroneous conclusions that can result from automatically expecting imports to have an immediate impact on an industry in the same calendar year as a surge occurs.

448. Similarly, in many instances, Complainants improperly focus solely on year-to-year correlations between changes in import volumes and changes in industry injury indicia without

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[526] *Argentina – Footwear*, AB Report, para. 144.
[527] *See* ITC Report, p. 51.
[528] Japan First written submission, para. 237.

recognizing that changes in an industry's condition can be the result of both volume- and price-based import competition. For example, in the case of carbon flat-rolled steel, Complainants contend that there was no correlation between import volume changes and year-to year changes in the industry's profit margins, noting that the industry's operating income levels declined in both 1999 and 2000 at the same time that imports were declining or remaining stable in absolute terms.[529]

449. However, as the ITC correctly noted in its analysis, the record showed that there was a direct correlation between changes in both the volumes and pricing patterns of imports during 1998, 1999 and 2000 and declines in the industry's operating margins in those years.[530] In this regard, the record firmly established a correlation between the decline in the industry's operating margins of 2.1 percentage points in 1998 and the 31.3 percent increase in the volume of imports in that year.[531] Then, although import levels slackened somewhat in 1999 and 2000, the record clearly showed these volumes remained at higher levels than in 1996 and 1997, and that they were being sold at prices that were substantially below their pricing levels in 1996, 1997, and 1998.[532] Thus, although import volumes fell somewhat from their 1998 peak, the record established that persistently high levels of import volumes continued to have a serious and adverse impact on the price and profitability levels of the domestic industry.[533] In sum, the sort of analysis urged by Complainants -- that is, an examination only of the correlations between trends in import volume and industry profitability levels -- would reflect an imprecise and demonstrably incomplete assessment of whether increased imports, and their pricing patterns, had seriously injured the domestic industry.

450. Finally, Complainants routinely present causation arguments that are based primarily on comparisons of imports trends with a limited number of selectively chosen industry performance factors. These arguments are flawed because, as discussed above, the Safeguards Agreements requires not a focus on one or two selected criteria but on all of the relevant criteria bearing on the condition of the industry.[534] In fact, the failures of these arguments become even more evident when one recognizes that Complainants routinely change the indicia used in their causation arguments from product to product. For example, although the EC bases its "causal link" argument for certain carbon flat-rolled steel on an analysis of such injury factors as the industry's capacity, production, scrap costs, and profitability levels,[535] it bases its "causal link" argument for tin mill products almost exclusively on a comparison of the average unit values of

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[529] *See, e.g.,* Japan First written submission, paras. 239-41; EC First written submission, para. 471; Brazil First written submission, paras. 169-172;

[530] ITC Report, pp. 59-62.

[531] ITC Report, pp. 59-60.

[532] ITC Report at 59-61.

[533] ITC Report, pp. 60-62.

[534] Safeguards Agreement, Article 4.2(a).

[535] EC First written submission, paras. 471, 473-476.

imports and domestic merchandise.[536] Needless to say, under the Safeguards Agreement, it is the totality of industry trends, and their interaction, that must be taken into account when a competent authority performs its analysis in a safeguards action.[537]

iv. *The ITC Was Not Required to Perform a Non-Attribution Analysis for Canada and Mexico*

451. As indicated previously, the President excluded imports of Canadian and Mexican steel from his remedy for all ten steel products for which a remedy was imposed. As a result, several Complainants assert that the Commission should have considered the effects of imports from Mexico and Canada as an other, non-import source of injury to the industry and should have distinguished the effects of Canadian and Mexican imports from the effects of non-NAFTA imports when performing its non-attribution analysis for all ten products subject to a remedy.[538] Complainants' argument is flawed in several respects.

452. First, although the Appellate Body has stated that the United States must perform a parallel "causation" analysis with respect to the injury caused by non-NAFTA imports when it excludes Canada and Mexico from a safeguards remedy,[539] it has not stated that the United States must perform a separate non-attribution analysis for these imports, either in its initial causation analysis covering all imports, or in the causation analysis performed as a part of the required "parallelism" analysis discussed in the *US - Wheat Gluten* and *US - Line Pipe* cases. As we describe below, there is simply no legal necessity or rationale for this panel to engraft such a requirement on the Safeguards Agreement in this proceeding.

453. As an initial point, there is nothing in the language of the Safeguards Agreement or the findings of the Appellate Body that indicates that the ITC must consider Canada and Mexican imports to be an other 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 Mexico and Canada should be excluded from the remedy[540] -- 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. In this

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[536] EC First written submission, paras. 481-85.

[537] *US - Wheat Gluten*, Panel Report, paras. 8.85-8.86.

[538] *See, e.g.* EC first written submission, para. 469; China first written submission, paras. 380-383.

[539] *See, e.g., US - Line Pipe*, paras. 179 *et seq.*

[540] As we discuss in more detail below, the U.S. statute directs the ITC to assess whether imports from Canada and Mexico qualify for the NAFTA exclusion only after the ITC "makes an affirmative determination" for all imports of a product being investigated in a safeguards proceeding. 19 U.S.C. §3371(a). As a result, the ITC only reaches the issue of whether imports from Canada or Mexico constitute a "substantial share of total imports" and "contribute importantly to the serious injury, or the threat thereof" to the industry after it has made an initial finding that all imports cause serious injury to the industry producing the like or directly competitive product. The ITC performed its NAFTA analysis for each product in question in this way in its determination. *See, e.g.,* ITC Report, pp. 34-35 & 65-67 (NAFTA finding for carbon flat-rolled steel).

regard, the United States notes that the U.S. statute and the Safeguards Agreement both require the ITC to perform its general causation analysis by including "imports" -- that is, all imports of the product concerned, not merely those eventually included in the measure -- in its analysis.[541] Moreover, the Appellate Body has not indicated in its prior findings that there is any reason for a competent authority to exclude any category of imports from its initial injury analysis. Accordingly, under the language of the statute and the Agreement, there is simply no basis for the ITC to treat these products in its initial injury analysis as though they were something other than imports.

454. Similarly, there is no reason that the ITC should be required to treat these imports as a "non-import"cause of injury in the context of its "parallelism" causation analysis. As we discuss in detail below, the Appellate Body has found that the Safeguards Agreement requires the United States to perform a second causation analysis that excludes Canadian and Mexican imports from its assessment of the causal link between imports and the condition of the industry, when the United States finds that Canadian and Mexican imports should be excluded from the safeguards remedy under the NAFTA exclusion.[542] However, the requirement that the United States exclude these imports from its "parallelism analysis" in effect requires the United States to treat these imports as an "other" cause of injury and to distinguish the price and volume effects of NAFTA imports from non-NAFTA imports.

455. Indeed, as can be seen from the causation analysis performed by the United States for non-NAFTA countries in this proceeding (which is discussed in detail below), the ITC appropriately discussed the nature and extent of the injurious effects of non-NAFTA imports and distinguished their effects from those of NAFTA imports. In fact, given that the ITC found that imports from Canada and/or Mexico did not constitute a substantial share of imports and did not contribute importantly to injury for a number of the products covered by the President's remedies, it is clear that the ITC concluded that Canadian and Mexican imports of these products were not a significant cause of injury to the domestic industry. Moreover, for the products for which the ITC did find that imports from Mexico and Canada would contribute importantly to injury, the ITC nonetheless performed an analysis that isolated the effects of non-NAFTA imports from those of NAFTA imports and concluded that non-NAFTA imports were still a substantial cause of serious injury to the industry in question. Having done so, the ITC clearly performed an analysis designed to identify the nature and extent of the injury caused by both NAFTA and non-NAFTA imports and to distinguish the effects of both groups of imports from one another.

v. *The Commission Conducted A Detailed and Cogent Analysis of All Relevant Factors in Its Causation Analysis; It Did Not "Ignore," "Dismiss," or Discuss in a "Cursory" Fashion Any Relevant Factor*

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[541] *See* Safeguards Agreement, Article 2.1, 4.2(a), & 4.2(b).

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

456. Finally, the United States notes that Complainants routinely accuse the Commission of performing "cursory"or "minimal" discussions of critical issues relating to causation, of "failing to analyze" certain issues in any manner whatsoever, or even of "ignoring" certain facts and issues entirely.[543] The Panel should be skeptical of these claims wherever and whenever they occur. As the United States describes in more detail below, in the case of every issue and fact that Complainants assert that the Commission "dismissed," "ignored," or discussed in a "cursory" way, the record clearly shows that the Commission considered all of the available record evidence, appropriately weighed it, and performed a thorough and objective assessment of the issue in question. Indeed, the length and detail of the Commission's Report in this proceeding[544] is an indication of the level of care and the amount of effort the Commission expended to ensure that its analysis was comprehensive, well-reasoned, and fully supported by the record evidence.

457. As we will show below, Complainants' assertions in this regard are unfounded and should be rejected.

b. The ITC's Causation Analysis For Certain Carbon Flat-Rolled Steel Was Fully In Accordance With Articles 2.1 and 4.2 of the Safeguards Agreement

458. For certain carbon flat-rolled steel, the ITC conducted a thorough and objective assessment of the record evidence and established that there was a genuine and substantial cause and effect relationship between increased imports and serious injury. The ITC's analysis established that there was a clear correlation between increases in the volume of increasingly low-priced imports in the marketplace and the significant declines in the overall condition of the carbon flat-rolled steel industry that occurred during the latter half of the period of investigation. The ITC also conducted a thorough and objective examination of the nature and extent of injury that was caused by increased imports and other relevant factors and ensured that it did not attribute the injurious effects of non-import factors to imports in its analysis.

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[543] *See, e.g.,* Japan First written submission, para. 230 ("the ITC ignored detailed and exhaustive evidence [in its investigation] that did separate and distinguish . . . alternative causes") & para. 251 (the ITC's non-attribution discussion for certain carbon flat-rolled steel is "disappointingly sparse"); Brazil First written submission, para. 160 (the ITC's causation analysis in its Report "pales in comparison" to the "robust and detailed evidence it was provided" allegedly showing a lack of causation; moreover, the ITC "made no attempt 'separate' and distinguish' the injurious effects" of various factors and "ignored detailed and exhaustive evidence" on the matter); New Zealand First written submission, para. 4.141 (the ITC "wrongly dismisses [demand declines] entirely as a cause of injury . . . by means of a short generalized discussion") & para. 4.149 (the ITC "wholly failed to assess the nature and extent" of injury caused by increased capacity).

[544] The Commission's opinions comprised 560 single-spaced pages of analysis and consideration of data, while its factual report comprised more than 400 pages of text and charts, and a large number of appendices. ITC Report, Vols. I, II, & III. In addition, the ITC prepared a number of other memoranda for review during the course of the proceeding.

i. *For Certain Carbon Flat-Rolled Steel, the ITC Objectively Analyzed and Fully Explained the Nature of the Causal Link Between Imports and the Industry's Serious Injury*

a.. *The ITC's Analysis Established That There Was a Clear Correlation Between Import Trends and Declines in the Industry's Condition*

459. In its analysis, the ITC established that there was a genuine and substantial causal link between import trends and the significant declines in the condition of the carbon flat-rolled steel industry during the latter half of the period of investigation. The ITC explicitly took into account factors that affected the competitiveness of domestic and imported merchandise in the U.S. market,[545] the trends in import volumes and market share during the period,[546] the pricing effects of imports,[547] and correlations between these trends and changes in the various indicia of the industry's condition.[548] After conducting this examination, the ITC correctly found that there was a clear correlation between increases in low-priced imports and the substantial declines in the industry's condition during the period.

460. 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 for any industrial economy. In its report, the ITC found a number of conditions of competition affected the market for carbon flat-rolled steel during the period of investigation, including the facts that:

a. There was significant and steady growth in demand for carbon flat-rolled steel from 1996 through 2000, with apparent U.S. consumption growing by 7.8 percent between 1996 to 2000.[549] During the period from January 2001 to June 2001, however, demand declined by 14.9 percent from the comparable period in 2000.[550]

b. The growth in productive capacity of foreign and domestic producers out-paced demand growth, with foreign productive capacity growing by 15.2 percent between 1996 and 2000 [551] and domestic productive capacity growing by 15.9 percent.[552]

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[545] ITC Report, pp. 56-58.
[546] ITC Report, pp. 59-60.
[547] ITC Report, pp. 59-60.
[548] ITC Report, pp. 60-62.
[549] ITC Report, p. 56.
[550] ITC Report, p. 56-57.
[551] ITC Report, p. 57-58.
[552] INV-Y-209, Table FLAT-ALT7 (US-33).

c. Foreign capacity increases occurred during a period of disruption in the world steel markets, as the Asian financial crisis in late 1997 and early 1998 led to the curtailment of steel consumption in Asian markets and created a flood of steel seeking alternative markets.[553] The acceleration of the financial deterioration in the former Republics of the Soviet Union and the decline for steel demand had a similar effect on the world steel market.

d. There is generally a moderate to high degree of substitutability between domestic and imported carbon flat-rolled steel, with most purchasers finding imported and domestic merchandise to be comparable in terms of quality, product range, and consistency.[554]

e. Although most purchasers ranked quality as the most important factors in their purchase decision, the large majority of purchasers rated price as one of the three most important factors in their purchase decision.[555] A significant percentage of purchasers rated price as the most important factor in the purchase decision.[556] Moreover, almost half of all purchasers reported that they "always" or "usually" purchase the lowest price carbon flat-rolled products available.[557]

f. Imports of various subcategories of carbon flat-rolled steel are affected by a number of antidumping and countervailing duty orders, some of which predated the period of investigation and some of which were imposed during the period.[558]

461. Taking the foregoing conditions of competition into account, the ITC then conducted a thorough and objective examination of the trends of imports and industry injury factors. It concluded that there was a clear correlation between import volume and pricing trends and declines in the overall condition of the industry.[559] In particular, after noting that the volume levels of imports remained essentially stable in 1996 and 1997,[560] the ITC 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, which occurred despite growing U.S. demand."[561] Moreover, the ITC noted, this surge of imports in 1998 entered the market at prices that were "generally significantly lower-priced" than during the first

[553] ITC Report, p. 58.
[554] ITC Report, p. 58.
[555] ITC Report, p. 58 & Table FLAT-64.
[556] ITC Report, p. 58 & Table FLAT-64.
[557] ITC Report, pp. 58 & FLAT-57.
[558] ITC Report, p. 58.
[559] ITC Report, pp. 59-62.
[560] ITC Report, pp. 59-60.
[561] ITC Report, p. 59.

two years of the period and that imports were priced significantly below domestic merchandise, thus leading to declines in domestic prices.[562]

462. The record supported these findings. In particular, it showed that, as a result of the 1998 surge in import volume – which reflected a 31.3 percent increase in the volume of imports –[563] imports increased their share of the overall market by 2.5 percent and their share of the commercial market for carbon flat-rolled steel by more than 5 percent in 1998,[564] causing similar substantial declines in the industry's share of the overall and commercial markets.[565] Moreover, with import pricing falling as the surge continued, the industry's operating income margin in 1998 dropped by 2.1 percentage points (to 4.0 percent), even though demand had grown and the industry's costs had fallen in that year.[566] Given these correlations, the record showed, and the ITC correctly found, that there was a direct coincidence between the surge in low-priced imports and declines in the industry's condition in 1998.

463. In addition, the record also established a clear correlation between import volume and pricing trends and changes in the industry's condition in 1999 and 2000, the final two full years of the period of investigation. Although it was true -- as the ITC itself noted -- that the "volume of imports slackened somewhat during these two years," it was also true that import volumes in 1999 and 2000 remained substantially higher than in 1996 and 1997[567] and that increasingly low-priced imports continued to disrupt pricing levels in the market, leading to substantial declines in the industry's pricing levels and operating income margins.[568]

464. In sum, as the ITC 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 . . . . As noted above, purchasers generally consider price an important factor in the purchasing decision[,] . . . the lowest price frequently

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[562] ITC Report, pp. 60-61.

[563] INV-Y-209, Table FLAT-ALT7.

[564] ITC Report, p. 59; INV-Y-209, Table FLAT-ALT7 (US-33); CR and PR at Table FLT-12 to FLAT-15, FLAT-17.

[565] ITC Report, p. 59; INV-Y-209, Table FLAT-ALT7 (US-33); CR and PR at Table FLT-12 to FLAT-15, FLAT-17.

[566] ITC Report, p. 60.

[567] ITC Report, p. 60. For example, the volume of imports was 13.7 percent higher in 2000 than in 1996. ITC Report, p. 60, and INV-Y-209, Table FLAT-ALT7 (US-33).

[568] ITC Report, pp. 60-62.

> wins the sale[,] . . . [and] purchasers generally consider imported certain carbon flat-rolled steel comparable in quality to domestically produced certain carbon flat-rolled steel. 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.[569]

465. In the end, the ITC's determination for certain carbon flat-rolled steel correctly reflects one simple and undeniable economic truth. In 1998, imports surged into the U.S. market as a result of the Asian financial crisis and the deteriorating condition of the Russian steel market and managed to obtain significant additional market share as a result of substantial underselling. The aggressive pricing practices of imports were a substantial cause of the price declines that caused prices of carbon flat-rolled steel to plummet dramatically in 1998 and imports' continued underselling throughout 1999 and 2000 resulted in the depression of domestic prices in 1999 and the suppression of prices in 2000 and 2001. This straightforward description reflects the reality of competition in the carbon flat-rolled steel marketplace in the United States in 1998, 1999, and 2000.

466. No matter what other rationales or excuses are offered by Complainants to try to explain away the massive price declines that occurred in the market in these years, the fact remains that increased imports, whether considered in conjunction with other factors or not, were a "genuine and substantial" cause of the declines in the industry's pricing and operating income levels. Any arguments to the contrary simply reflect a failure to recognize the realities of the competitive conditions affecting the U.S. market for certain carbon flat-rolled steel during the period between 1998 and 2000.

b. *Complainants' Arguments to the Contrary Have No Merit*

467. Despite the ample record evidence showing a correlation between import volume and pricing trends and declines in the industry's condition in 1998, 1999, and 2000, Complainants contend that the ITC failed to establish the existence of a correlation between these trends. Their arguments are flawed because they mischaracterize the record data, ignore critical evidence showing fierce price competition between imports and domestic merchandise, or reflect a not particularly plausible assessment of the record evidence relating to competition in the U.S. carbon flat-rolled steel market. They should be rejected.

468. First, several Complainants mistakenly contend that the record showed that the industry was not injured by imports between 1996 and 2000, citing the fact that the industry's net

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[569] ITC Report, pp. 61-62 (emphasis added).

commercial sales, domestic shipment, and production levels all grew during that period.[570] Their argument is flawed in two respects. First, while it may be true that the industry's sales, shipment, and production levels did, in fact, increase during the period between 1996 and 2000,[571] the record reflects that these increases essentially tracked the growth in demand for certain carbon flat-rolled steel during the period from 1996 to 2000.[572] More importantly, the record shows that the industry was only able to maintain its production, shipment and sales levels between 1999 and 2000 by cutting prices dramatically in response to the extraordinary declines in import pricing that began in 1998 and continued thereafter.[573] As a result of this competitive strategy, the industry's pricing levels and operating income levels dropped precipitously during the period from 1996 to 2000.[574] Accordingly, the industry confronted the Hobson's choice of either maintaining its market share at the expense of lower prices and profit margins or sacrificing sales, reducing production, and closing facilities.

469. Secondly, a number of Complainants assert that there was no correlation between import volume trends and declines in industry condition on an annual basis during the last three years of the period of investigation.[575] In this regard, they state the record showed that the industry's overall condition was not immediately and adversely impacted by the surge of imports that occurred in 1998 and that it only began declining substantially in 1999 and 2000, when imports volumes were also in decline.

470. Complainants are wrong factually. First, the 1998 surge in import volume did indeed have a clear and adverse impact on the overall condition of the industry.[576] In 1998 -- when import volumes increased by 31.3 percent and import sales values dropped by 8.4 percent[577] -- the industry's share of the overall market fell by 2.5 percentage points, its share of the commercial market fell by more than 5 percentage points, its aggregate net sales value dropped by 3.0 percent (despite an increase in its overall net sales quantity of 0.5 percent), its average unit sales prices fell by 3.1 percent, its aggregate gross profits fell by 19.8 percent, its aggregate operating income levels dropped by 36.9 percent, and its operating income margins fell by 2.1 percentage points from the previous year's level.[578] These declines occurred in a market in which demand grew by 3.2 percent. Given these declines, it is difficult to understand how

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[570] China first written submission, paras. 377-379; Brazil, first written submission, paras. 166-67.

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

[572] *See* INV-Y-209, Table FLAT-ALT7 (US-33).

[573] ITC Report, p. 61.

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

[575] *See* Japan First written submission, paras. 231, 234-239; EC First written submission, para. 471; Brazil First written submission, paras. 161, 163, & 169; New Zealand First written submission, para. 4.126; Korea First written submission, paras. 105-108.

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

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

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

Complainants could seriously believe that there was not a decline in the overall condition of the industry that was correlated to the 1998 surge.[579]

471. Moreover, there was also a distinct correlation between the volume and price trends of imports and the continuing declines in the industry's condition that occurred in 1999 and 2000. In this regard, even though import volumes "slackened somewhat" in 1999 and 2000 from their 1998 surge level, import volumes in both years remained substantially above 1996 and 1997 levels.[580] Indeed, in the year 2000, import volumes were 13.7 percent higher than in 1996.[581] Moreover, as discussed above, these elevated levels of imports continued to be sold at prices that were substantially lower than domestic prices, and were, in fact, lower than their 1996 and 1997 levels.[582] As a result of this continued and substantial underselling, imports depressed and suppressed domestic prices in both 1999 and 2000, and caused continued declines in the industry's net unit sales values, gross profits, operating income, and operating income margins.[583] Given this, Complainants' argument that there is no correlation in these years between import trends and declines in the industry's condition is simply an attempt to read out of the record of this case the ample evidence that shows that imports adversely affected the industry's domestic pricing and financial condition in 1999 and 2000.

472. It is important to note that few of the Complainants have actually challenged the factual underpinnings for the ITC's finding of a clear correlation between the persistent underselling by imports and declines in the price and profitability levels of the domestic industry.[584] In this regard, it must be assumed that they recognize, as did the ITC, that the record pricing data firmly established that:

- The elasticity of substitution between imports and domestic merchandise was moderate to high.[585]

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[579] In this regard, the United States notes that Japan makes the claim that the 1998 surge in imports was not a "dramatic" increase in import volumes, as stated by the ITC. Japan First written submission, para. 233; *see also* Brazil First written submission, para. 163. In 1998, that is, in one calendar year, the total volume of imports entering the carbon flat-rolled market in 1998 increased by 6.1 million tons, an increase of 31.3 percent over the 1997 level of 19.2 million tons. INV-Y-209, Table FLAT-ALT7. Thus, in that year, following the Asian financial crisis and the continued deterioration of the Russian market, imports increased their share of the entire commercial carbon flat-rolled steel market of more than five percent. ITC Report, p. 59. In a market the size of the U.S. carbon flat-rolled steel market (especially one that is reasonably price-sensitive), this one-year increase was clearly a "dramatic" one.

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

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

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

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

[584] EC First written submission, paras. 472 & 475; New Zealand First written submission, para. 4.133.

[585] ITC Report, pp. 58 & 62.

- Imports routinely undersold the domestic merchandise throughout the period of investigation.[586]

- Import prices fell substantially as imports surged in 1998 in response to the Asian crisis and the acceleration in the financial deterioration of the former republics of the Soviet Union, and generally continued to decline throughout the remainder of the period. Even though there was an improvement in import and domestic prices in 2000, imports continued to undersell domestic merchandise by substantial margins on most price comparisons during 2000. Moreover, prices declined even further in interim 2001.[587]

- Domestic price declines followed decreases in import prices during the period. The moderate to high level of substitutability between imports and domestic merchandise showed that domestic price declines were due, to a significant degree, to aggressive import underselling. As a result, the industry's revenues and profitability levels declined substantially from 1998 to 2000.[588]

473. Despite these uncontroverted factual findings, several Complainants contend that there was not, in fact, a clear causal link between import pricing and domestic pricing. For example, the EC contends that imports could not possibly have caused any declines in domestic prices because they generally had a market share of less than 10 percent throughout most of the period from 1996 to 2000.[589] The EC's argument ignores the fact that, in a relatively price-sensitive market like the carbon flat-rolled market,[590] even a relatively small volume of low-priced merchandise can have a dramatic impact on pricing throughout the market.[591] Accordingly, the fact that imports did not occupy a predominant share of the market during the period of investigation does not, by itself, indicate that imports could not have a significant effect on domestic prices.

474. Moreover, the EC itself appears to recognize that a relatively small volume of merchandise can have a significant effect on prices in the carbon flat-rolled steel market. In this regard, the EC -- like other Complainants -- argues that the domestic minimills were primarily responsible for price declines in the carbon flat-rolled market.[592] However, in making this argument, the EC and the other Complainants appear not to have noticed that, on a year-to-year

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[586] ITC Report, pp. 60-62.
[587] ITC Report, pp. 61-62.
[588] ITC Report, p. 60-62.
[589] EC first written submission, para. 472.
[590] In this regard, the United States notes that the ITC found that there was a moderate to high level of substitutability between imports and domestic merchandise during the period of investigation, which indicates that there was a high level of probability that domestic prices would drop in response to declines in import prices. ITC Report, p. 58.
[591] ITC Report, FLAT-60 & n.42.
[592] EC first written submission, paras. 473-475.

basis, minimills shipped a substantially smaller volume of carbon flat-rolled steel to the commercial market than is accounted for by imports.[593] Clearly, then, the EC would appear to believe that these sorts of volumes can, indeed, have a significant impact on pricing in the marketplace. The United States believes that the EC should not be allowed to have it both ways. The intrinsic contradictions in their arguments should lead the Panel to reject both of them.

475. Further, Brazil asserts that the ITC's price findings were flawed because the ITC failed to notice that domestic products were priced below import prices throughout the latter half of 2000 and the beginning of 2001.[594] Brazil's argument is premised on a mistaken reading of the record. During the period of investigation, imports of carbon flat-rolled steel undersold domestic merchandise by substantial margins in a substantial majority of possible price comparisons, even during the last year and a half of the period of investigation.[595] More specifically, the public versions of the Commission's quarterly price comparisons for the slab, plate, hot-rolled and one cold-rolled price comparison products all show imports underselling domestic merchandise by substantial margins on the large majority of price comparisons through 2000.[596] Moreover, on one of the two cold-rolled price comparison products, imports routinely undersold the domestic product through the first quarter of 2001.[597] While the domestic product did undersell imports on these products in a majority of instances in interim 2001, this underselling only occurred after the domestic merchandise had pursued the imports downward on prices through the three years prior to that time.[598]

476. It is true that, for the remaining cold-rolled price comparison product, the industry undersold imports during 2000 and in interim 2001, usually by small margins.[599] However, the record also shows that imports of this cold-rolled product nonetheless consistently undersold the domestic industry by substantial margins during 1998 and 1999, when the industry experienced substantial declines in its profitability levels.[600] Given this, it is clear that Brazil's assertions about the prevalence of underselling by the industry during the latter half of 2000 and interim 2001 are simply an attempt to distract the attention of the Panel from the fact that the weight of the pricing evidence shows that imports led prices down during the period from 1998 through 2000 by aggressive underselling.

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[593] The record showed that minimills shipped at most 11.9 million tons of all carbon flat-rolled products (which includes a small percentage of GOES and tin mill products) in the merchant market on annual basis during the period of investigation. INV-Y-215, Table FLAT-1 (minimill trade data) (US-60). The annual volume of imports shipped into the U.S. market was never less than 18.3 million tons. INV-Y-209, Table FLAT-ALT7 (US-33).

[594] Brazil first written submission, paras. 74 & 210-211.

[595] ITC Report, Tables FLAT-66 to FLAT-73-74.

[596] ITC Report, Tables FLAT-66 to FLAT-69, FLAT-70.

[597] ITC Report, Table FLAT-70.

[598] ITC Report, Tables FLAT-66-69, 70.

[599] ITC Report, Tables FLAT-71.

[600] ITC Report, Tables FLAT-71.

477. Brazil also contends that the ITC's analysis is flawed because it did not take into account the fact that domestic prices were falling more quickly than import prices during the latter half of the period.[601] Brazil's pricing argument ignores the conditions of competition in the marketplace. It should not be surprising that domestic prices were falling faster than import prices, during a period when domestic producers were attempting to maintain market share by eliminating the substantial price undercutting that imports were engaged in throughout the period of investigation. In such a situation, domestic producers will be forced to cut their prices at a more rapid rate than imports to avoid a loss of additional market share. Given that domestic prices were routinely higher than imports throughout the period,[602] such a decline does not indicate that it was domestic producers who were leading prices downward.

478. Finally, Brazil contends that the "greatest flaw in the ITC's pricing discussion is the fact that the margins of underselling in 1997 [by imports] . . . were about the same as 1999 and 2000,"[603] which -- Brazil appears to suggest -- indicates that imports were simply maintaining an appropriate price level below domestic producers in the market. What Brazil fails to acknowledge is that two critical developments occurred in the market in 1998 that dramatically affected conditions of competition in the market and resulted in the depression of domestic carbon flat-rolled prices. First, there was a sudden and massive surge of imports in that year as a result of the Asian financial crisis and the continued deterioration in the steel market in the former Soviet Union. Second, as a result of this surge, import prices declined precipitously during that year and continued to decline and remain at low levels through the end of June 2001. While it may be true, as Brazil asserts, that imports maintained a substantial and consistent margin of underselling during the last four years of the period, the record also established that the significant increase in the volume of increasingly low-priced imports in 1998 placed substantial downward pressure on prices during the last three and a half years of the period of investigation.

479. Finally, New Zealand contends that the ITC's price suppression and depression findings are flawed because, "[t]o establish that imports drove down domestic prices, it would be necessary to show that imports led down domestic prices and the domestic product lost market share."[604] New Zealand's argument ignores basic economic reality. Although it is true that a combination of import and domestic price declines and a loss of domestic market share might be a good indication that imports have suppressed or depressed domestic prices, it is not the case that price-suppression or depression will necessarily be accompanied by market share losses. Instead, significant price-suppression or depression can occur without market share losses if the domestic producers choose to compete closely on price with imports rather than lose market share. In this situation, the domestic producers may maintain a relatively stable market share in the face of aggressive import pricing competition but experience significant pricing and profitability declines. Indeed, this is exactly what occurred in the carbon flat-rolled steel market

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[601] Brazil First written submission, paras. 74 & 210-211.
[602] ITC Report, p. 61 & Tables FLAT-66-71, 73-74.
[603] Brazil First written submission, para. 211.
[604] New Zealand First written submission, para. 4.133.

in 1999 and 2000, after domestic producers realized that they had lost substantial market share in 1998 due to a massive influx of lower-priced imports. By lowering their prices in response to import price declines, the industry was able to limit their loss of market share. New Zealand's argument simply ignores basic concepts of rational economic behavior.

480. In sum, the ITC thoroughly and objectively examined the record evidence in this investigation and concluded that there was a clear correlation between the pricing and volume trends of imports of certain carbon flat-rolled steel and the declines in the industry's condition during the latter half of the period of investigation. Although Complainants have tried to establish that the ITC's analysis contains factual flaws or is inconsistent with the record, they have failed to do so. Their arguments are unfounded and should be rejected.

ii. *For Certain Carbon Flat-Rolled Steel, the ITC Conducted a Reasoned and Adequate Examination of the Injury Purportedly Caused by Factors Other than Increased Imports And Ensured That Any Injury Caused By These Factors Was Not Attributed to Imports*

481. In addition to correctly finding that there was a clear correlation between the pricing and volume patterns of imports and the declining condition of the carbon flat-rolled steel industry, the ITC also conducted a thorough and detailed examination of factors other than imports that might be have caused injury to the carbon flat-rolled industry during the period of investigation. In particular, the ITC considered whether several other factors might be sources of injury to the industry, including 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.

482. 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, during the period of investigation and ensured that it would not attribute to imports any injury caused by those factors. Complainants' arguments that the ITC failed to do so are unfounded and should be rejected by the panel.

483. We address below each of the factors considered by the ITC in its analysis.

a. *The ITC Properly Ensured that It Did not Attribute to Imports Any Injury that Was Attributable to Declines in Demand*

484. Consistent with the Appellate Body's guidelines in *US - Wheat Gluten*, the ITC first identified the substantial demand declines that occurred in the carbon flat-rolled steel market in the three quarters of the period of investigation as a possible source of injury to the industry. In its analysis, the ITC explained, in a reasoned and thorough manner, the nature and extent of the

injurious effect that was attributed to these demand declines, and distinguished that effect from the effects of imports.

485. More specifically, in its analysis, the ITC explicitly recognized that demand for carbon flat-rolled steel had declined substantially during the last three quarters of the period of investigation.[605] It specifically noted that this demand decline occurred only very late in the period, beginning with the fourth quarter of 2000 and lasting through the first two quarters of 2001.[606] It correctly noted, however, that demand had increased consistently during each of the five years before interim 2001, and that the industry had been experiencing serious injury because of imports since at least 1998, even though demand was still rising in that year. Moreover, the ITC found that, as a result of import competition, the industry's condition continued to deteriorate in 1999 and 2000, even though demand continued to rise during these years.[607] As a result, the ITC properly concluded that the demand declines in interim 2001 had only exacerbated the industry's level of serious during that period,[608] and had not been the cause of injury during prior periods. It is clear then that the ITC properly discounted these declines in demand as a significant cause of injury during the period.

486. As can be seen, then, the ITC thoroughly discussed the nature and the extent of the injury that was attributable to demand declines during the period. The ITC correctly noted that demand declines had become evident only during the final three quarters of the period of investigation and could only have contributed substantially to the industry's "continued deterioration" during that small period of time.[609] In other words, as the ITC correctly found, these demand declines could not possibly have contributed to the serious declines in the condition of the industry that occurred during the two-and-a-half years prior to this period, when demand was, in fact, increasing.[610] By performing an analysis that assessed whether imports caused injury to the industry during a period of increasing demand, the ITC was able to distinguish the effects of the demand declines in the final quarters of the period of investigation from those attributable to imports during prior periods. As a result, the ITC was able to ensure that it did not attribute the injury caused by these late-period demand declines to imports. In sum, the ITC properly separated and distinguished the effects of demand declines from those of imports in its analysis.

487. Despite this, Complainants challenge the ITC's analysis, contending that the ITC improperly discounted demand declines as a significant source of injury to the industry.[611] For example, Japan, Brazil and New Zealand all assert that the ITC improperly ignored the fact that

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[605] ITC Report, p. 63.
[606] ITC Report, p. 63.
[607] ITC Report, p. 63.
[608] ITC Report, p. 63.
[609] ITC Report, p. 63.
[610] ITC Report, p. 63.
[611] Japan First written submission, paras. 251-261; Korea First Written Submission, paras. 132-34; Brazil First written submission, paras. 180-185; New Zealand First written submission, paras. 4.140- 4.145.

the industry's operating income margins supposedly moved in tandem with changes in demand.[612] This assertion is factually wrong. The record clearly showed that the industry's operating income levels did not fluctuate with demand.[613] Although the industry's operating income margins did increase between 1996 and 1997 at the same time as a growth in demand, its operating margins declined in each of 1998, 1999 and 2000, even though demand grew in each of these years.[614] The only distinction, in fact, between 1997 and the three subsequent years is a simple one: there was a substantially higher volume of imports in the markets in these years than in 1997 levels and these imports were priced at substantially lower levels than in 1997. Given this, these Complainants' argument has no factual foundation at all.

b. *The ITC Properly Ensured that It Did not Attribute to Imports Any Injury Attributable to Domestic Capacity Increases*

488. The ITC also identified the industry's capacity increases as a possible source of injury during the period of investigation. In its analysis, the ITC explained, in a reasoned and thorough manner, the nature and extent of the injurious effect attributable to these capacity increases, and distinguished their effect from that of imports. The ITC's analysis was fully in accordance with the requirements of the Safeguards Agreement, even though Complainants assert otherwise.

489. The ITC first identified the nature and extent of the effects of the industry's capacity increase on its condition. It correctly recognized that the industry's production capacity had increased by 15.9 percent from 1996 to 2000 and that the industry's capacity had increased at a rate that was higher than the increase in demand during that same period, given that consumption had grown by 7.8 percent.[615] It also correctly recognized that the industry's production levels, while growing, had not kept pace with the increases in the industry's capacity levels.[616] Moreover, after considering the relationship of these two trends, the ITC correctly found that imports were not a significant cause of declines in the industry's capacity utilization rates. Instead, it found that these capacity utilization declines were due "in significant part" to the increase in industry capacity over the period.[617]

490. In other words, the ITC correctly discussed the nature and extent of the industry's capacity rates, found that they had been primarily responsible for the declines in the industry's

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[612] Japan First written submission, paras. 251-261; Korea First Written Submission, paras. 132-34; Brazil First written submission, paras. 180-185; New Zealand First written submission, paras. 4.140- 4.145.

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

[614] INV-Y-209, Table FLAT-ALT7 (US-33). Apparent U.S. consumption grew from 203.2 million tons in 1996 to 207.7 million tons in 1997 to 214.4 million tons in 1998 to 217.4 million tons in 1999 and 218.9 million tons in 2000. Id. The industry's operating income margins grew from 4.3 percent in 1996 to 6.1 percent in 1997 but declined to 4.0 percent in 1998, declined further to -0.7 percent in 1999 and then to -1.4 percent in 2000. Id.

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

[616] ITC Report, p. 63.

[617] ITC Report, p. 63.

capacity utilization rates, and therefore explicitly chose not to attribute the bulk of these declines to imports. Indeed, as can be seen from its determination, at no point in its analysis did the ITC specifically find that the declines in the industry's capacity utilization rates were attributable in substantial part to imports or attempt to characterize these declines as an significant indication that imports were causing injury to the industry.[618] Accordingly, it is clear that any argument made by Complainants that the ITC improperly attributed the declines in the industry's capacity utilization rates to imports reflects a misunderstanding of the ITC's actual discussion on capacity utilization.[619] Moreover, it is equally clear that the ITC properly separated and distinguished the effect of the industry's capacity increases on the industry's capacity utilization rates and attributed little of these declines to imports.[620]

491. In addition to assessing the impact of the industry's capacity increases on its capacity utilization rates, the ITC also addressed arguments made by importers and foreign producers that the industry's capacity increases placed significant pressure on domestic prices, thereby causing price declines.[621] In its analysis of this issue, the ITC thoroughly discussed the nature and impact of these capacity increases on domestic pricing behavior. As discussed above, the ITC noted that the industry had added capacity during the period of investigation, and concluded that the capacity additions had outstripped increases in demand during the same period.[622] Although it found that these increases in capacity were generally justified because there had been consistent demand increases in the market, it also recognized that this increased capacity provided the industry with "a significant incentive to maximize the use of steel making assets," which would have an "affect [on] producers' pricing behavior,"[623] as the foreign respondents had urged.

492. Nonetheless, the ITC did not simply conclude that these capacity increases had caused the substantial price declines that hit the carbon flat-rolled steel market in 1998, 1999, and 2000.

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[618] It should be noted that, while the ITC did rely on these capacity increases as a grounds for finding that the industry was "seriously injured," ITC Report, pp. 51-52, that finding relates to whether the industry has suffered a significant decline in its overall condition, not whether imports had a substantial causal link to the declines in the overall condition of the industry.

[619] *See, e.g.,* Brazil First written submission, para. 191. In this regard, the United States notes that it is because the ITC did not ascribe any declines in the industry's capacity utilization rates to imports that the Appellate Body's holding in *US - Wheat Gluten* is inapposite to the ITC's carbon flat-rolled steel analysis. As the Appellate Body noted in *Wheat Gluten*, the ITC explicitly found that declines in the industry's capacity utilization rates were the direct result of the increase in imports. *US - Wheat Gluten*, AB Report, paras. 82-84. Here, of course, the ITC has held the opposite.

[620] It is, of course, the case that a small portion of these capacity utilization declines were attributable to imports over the entire period, because imports did gain market share between 1996 and 2000. Moreover, some part of the industry's capacity utilization declines in 1998, when imports gained 2.5 percentage points of market share, was attributable to this import increase. However, as can be seen from the ITC's analysis, it placed little emphasis on this factor as an indication of the causal link between imports and serious injury. ITC Report, p. 63.

[621] ITC Report, p. 63.

[622] ITC Report, p. 63. In this regard, the record showed that apparent consumption had grown by 7.8 percent from 1996 to 2000, ITC Report, p. 63, while industry capacity increased by 15.9 percent during that period. INV-Y-209, Table FLAT-ALT 7 (US-33).

[623] ITC Report, p. 63.

Instead, it appropriately examined the ample record data on pricing to assess the nature and scope of the price effects of both imports and this increased capacity in the market.[624] As we have previously discussed, the record data on pricing -- both the price comparison data and the data on average unit values -- showed that imports consistently undersold the domestic industry (including minimill producers) throughout the period of investigation,[625] that the large surge of lower-priced imports in 1998 had caused a significant drop in prices in that year, and that imports continued to lead prices down, or keep them suppressed, by consistent underselling through 1999 and 2000.[626]

493. Moreover, even though the ITC correctly acknowledged that minimills had added the large bulk of this additional capacity and this additional lower-cost capacity had some effect on prices,[627] the ITC also correctly found that imports of hot-rolled merchandise had consistently undersold the merchandise sold by minimills during the period from 1998 and 2000.[628] Thus, although the ITC recognized that these capacity increases played some role in price declines in the market, it also correctly found that it was increased imports, not capacity increases, that were primarily causing the price declines that occurred during the period from 1998 to 2000.[629]

494. Given the foregoing, it is clear that the ITC discussed the nature and extent of the price declines attributable to both imports and increased industry capacity and distinguished and separated the price declines attributable to imports from those attributable to capacity increases. In this regard, the ITC properly assessed that these capacity increases were substantial and were likely to have some effect on prices because they had outstripped the growth in demand. Nonetheless, the ITC also correctly noted that weight of the record evidence established that imports had a far more significant and negative impact on prices than did these capacity increases, specifically and correctly noting that "imports, rather than domestically produced steel, led prices downward during the POI."[630] Moreover, by finding that capacity increases had some effect on domestic pricing but imports had a far more substantial effect, the ITC appropriately made a qualitative finding on the general level of injury that should be attributed to each factor.

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[624] ITC Report, p. 63-64.

[625] ITC Report, p. 63-64 & Tables FLAT-66 to FLAT-71.

[626] ITC Report at 63-64 & 60-62.

[627] ITC Report, p. 65.

[628] ITC Report, p. 65. In this regard, the ITC prepared price comparison charts showing the level of underselling and overselling by imports with respect to minimills. INV-Y-215 (import/minimill price comparisons) (US-38). Although the quarterly pricing comparisons are confidential, the record shows that imports undersold minimills on their sales of plate, hot-rolled and cold-rolled steel in the large majority of possible price comparisons during the period, with imports underselling minimills in 64 percent of possible comparisons (70 of 110 comparisons), at margins ranging up to 30.6 percent. Id. Imports undersold minimills in 76 percent of possible comparisons (50 of 66) involving plate and hot-rolled merchandise. Id.

[629] ITC Report, p. 64.

[630] ITC Report, p. 63-64.

495. Indeed, the only way in which the ITC could have more specifically identified the distinct amount of pricing effects caused by these factors would have been to place a quantitative value on the effects caused by each. However, as we have previously noted, the text of the Safeguards Agreement does not require a quantitative valuation of the effects attributable to imports or non-import factors, respectively, nor has the Appellate Body or any panels construed the Safeguards Agreement to do so.[631]

496. Complainants challenge the ITC's analysis on a number of grounds. First, Complainants assert that the ITC analysis failed to recognize that the capacity increases should have had a much more significant impact on domestic prices than imports because the capacity increases were much larger on an absolute level than the increases in imports during the period.[632] The flaw in this argument is obvious. Complainants' argument is premised on an "apples" to "oranges" comparison of factors that have differing price effect characteristics. More specifically, instead of comparing the domestic industry's capacity increases during the period to the foreign industry's capacity increases, Complainants simply compared the industry's capacity increases to increases in import shipments. As a theoretical matter, the distinction is critical, because actual shipments of merchandise, whether domestic or import, have a more direct effect on pricing behavior in the market than capacity increases in that shipments reflect actual pricing and sales competition in the market place. In essence, while the availability of capacity might have some impact on pricing behavior in a market place, the actual price effects of increased capacity are only directly and substantially transmitted to the market when that capacity is used to produce and ship merchandise. Or, as the ITC's economic staff noted during the investigation, "capacity is generally not a proximate cause of price changes" in a market.[633]

497. Accordingly, Complainants should have compared the domestic industry's capacity increases to the foreign industry's capacity increases during the period of investigation. If they had, they would have recognized that the foreign industry's capacity increase during the period of investigation was substantially larger than the domestic industry's capacity increases during this period.[634] More specifically, foreign production capacity grew by 44 million tons during the period from 1996 to 2000, while the domestic industry's production capacity grew by 32.2 million tons.[635] In other words, during a period in which demand in the Asian and other markets was significantly affected by the Asian financial crisis and the continuing deterioration of the steel markets in the former Soviet Union, foreign steel producers increased their aggregate capacity levels by an amount that was 37 percent larger than the domestic industry's capacity increases. It should not be surprising, then, that the ITC concluded[636] that these substantially

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[631] *See, e.g., US - Lamb Meat*, Panel Report, para. 7.247; *US - Wheat Gluten*, Panel Report, para. 8.142.

[632] *See* Japan First written submission, paras. 266-67; Korea First written submission, paras. 126-28; Brazil First written submission, paras. 189-90.

[633] EC-Y-042, p. 3 (US-35).

[634] *Compare* ITC Report, p. 57-8, *with* INV-Y-209, Table FLAT-ALT7 (US-33).

[635] ITC Report, pp. 57-8; INV-Y-209, Table FLAT-ALT7 (US-33).

[636] ITC Report, p. 64.

higher increases in foreign productive capacity had a greater hand in causing price declines in the market than domestic capacity increases.

498. Moreover, if Complainants had also compared the increase in import shipments during the period with the increase in the industry's shipments between 1996 and 1998, they would have recognized that the import increase during this period was 2.6 million tons, or 60 percent, larger than the increase in domestic shipments during the same period.[637] Moreover, this proportionally larger increase in import volume in the market in this period was accompanied by a significant reduction in import prices as well.[638] The only change in these relative trends occurred in 1998 and 2000, when the industry concluded that it would need to compete with the substantially reduced import pricing levels in order to reverse its market share losses. Given the substantial increase in import volumes in 1998 and the significant reduction in their pricing levels, it should again not be surprising that the ITC found that increasing import shipments at lower prices had a more substantial impact on pricing levels in the market than did domestic capacity increases and domestic shipments.

499. Complainants also assert that the ITC was mistaken when it stated that, if domestic capacity increases had been the source of injury to the industry, the ITC "would have expected to see the domestic industry lead prices downward, and wrest market share from imports."[639] According to Complainants, the record showed that this was the case as the industry regained market share in 1999 and 2000 by aggressively dropping their prices. Complainants misread the ITC's statement. First, they ignore the fact that the record clearly showed, as the ITC found, that imports led prices down and kept them suppressed during the period from 1998 through 2000, not the domestic industry. As a result, one aspect of the Commission's hypothetical scenario was not met. Moreover, although the industry did manage to regain some of its lost market share in 1999 and 2000 by actively following downward import prices in those years, the record did not show that the industry utilized its increasing capacity to wrest market share from imports that was held by imports at the beginning of the period.[640] In other words, by following import prices downward in 1998, 1999 and 2000, the industry was only able to regain some of its market share losses, but it was not able to increase its market share over the level it held in 1996.

500. Finally, Japan asserts that the industry would have remained profitable if it had simply foregone these capacity increases.[641] Japan's argument is misplaced in two significant respects.

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[637] INV-Y-209, Table FLAT-ALT7 (US-33). U.S. shipments increased from 184.8 million tons in 1996 to 189.1 million tons in 1998, an increase of 4.3 million tons. Imports increased from 18.4 million tons in 1996 to 25.3 million tons in 1998, an increase of 6.9 million tons. Id.

[638] INV-Y-209, Table FLAT-ALT7; ITC Report, Tables FLAT-66 –71, FLAT-73-74.

[639] ITC Report, p. 64; *see* Japan first written submission, paras. 263-64; Brazil first written submission, paras. 186-87.

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

[641] Japan First written submission, para. 268.

First, it ignores the fact -- recognized by the ITC[642] -- that an industry can be expected to increase its capacity in response to consistent growth in demand in a market, as occurred in the carbon flat-rolled steel market during 1996 through 2000. Second, and more importantly, Japan's argument ignores the fact that, even if the industry had not increased its capacity levels, imports would still have surged into the market in 1998 at low-prices and led prices downward through the remainder of the period. Thus, even if these domestic capacity increases had not occurred, the record shows that imports would still have caused the substantial price declines seen in the market during the period from 1998 through 2000. In this regard, the record shows, for example, that the average unit values of imports fell by 10.1 percent during this period, with all of this decline being represented by lower prices in 1998, 1999 and 2000.[643]

501. In sum, the ITC properly identified and addressed the nature of the impact that capacity increases had on pricing in the certain carbon flat-rolled market. Its analysis ensured, moreover, that it did not attribute to imports any price declines caused by capacity increases. Given this, Complainants' arguments should be rejected.

c. *The ITC Properly Ensured that It Did not Attribute to Imports The Effects of Legacy Costs*

502. The ITC also identified the industry's legacy costs[644] as a possible other factor causing injury to the industry during the period of investigation. In its analysis of legacy costs, the ITC explained, in a reasoned and thorough manner, the nature and extent of the effects of these costs and reasonably found that they had not contributed to the declines in the industry's condition during the period of investigation. As a result, the ITC's analysis properly found that none of the injury occurring during the period was attributable to these costs. The ITC's analysis was fully in accordance with the requirements of the Safeguards Agreement.

503. In its analysis, the ITC acknowledged that the legacy costs had been, and continued to be, a long term obstacle to the prospects of consolidation in the industry.[645] It noted, however, the issue of the industry's legacy costs had predated the period of investigation and that these costs had not prevented the industry from earning a reasonable rate of return in 1996 and 1997, before the surge of imports in 1998.[646] Moreover, although the ITC explicitly recognized that the burden of legacy costs varied between producers and had left certain producers more vulnerable to injury from imports, it found that there was no record evidence linking legacy costs to the price declines that caused serious injury to the industry during the latter part of the period of

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[642] ITC Report, p. 63.

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

[644] The term "legacy costs" is used by the parties to refer to the pension and non-pension benefit costs that are paid by the industry to its retired employees. *See* ITC Report, pp. OVERVIEW-31-35.

[645] ITC Report, p. 64. Indeed, the ITC's factual report sets forth a lengthy discussion of the impact these costs have had on the industry's condition. ITC Report, p. OVERVIEW-31-35.

[646] ITC Report, p. 64.

investigation.[647] Accordingly, the ITC reasonably discounted these costs as an other factor causing injury to the industry during the period of investigation.

504. The ITC's finding that legacy costs had not contributed to the declines in the industry's condition during the period is fully supported by the record evidence. In this regard, the ITC prepared an analysis of the financial impact these costs had on the financial results of the industry in its Report.[648] That analysis shows not only that legacy costs did not contribute to the declines in the industry's financial condition during the period from 1996 to 2000 but that the change in these "costs" actually benefitted the industry with respect to its operating results during this period.[649] In this regard, that analysis shows that the aggregate net period cost for steel producers who had either defined benefit or defined contribution plans actually declined over the period; more specifically, the aggregate net periodic cost of the post-employment pension and non-pension benefits for both defined benefit and defined contribution employers fell by $447 million during the period from 1996 to 2000.[650] Since these are the costs that are reflected in the operating results of the industry,[651] the industry's "legacy costs" did not increase the industry's costs over the period, as Complainants suggest; instead, the industry's legacy "costs" actually reduced the industry's aggregate cost of goods sold over the period, thus increasing the industry's operating income levels somewhat during the period of investigation.

505. Accordingly, it can be seen that the ITC was correct when it found that the industry's legacy costs had not contributed to the serious injury being experienced by the industry during the period of investigation. Although Complainants correctly note that the ITC recognized that legacy costs represented a "vexing problem" for the industry, they ignore the fact that the ITC clearly stated that the legacy cost issue was a problem predating the period of investigation that would hinder the industry's future efforts to adjust, but did not contribute significantly to the pricing or cost issues that caused the industry's injury during the period of investigation. Given this, and the supporting record data, the ITC reasonably found that these costs had not been a factor causing injury to the industry during the period.

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[647] ITC Report, p. 64.

[648] ITC report, Table OVERVIEW-9.

[649] ITC report, Table OVERVIEW-9.

[650] ITC report, Table OVERVIEW-9. In this regard, the aggregate net periodic cost for these firms for legacy costs consistently declined during the period, from 1.123 billion dollars in 1996 to 834 million dollars in 1998 to 676 million dollars in 2000. *Id*. The aggregate net periodic cost of these expenses is calculated by adding the net periodic costs (or benefits) of post-employment pension and non-pension benefits for defined benefit plan employers to the net pension plan expense and other post-employment benefits for defined contribution plan employers. *Id*. These are the amounts recognized in a company's operating income statements. *Id*.

[651] It is important to note that the items marked "amounts recognized in financial statements" in Table OVERVIEW-9 reflect liability or asset amounts that are included in a company's balance sheet, not its statements of operating results. ITC Report, pp. 33 & 35.

d. *The ITC Properly Ensured that It Did not Attribute to Imports Any Injurious Effects of Intra-Industry, i.e., Minimill, Competition*

506. Moreover, the ITC also identified intra-industry competition -- from minimills, in particular – as a possible other factor causing injury to the industry during the period of investigation. In its analysis of the effects of intra-industry competition, the ITC explained, in a reasoned and thorough manner, the nature and extent of the injurious effect attributable to these increases, and distinguished that effect from the effects of imports. The ITC's analysis was fully in accordance with the requirements of the Safeguards Agreement.

507. In its analysis of intra-industry competition, the ITC thoroughly discussed the nature and extent of minimill competition on domestic pricing for certain carbon flat-rolled steel.[652] In particular, the ITC correctly recognized that the record data showed that minimills "did typically enjoy cost advantages over integrated producers," noting that these advantages were due to minimills' lower raw materials costs and the different product mixes of the two categories of producer.[653] As a result of these cost advantages, the ITC found that it was reasonable to expect that the addition of a greater volume of lower cost capacity would have some indirect effect on prices.[654] Based on its assessment of the record, therefore, it concluded that the addition of this lower-cost capacity had some effect on domestic pricing during the period of investigation.[655]

508. Moreover, the ITC did not simply assume that the pricing decisions of minimill operators had caused the substantial price declines that hit the carbon flat-rolled steel market between 1998 and interim 2001. Instead, it appropriately examined the ample record evidence that was available on the nature of price competition between minimills, imports and integrated producers.[656] As the ITC noted in its discussion of the competitive effects of minimills, the data indicated that, even though minimills were lower-cost producers than integrated producers, imports, not minimills, were the price leaders in the market place and led prices downward throughout the period of investigation.[657] Indeed, as the ITC pointed out in its analysis, the price comparison data showed that imports consistently undersold minimill producers throughout the entire period of investigation on its sales of hot-rolled merchandise, which accounted for the bulk

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[652] ITC Report, p. 65.

[653] ITC Report, p. 65.

[654] ITC Report, p. 65.

[655] ITC Report, p. 65.

[656] In this regard, we note that, during its investigation, the ITC prepared a series of specific charts breaking out the financial and production operations for minimill and integrated producers, separately, and a series of quarterly price comparison charts showing underselling/overselling patterns between minimills, imports and integrated producers. *See, e.g.*, INV-Y-215, pp. 3-11 (US-38); *see also* Minimill Trade Data (US-60). While some of this material may not be released because it is confidential, the ITC did, in fact, prepare such data and examine it, as can be seen in US-38. Accordingly, New Zealand's assertion that the ITC did not segregate data for these producers in its Report is highly misleading. New Zealand first written submission, para. 4.160.

[657] ITC Report, p. 65.

of minimill shipments during the period.[658] Moreover, the record showed that imports undersold minimills consistently on plate and cold-rolled as well during the period as well.[659] Given this record evidence, the ITC properly concluded that it was not "low-cost" minimills, but imports, that led prices in the carbon flat-rolled market down so consistently during the period from 1998 to 2001.[660] Thus, although the ITC reasonably concluded that minimills had played some role in price declines in the market, it also correctly found that it was increased imports, not the operations of minimills, that were the primary cause of the price declines that occurred during the period from 1998 to 2000.[661]

509. Like its discussion of capacity increases, it is clear that the ITC discussed the nature and extent of the pricing effects of both imports and minimills and distinguished the effects attributable to minimills from those attributable to imports. As discussed above, the ITC properly recognized that minimills did have the ability to reduce their prices to respond to competition from imports and other producers, and that they did therefore have some impact on domestic pricing as a result. However, the ITC correctly noted that the weight of the record evidence established that imports had a far more significant and negative impact on prices than did minimills, specifically noting that the record evidence showed that "imports, rather than domestically produced steel, led prices downward during the POI."[662] Moreover, by finding that imports were the price leaders in the market and had a far more substantial effect on domestic pricing than minimills, the ITC appropriately made a qualitative assessment of the extent of injury that was attributable to each of these factors.

510. Indeed, the only way in which the ITC could have more specifically identified the distinct amount of pricing effects caused by minimill competition would have been to place a quantitative value on the effects caused it. However, as we have previously noted, the text of the Safeguards Agreement does not require a quantitative valuation of the effects attributable to imports or non-import factors, respectively, nor have the Appellate Body or any panels construed the Safeguards Agreement to do so.[663]

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[658] In this regard, we note that it was entirely reasonable for the Commission to rely on its price comparison data for two hot-rolled products when assessing whether imports consistently undersold the merchandise sold by minimills. In this regard, the record indicated that hot-rolled steel accounted for the large majority of minimill producers' commercial shipments. *Compare,* Table FLAT-1 (Minimill Trade Data for Carbon Flat-rolled Steel) with Table G03-1 (Table for Minimill Hot-rolled Steel Trade Date) (US-60). Accordingly, Brazil's assertion that the ITC improperly relied on this data to support its analysis is simply misplaced. Brazil First written submission, para. 197.

[659] As indicated previously, although the quarterly pricing comparisons are confidential, the record shows that imports undersold minimills on their sales of plate, hot-rolled and cold-rolled steel in the large majority of possible price comparisons during the period, with imports underselling minimills in 64 percent of possible comparisons (70 of 110 comparisons), at margins ranging up to 30.6 percent. Id. Imports undersold minimills in 76 percent of possible comparisons (50 of 66) involving plate and hot-rolled merchandise. Id.

[660] ITC Report, p. 65.

[661] ITC Report, p. 65.

[662] ITC Report, p. 63-64.

[663] *See, e.g., US - Lamb Meat*, Panel Report, para. 7.247; *US - Wheat Gluten*, Panel Report, para. 8.142.

511. Complainants assert, however, that the ITC's analysis ignores the fact that the amount of capacity added by minimills was substantially larger than increases in imports during the period of investigation.[664] As we indicated previously, this argument is flawed in several respects. First, Complainants' argument fails because it is based on an "apples" to "oranges" comparison of non-comparable factors. In particular, Complainants' mistakenly compare the capacity increases of minimill producers to import shipments during the period, when the more appropriate comparison is to compare the minimills' capacity increases to capacity increases of foreign producers. As we indicated above, if Complainants had performed this more appropriate comparison, they would have recognized that the foreign industry's capacity increases during the period of investigation were substantially larger than the capacity increases undertaken by minimills during this period.[665] Given this substantial difference in the capacity increases of the two sets of producers, it should not be surprising that the ITC concluded that imports were a more significant cause of price declines in the market than minimills.[666]

512. Moreover, in this same vein, the record shows that there was a substantially larger volume of imports shipped into the market than there was of merchandise shipped by minimills. In particular, the volume of imports shipped into the U.S. market ranged between 18.3 million and 25.3 million tons on annual basis during the period from 1996 to 2000.[667] By way of comparison, the total volume of all carbon flat-rolled shipments (including GOES and tin mill steel) made by minimill producers into the commercial market never exceeded more than 11.9 million tons on an annual basis.[668] Moreover, as we have previously described, the record evidence established that imports routinely and consistently undersold domestic and minimill merchandise throughout the period of investigation, including the years 1998, 1999, and 2000.[669] Accordingly, the record clearly confirms that the ITC was correct when it found that imports had a more substantial impact on market pricing than minimills during the period from 1998 to 2000.

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[664] *See* Brazil first written submission, para. 199; Korea First written submission, para. 137; New Zealand first Written Submission, para. 4.159.

[665] *Compare* ITC Report, p. 57-8 with INV-Y-209, Table FLAT-ALT7 (US-33).

[666] In this regard, we note that several of the Complainants have made assertions about the size of minimill production capacity or production levels that are simply not consistent with the record. For example, New Zealand states that minimills production of flat-rolled steel increased to 45 million tons, and 47.5 percent ot total domestic production in 1999. New Zealand First written submission, para. 4.159 and attached figure. The record indicates that the actual minimill capacity for all carbon flat-rolled products in 1999 was 34.5 million tons. Table FLAT-1 (US-60).

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

[668] Table FLAT-1 (US-60). In this regard, the record indicates that the bulk of minimill production was captively consumed in the production of downstream products. For example, in 2000, minimills internally consumed or transferred 16.043 million tons of flat-rolled steel, or 56.4 percent, of its total production of 28.4 million tons of flat-rolled merchandise in that year. Generally, as the ITC has previously recognized, this captive consumption has little pricing impact in the market because it is not offered on the market for sale and is generally ear-marked for consumption by an individual producer. *See, e.g., Certain Flat-Rolled Carbon Steel Products from Argentina, et al.,* ITC Inv. Nos. 701-TA-319-332, 334, 336-342, 344 & 347-353 (Final) and 731-TA-573-579, 581-592, 594-597, 599-609, & 612-619 (Final), USITC Pub. No. 2664, at p. 21 (August 1993).

[669] ITC Report at 61-62, 65.

513. In support of this argument, Complainants contend that the ITC ignored the fact that the minimills were able to maintain their profitability levels in the face of aggressive price competition in the market because they had a lower cost structure than the integrated producers.[670] This argument is simply not correct. Although it was true – as the ITC recognized in its analysis – that "minimill producers may have been in a better position to withstand low-priced import competition than other domestic producers" due to their cost advantages,[671] the record does not show that minimills were able to maintain a healthy profit margin throughout the period of investigation in the face of lower prices. Instead, as even the Complainants' own charts show, the unit operating income for minimills declined from a profit of approximately $28 per ton in 1997 to a loss of approximately $4 per ton in 1998, when imports surged in the market.[672] Moreover, even though minimills were able to improve their operating income to approximately $7 and $16 dollars per ton in 1999 and 2000, respectively, the returns obtained by minimills in these two years remained significantly below the strong level obtained by minimills in 1997, that is, before the import surge occurred.[673] Further, minimills' operating income declined to a loss again in interim 2001, as prices fell even further in the market. In other words, despite Complainant's arguments to the contrary, the record shows not that minimills were able to continue earning strong profits throughout the period of investigation, even as prices fell, but that minimills experienced the same operating income declines as integrated producers as a result of the surge of low-priced imports that occurred in 1998.[674]

514. In sum, the ITC properly described the nature and extent of the pricing impact of minimills during the period of investigation and ensured that it did not attribute to imports those pricing effects. Its analysis was consistent with the Appellate Body's guidelines in this regard.

e. *The ITC Properly Ensured that It Did not Attribute to Imports Any Injurious Effects of Bad Management Decisions or Purchaser Consolidation*

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[670] Japan First written submission, paras. 274; Brazil First written submission, paras. 197-199; Korea First written submission, paras. 135.

[671] ITC Report, p. 65.

[672] Japan First written submission, Figure, p. 96; Brazil First written submission, Figure 25; Korea First written submission, Graph 4.

[673] Japan First written submission, Figure, p. 96; Brazil First written submission, Figure 25; Korea First written submission, Graph 4. Indeed, in this regard, we would note that there would be appear to be some correlation between these increases and the declines in imports volumes that were seen in these two years.

[674] Moreover, the United States notes that Complainants' argument is, in essence, an assertion that the ITC should have conducted its causation assessment for only a portion of the carbon flat-rolled steel industry, the integrated producers. Under the Safeguards Agreement, however, the ITC must assess whether imports are causing serious injury to the industry as a whole, not whether they are causing injury to certain segments of the industry. Thus, even if minimills were in fact performing somewhat better in the face of import competition than integrated producers, the ITC would nonetheless still need to consider whether the data for the entire industry showed whether the industry as a whole, including this producer, was seriously injured by imports. As we discuss above, it is clear that minimills were impacted by import competition as well during the period of investigation.

515. Finally, alone among Complainants, China contends that the ITC identified poor management decisions and purchaser consolidation as other factors causing injury to the industry but failed to identify the injury attributable to these causes or to ensure that it did not attribute this injury to imports.[675] Although China's arguments on these issues are cursory, it is apparent that China misreads the ITC's finding on these two factors. The ITC clearly rejected the arguments made by respondents that either of these factors caused injury to the industry.

516. In this regard, the ITC addressed the argument made by importers and foreign producers that bad management decisions, such as the industry's capital investment decisions, had caused injury to the industry.[676] The ITC found this argument "unpersuasive," noting that the increased debt load and other management decisions of the industry did not explain the decline in prices that occurred during the period.[677] Moreover, the ITC stated that the record showed that substantial declines in the industry's performance first began in 1998, when imports surged into the market and began driving prices downward.[678] It noted that these imports prevented the industry from maintaining or achieving high levels of profitability and that the industry's degree of debt was a result of that import competition, rather than being a cause of injury.[679] In sum, the ITC properly identified the nature and extent of the injury caused by this other factor, found that there was no evidence that bad management decisions caused injury to the industry, and reasonably dismissed this alleged "injury" factor as a possible source of injury.

517. Similarly, the ITC also addressed the argument made by foreign respondents that buyer consolidation had impacted the bargaining power and profits of the industry.[680] After recognizing that there had been some consolidation of buying operations by automotive manufacturers and other steel purchasing sectors, the ITC discounted this factor as a cause of injury, noting that it had been on-going for a number of years and that it pre-dated 1998, the year of the import surge.[681] Moreover, it stated that it found no evidence indicating that this consolidation had an impact on domestic pricing or that it had been a cause of serious injury to the industry.[682] Given that China has not offered any substance to support these arguments, it is clear that the ITC's findings in this regard are reasonable and that the ITC properly discounted the argument that purchaser consolidation was a source of injury to the industry.

iii. *The ITC Reasonably Chose Not to Rely on the Econometric Analyses Submitted by the Domestic Industry and Foreign Respondents*

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[675] China First written submission, paras. 370 & 375.
[676] ITC Report, p. 64.
[677] ITC Report, p. 64.
[678] ITC Report, p. 64.
[679] ITC Report, p. 64.
[680] ITC Report, p. 65.
[681] ITC Report, p. 65.
[682] ITC Report, p. 65.

518. Brazil and Japan further assert that the ITC ignored for no reason an economic study, submitted by counsel for the foreign respondents, that they insist established that imports had a significantly smaller impact on carbon flat-rolled steel prices than other factors.[683] According to Japan and Brazil, this study was a "formal economic study" that "demonstrated qualitatively and quantitatively" that several non-import factors had a more important impact on pricing than imports.[684] Moreover, they contend, the ITC's economic staff and an economic consultant for the industry both agreed with the study's findings that imports had no impact on cold-rolled pricing and corrosion-resistant pricing, and little impact on hot-rolled pricing.[685] Finally, they assert that the ITC appears to have misread its own staff memorandum when discounting the conclusions of the study in its determination.

519. Nothing could be further from the truth. The ITC properly dismissed the conclusions in the study -- and those in a similar study submitted by the domestic industry -- because both studies had "serious" methodological limitations.[686] The two studies in question both purported to be comprehensive economic studies establishing the extent to which imports impacted pricing in the flat-rolled market.[687] Not surprisingly, the study submitted by the domestic industry purported to show that "imports were the most important determinant of the decline in domestic hot- and cold-rolled steel products," while the study submitted by foreign respondents purported to show that imports were not a particularly important factor in price declines for hot-rolled, cold-rolled and galvanized (i.e., corrosion-resistant) steel.[688]

520. As can be seen from the staff memorandum analyzing the studies, the ITC's economic staff found that the economic "models" in both studies contained substantial analytical flaws. [689] The ITC staff found that the domestic industry's study was flawed because it assumed, without laying an evidentiary foundation, that integrated producers would make changes in their production patterns due to changes in profitability levels.[690] Moreover, the staff noted, the domestic industry's study failed to make the necessary distinctions between factors reflecting demand variations and variations in domestic and foreign competition in the market.[691] As a result, the staff concluded, the domestic study simply did not provide sufficient statistical evidence of its conclusions, that is, that the "effect of import competition was significantly greater than the effect of other factors."[692] In other words, the ITC staff found that the author of the study had not proved his thesis.

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[683] Japan First written submission, paras. 276-281; Brazil First written submission, paras. 212-215.
[684] Japan First written submission, paras. 276-281; Brazil First written submission, paras. 212-215.
[685] Japan First written submission, paras. 276-281; Brazil First written submission, paras. 212-215.
[686] ITC Report, p. 59, n. 260.
[687] EC-Y-042 (US-35).
[688] EC-Y-042, p.1 (US-35)
[689] EC-Y-042, p.2-3. (US-35)
[690] EC-Y-042, p.2. (US-35)
[691] EC-Y-042, p.2. (US-35)
[692] EC-Y-042, p.3. (US-35)

521. The ITC staff found that the study submitted by the foreign respondents had serious methodological flaws as well. Its most significant flaw, they noted, was that the study was not actually a "formal" economic model but simply reflected an "informal" argument that "'massive' increases in domestic capacity, primarily by low-cost mills, [had] driven down prices."[693] After noting that "capacity is generally not a proximate cause of price changes," the staff stated that the lack of a formal conceptual model made it impossible to assess the validity of the study's core argument.[694] The staff also noted that the respondents' economic "model" failed to provide an adequate justification for using certain variables as the best measures of domestic competition.[695] Accordingly, the staff noted, the study's "main argument[,] that domestic competition was the biggest source of domestic price decline[,] is only weakly supported by the empirical results."[696] In their final word on the matter, the ITC economic staff stated that the author of the study "did not provide evidence that the effect of import prices and volumes was significantly less than the other factors."[697] In other words, the ITC staff found that the author of this study had not provided support for his basic argument.

522. In sum, the ITC reasonably chose to discount these studies because the ITC and staff both found the two studies to be deeply flawed. In this regard, it would appear to be Japan and Brazil who misread the ITC staff memorandum.

iv. *The ITC's Analysis of the Impact of Antidumping and Countervailing Duty Orders on Imports During the Period was Reasonable and Fully Consistent with the Safeguards Agreement*

523. Brazil and Korea also contend that the ITC failed to properly analyze the impact of unfairly traded imports in the market in its analysis, asserting that the ITC failed to recognize that the antidumping and countervailing duty orders imposed on imports effectively eliminated the injurious effects of these imports.[698] Accordingly, Brazil and Korea argue, the ITC should have treated the effects of these imports as an other factor causing injury to the industry. Their argument is flawed, legally and factually.

524. First, as a legal matter, there is simply no provision in the Safeguards Agreements that requires a competent authority to exclude imports subject to antidumping or countervailing duty orders from its calculus of assessing the contribution of imports to injury. On the contrary, the basic provisions of the Safeguards Agreement require a competent authority to assess serious injury and causation by examining whether "imports" -- that is, all imports, not only "fairly traded" imports -- have caused serious injury to the domestic industry producing the like or

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[693] EC-Y-042, p.2.(US-35)
[694] EC-Y-042, p.2.(US-35)
[695] EC-Y-042, p. 3.(US-35)
[696] EC-Y-042, p. 3.(US-35)
[697] EC-Y-042, p. 3.(US-35)
[698] Korea First written submission, paras. 139-140; Brazil First written submission, paras. 208-211.

directly competitive article.[699] Indeed, unless a particular exception in the Agreement applies, the remedy imposed must apply to all imports of the product concerned "irrespective of its source," without regard to whether some imports are subject to antidumping or countervailing duty orders.[700] The Agreement simply does not suggest that a competent authority should treat imports subject to antidumping or countervailing duty orders as though they were a "non-import" injury factor in the ITC's causation analysis.

525. Second, the argument is incorrect as a theoretical matter. The premise of Brazil's and Korea's argument is that the imposition of antidumping or countervailing duties on imports from a particular country eliminates all of the injurious effects these imports have had, or could have, on an industry. Under the Antidumping and Subsidies Agreements, an investigating authority may impose duties on imports if dumped or subsidized imports are causing "material" injury to a domestic industry producing the like product.[701] As the Appellate Body has stated, the "material" injury standard contained in these Agreements requires a lower amount of injury than does the "serious injury" standard of the Safeguards Agreement.[702] Thus, an investigating authority need only determine in an antidumping or countervailing duty investigation whether there is the requisite amount of injury, that is "material" injury, needed to satisfy the requirements of the Antidumping and Subsidies Agreements; the authority has no need to assess whether the industry is suffering a higher -- i.e., "serious" -- level of injury than the "material" level required under the Antidumping and Countervailing Duty Agreements.

526. Accordingly, although antidumping duties and countervailing duties are remedial duties intended to offset the level of subsidies or the amount of "dumping" found for imports from a country and, by doing so, to remedy the "material" injury caused by these dumped or subsidized imports, they do not, and indeed may not, offset all of the injury that an industry can suffer as a result of those imports. Indeed, oftentimes, the orders do not offset all of the material injury caused by unfairly traded imports even after their imposition. In other words, even with the imposition of duties to offset these "unfair" trade practices, imports subject to antidumping an countervailing duty orders can still cause additional injury to the industry that would qualify as serious injury under the Safeguards Agreement.

527. For example, even if antidumping or countervailing duties were imposed on imports of a product from a particular country, importers are not precluded from increasing their shipments of these imports to the U.S. market. As a result, imports from a particular country can still surge into the market at fairly traded prices and take away substantial market share from the industry, or reduce domestic production and shipment levels in a serious fashion. Similarly, imports subject to antidumping and countervailing duty orders can continue to undersell the domestic like

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[699] *See* Safeguards Agreement, Article 2.1, 4.2(a), & 4.2(b).

[700] Safeguards Agreement, Article 2.2.

[701] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 3.1, n. 9; Agreement on Subsidies and Countervailing Measures, Article 15.1, n. 45.

[702] *US- Lamb Meat,* AB Report, para. 124.

product and place downward pressure on prices, even if an antidumping order offsets the dumping margins for the product. For example, if a particular country had a competitive cost advantage over the United States with respect to the products, producers in that country could still price their product at "fair," i.e., non-"dumped", prices and yet still be able to undersell the industry and cause serious price declines in the market.[703] Given this, it is clear that the imposition of antidumping and countervailing duties does not indicate that imports subject to those duties are no longer capable of contributing to serious injury to an industry because they are "fairly" traded. On the contrary, since safeguards actions are intended to remedy injury arising from increases in "fairly traded" imports, the imposition of antidumping or countervailing duties on imports from particular countries simply places those imports on a par with other "fairly traded" imports in the safeguards proceeding. Accordingly, as a theoretical matter, the argument of Brazil and Korea fails under the Safeguards Agreement.

528. Indeed, the record did not show that the orders imposed on certain carbon flat-rolled steel products during the period of investigation had eliminated the injurious effects of these imports. As the ITC correctly noted in its decision, although imposition of orders on hot-rolled carbon steel and plate stemmed the flow of these imports to some extent, the record data showed that reasonably substantial volumes of imports from the countries covered by the orders still continued to enter the United States, as did much more substantial volumes of imports from countries not covered by the orders.[704] For example, despite the fact that antidumping duty orders were imposed on carbon steel plate imports from China, Russia and the Ukraine in October 1997,[705] China, Russia and the Ukraine remained the third, fourth and ninth largest exporters of plate to the United States in the year 2000.[706]

529. Moreover, even with the imposition of antidumping duty orders on hot-rolled steel from Russia, Japan, and Brazil, prices for hot-rolled steel continued to be depressed in the market after imposition of the orders.[707] Although antidumping orders were imposed on these imports in June and July 1999,[708] the ITC correctly noted, the "corrosive effects" of these low-priced imports still continued to impact the industry's pricing levels, as evidenced by the fact that the pricing levels for hot-rolled did not come close to recovering to their 1997 levels, even after imposition of the orders.[709] On the contrary, after imposition of these orders, the record indicated that hot-rolled

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[703] Indeed, if the United States is an important enough market for a country subject to an order, that country's producers may even choose to lower their home market price to offset the dumping margin, rather than increasing their U.S. prices. This results in the export prices of the producers remaining at the same low levels that led to adverse price effects in the antidumping investigation.

[704] ITC Report, p. 62.

[705] ITC Report, p. OVERVIEW-3.

[706] INV-Y-180, Table G02 (US-40).

[707] ITC report, p. 62.

[708] ITC Report, p. OVERVIEW-3.

[709] ITC Report, Tables FLAT-66-FLAT-71 & FLAT-73-74.

prices continued declining through the end of June 2001, after a small initial boost in the first two quarters of 2000.[710]

530. In sum, the ITC properly analyzed the impact of the antidumping and countervailing orders imposed on imports during the period of investigation. It correctly chose to treat these imports in the same manner as all other "fairly" traded imports in its investigation. Moreover, it also correctly found that the orders had not fully eliminated the injurious effects of these and other imports.

v. *As specified by the Appellate Body, the ITC Did Not Consider the Cumulative Effect or Interrelation of Other Causes*

531. Finally, Japan contends that the ITC should have considered the impact of the non-import factors on a cumulative basis when performing its causation analysis because the "effects of these various factors are interrelated and mutually reinforcing . . . "[711] Moreover, Japan asserts, the "effect of these factors intensified dramatically in the latter part of the period when the steel market experienced a sharp contraction in demand. . . "[712] Finally, Japan asserts, the ITC analysis provides no discussion of these interactions; instead, the ITC "evaluated the importance of each factors in isolation relative to increased imports. . ."

532. For the first time, the United States must admit that it agrees with some of the assertions made by Japan in its first written submission. Like Japan, the United States agrees that the effects of most injury factors, including increased imports, are oftentimes "interrelated and mutually reinforcing" and are therefore difficult to disentangle. Similarly, the United States agrees that, when one of these factors intensifies its injurious effect over time, it is likely that it will also intensify the injury experienced by the industry due to the interplay of that factor with other factors causing injury, such as increased imports. In fact, it is precisely for these reasons that the United States has consistently taken the position in WTO disputes that it is not realistic as an economic matter to expect a competent authority to precisely identify and separate the injury effects of individual factors in complex and sophisticated markets, such as the steel market.

533. Nonetheless, Japan is clearly mistaken in asserting that a competent authority must assess whether imports are a more important cause of serious injury than all other possible factors before imposing a safeguards remedy. The Safeguards Agreement simply does not contain a requirement that a competent authority find that the injurious effects of imports are greater than the cumulated effects of all other injurious factors. In fact, the Agreement contains no language requiring a competent authority to weigh the importance of the injurious effects of increased imports against any factor, either individually or collectively, nor has Japan pointed to such a

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[710] ITC Report, Tables FLAT-68-69.
[711] Japan First written submission, paras. 282-283.
[712] Japan First written submission, paras. 284.

requirement in its argument. Instead, as long as there is a "genuine and substantial" causal relationship between increased imports and a significant overall impairment in the condition of the industry, and as long as the competent authority does not attribute the effects of other factors causing injury to imports, the requirements of the Safeguards Agreement are satisfied. Indeed, even the Appellate Body has interpreted the Agreement as requiring a competent authority to "separate and distinguish" the injurious effects of individual factors causing injury from one another when performing its injury analysis.[713] Even though this separation and distinction of individual injury factors may be "difficult," the Appellate Body has directed that it be done.[714]

534. Accordingly, in its steel determination, the ITC has taken great pains to identify the nature and scope of the injury caused by both imports and other individual factors, to assess the extent of injury, if any, that each of these individual factors has caused to the industry, and to ensure that it does not attribute the effects of non-import factors to imports in its causation analysis. Indeed, even Japan appears to concede that the United States did actually "isolate" the injurious effects of each of the factors by evaluating the importance of each factor in relation to increased imports.[715] The ITC's efforts in this regard are in full compliance with the principles outlined by the Appellate Body in *US -Wheat Gluten* and other cases, i.e., that competent authorities "separate" and "distinguish" the effects of increased imports from those of all other individual injury factors in safeguards investigations.

535. Accordingly, the United States believes that the cumulated analysis proposed by Japan is simply not consistent with the provisions of the Safeguards Agreement or the interpretation of these provisions by the Appellate Body.

vi. *Conclusion*

536. In sum, the ITC's causation analysis with respect to certain carbon flat-rolled steel is a well-reasoned and cogent analytical discussion that takes into account the complexities of a large and sophisticated market for a raw material critical to any large economy. In its analysis, the ITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of certain carbon flat -rolled steel and the significant declines in the condition of the carbon flat-rolled steel industry during the latter half of the period of investigation. Moreover, the ITC analyzed a number of other factors alleged to be causing injury to the industry (such as demand declines, increased domestic capacity, and intra-industry competition), identified the nature and scope of the injury caused by these factors, if any, and ensured that it did not attribute the effects of these

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[713] *See, e.g., US - Lamb Meat*, AB Report, paras. 179, n. 38 ("[i]n a situation where several factors are causing injury 'at the same time,' a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated.").

[714] *US - Hot-Rolled,*AB Report, para. 228.

[715] Japan First written submission, para. 285.

factors to imports. The ITC's analysis is fully consistent with the requirements of the Safeguards Agreement.

c. Commissioner Miller's Causation Analysis For Tin Mill Steel Was Fully In Accordance With Articles 2.1 and 4.2 of the Safeguards Agreement

537. With regard to tin mill steel, Commissioner Miller established, through a thorough and objective assessment of the record evidence, a genuine and substantial cause and effect relationship between increased imports and serious injury. Her analysis showed that there was a clear correlation between increases in the volume of increasingly low-priced imports of tin mill steel and the significant declines in the overall condition of the tin mill steel industry that occurred during the latter half of the period of investigation. She conducted a thorough and objective examination of the nature and extent of the effects of other factors and ensured that she did not attribute the effects, if any, of these factors to imports in her analysis. Complainants' arguments to the contrary have no merit.

i. *The President Did Not Rely Solely on Commissioner Miller's Causation Analysis*

538. As an initial matter, the United States notes that several Complainants mistakenly assert in their briefs that the President relied solely on Commissioner Miller's causation findings for tin mill products when determining to impose a safeguard remedy on tin mill steel.[716] As the United States discusses in more detail below, three Commissioners found that tin mill steel was causing serious injury to the domestic tin mill industry: Commissioners Miller, Bragg and Devaney.[717] Commissioner Miller found tin mill steel to be a separate like product and made an affirmative injury finding for that product,[718] while Commissioners Bragg and Devaney found tin mill steel to be part of the same like product as other carbon flat-rolled steel and made an affirmative determination for that like product.[719]

539. Under the U.S. statute, the President cannot decide to treat an affirmative finding of one Commissioner as a basis for imposing a remedy, as Complainants allege. Instead, under the U.S. statute, the President may only impose a remedy if at least one-half of the Commissioners then in office make an affirmative finding of injury and causation.[720] In this case, the President was only able to impose a remedy on tin mill products because three of the six sitting Commissioners had found that tin mill steel, whether or not treated as a separate like product, had caused serious injury to a domestic industry. In fact, in his official announcement of the

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[716] *See, e.g.,* EC First written submission, para. 477; Norway First written submission, para. 314; China First written submission, para. 508.

[717] ITC Report, pp. 55, n. 224, 269, &307.

[718] ITC Report, pp. 307.

[719] ITC Report, pp. 364-65, 50, n. 186, & 269.

[720] 19 U.S.C. §2253(a) & 1330(d)(i).

imposition of these remedies, the President specifically stated that he considered the "determinations of the groups of Commissioners voting in the affirmative with regard to" tin mill products to be the determination of the ITC.[721] In other words, the President specifically and clearly identified the affirmative determinations of Commissioners Miller, Bragg and Devaney as the decision of the Commission for tin mill steel. Accordingly, even though Complainants argue otherwise, the President's remedy finding does not indicate that he adopted the like product decision or injury finding of Commissioner Miller as his own.

540. Thus, it is incorrect both legally and factually for Complainants to assert that the President adopted the injury and causation findings of Commissioner Miller as the sole grounds for his findings. Nonetheless, because Complainants focus their arguments concerning tin mill products almost entirely on Commissioner Miller's causation analysis for tin mill, the United States also focuses its discussion on Commissioner Miller's analysis as well.

541. However, the United States does note that Complainants have not seriously challenged the affirmative findings of Commissioners Bragg and Devaney with respect to tin mill products and other carbon flat-rolled products.[722] Accordingly, the Complainants have failed to make a *prima facie* showing that Commissioners Bragg and Devaney's analysis with respect to these products violated the causation requirements of the Safeguards Agreement. The Panel should therefore should find that the causation analysis of these Commissioners has not been placed at issue by Complainants in this proceeding and should find that the determinations of these Commissioners are proper under the Agreement.

ii. *In Her Analysis of the Tin Mill Steel Industry, Commissioner Miller Thoroughly and Objectively Explained the Nature of the Causal Link Between Imports and the Industry's Serious Injury*

a. *Commissioner Miller's Analysis Established That There Was a Clear Correlation Between Import Trends and Declines in the Industry's Condition*

[721] Presidential Proclamation No. 7259, 3 March 2002, paragraph 4.

[722] Only one Complainant, Korea even attempts to make a cursory challenge to the analysis of Commissioners Bragg and Devaney, but its challenge consists of the single assertion that Commissioners Bragg and Devaney never considered at factors that were responsible for the decline in the "condition of the tin mill products industry." Korea first written submission at 146. Korea's argument ignores the fact that these Commissioners found that the tin mill steel was part of the broader carbon flat-rolled steel like product category. ITC Report, pp. 36, n. 65, 269. As a result, under the U.S. statute and the Safeguards Agreement, the primary focus of these Commissioners should have been, and was, on the impact of carbon flat-rolled steel imports on the domestic industry producing carbon flat-rolled steel, given the conditions of competition affecting that broader market. Thus, Commissioner Bragg and Devaney appropriately focused their analysis on conditions of competition in that marketplace, not on the smaller segment of that market that included tin mill steel.

542. Commissioner Miller performed a thorough and objective analysis of the record and established that there was a genuine and substantial causal link between the volume and market share trends for imports of tin mill steel and the significant declines in the condition of the tin mill steel industry during the latter half of the period of investigation.[723] In her analysis, Commissioner Miller took into account all of the relevant factors affecting the competitiveness of domestic and imported merchandise in the U.S. market,[724] the trends in import volumes and market share during the period,[725] the pricing effects of imports,[726] and correlations between these import trends and the changes in the industry's condition.[727] After assessing these factors, she reasonably found that there was a substantial and genuine relationship between increases in low-priced imports and the substantial declines in the industry's condition during the period.

543. In her analysis, Commissioner Miller found that several conditions of competition affected the market for tin mill steel, noting in particular that:

a. Demand for tin mill steel declined overall during the period, by 4.9 percent from 1996 to 2000. This decline was not steady, however, because apparent consumption in both 1997 and 1999 grew to the levels seen in 1996, the first year of the period of investigation.[728]

b. Tin mill producers and purchasers both agree that there has been a long-term decline in demand, as consumers have increasingly used non-tin mill products for packaging, the primary end use for tin mill steel.[729]

c. U.S. producers have responded to this decline in demand by reducing capacity, with aggregate domestic capacity declining by 3.7 percent between 1996 and 2000.[730]

d. Imported and domestic tin mill steel is substitutable and the tin mill market is highly price-sensitive. Import prices are used as leverage by purchasers in contract negotiations with the domestic industry.[731]

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[723] ITC Report, pp. 307-09.
[724] ITC Report, pp. 307-08.
[725] ITC Report, p. 308.
[726] ITC Report, p. 308.
[727] ITC Report, pp. 308-09.
[728] ITC Report, p. 307 & Table FLAT-C-8.
[729] ITC Report, p. 307.
[730] ITC Report, p. 307.
[731] ITC Report, p. 307.

e. Tin mill purchasers have increasingly consolidated, thus enhancing their negotiating power. However, much of this consolidation took place well before the period of investigation.[732]

f. An antidumping duty order was imposed on tin mill products from Japan in the second half of 2000. Imports from Japan have continued to enter the U.S. market, however.[733]

544. Taking the foregoing conditions of competition into account, Commissioner Miller then conducted a thorough and objective examination of the trends for imports and the industry's injury factors. She concluded that there was a clear correlation between increased import volume and declines in the overall condition of the industry.[734] In particular, she found that:

- While the volume of imports increased overall, imports surged in 1999 when they increased by 45.0 percent from the prior year. Imports also showed their greatest market share gain in 1999, with their market share growing by 4.9 percentage points from 12.8 percent in 1998 to 17.7 percent in 1999.[735]

a. Although the industry had been unprofitable before 1999, it suffered a serious downturn in operating income in 1999 when imports surged into the market. In 1999, the industry's operating income margin dropped by 3.2 percentage points from its level in 1998, to -6.9 percent.[736]

b. The growth in imports, particularly the surge in 1999, placed downward pressure on the price of domestic merchandise. Import pricing declined throughout the period but at a more rapid rate than domestic pricing. Domestic prices declined through the period, and were at their lowest levels in 1999, when the import surge occurred.[737]

c. Imports are substitutable with domestic merchandise. Moreover, there was intense price competition between imports and domestic merchandise in contract negotiations during the period of investigation. These facts indicated that the industry's downward trends in 1999 were due directly to the surge in imports in that year.[738]

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[732] ITC Report, p. 307.
[733] ITC Report, p. 308.
[734] ITC Report, pp. 308-09.
[735] ITC Report, p. 308.
[736] ITC Report, p. 308.
[737] ITC Report, p. 308.
[738] ITC Report, p. 308.

d. Although import volumes slackened somewhat in 2000 and interim 2001, they continued to exert substantial pricing pressure in the market because of the intense price competition in annual contract negotiations. As a result, the condition of the industry continued to deteriorate during the last year-and-a-half of the period, with the industry's operating margin remaining at -6.1 percent in 2000 and declining to -7.4 percent in interim 2001.

545. In sum, Commissioner Miller established that there was a genuine and substantial correlation between import trends and declines in the industry's condition during the latter half of the period of investigation. In particular, Commissioner Miller showed 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.[739] Similarly, although import levels slackened somewhat from 1999, their peak year, Commissioner Miller established that imports remained at a level in 2000 that was substantially higher than the levels seen in 1996[740] and that they were priced at increasingly lower levels during the course of intense annual price negotiations in 2000 and 2001.[741] As a result, she reasonably found that these elevated import levels caused substantial declines in the operating margins of the industry during this period and continued to seriously injure the industry.[742] Clearly, Commissioner Miller's analysis showed that there was a genuine and substantial correlation between increased volumes of increasingly lower-priced imports and the substantial declines in the industry's condition from 1999 to 2001.

b. *Complainants' Arguments to the Contrary Have no Merit*

546. Complainants assert that there was a not a clear correlation between import increases and declines in industry trends. First, Complainants assert that there was no correlation between increases in import volumes during the last half of the period and the declines in the industry's operating margins,[743] as Commissioner Miller found. Actually, the record showed a direct correlation between changes in import volumes and changes in the industry's operating margins between 1998 and 2000. For example, in 1998, when import market share increased by 2.8 percentage points, the industry's operating income margin dropped by 2.4 percentage points. Similarly, in 1999, when import volumes surged dramatically in 1999 (growing by 45 percent on an absolute level and by 4.9 percentage points in market share terms), the industry's operating loss percent nearly doubled, dropping from -3.7 percent in 1998 to -6.9 percent in 1999.[744] In 2000, however, when import volumes and market share slackened somewhat between 1999 and

[739] ITC Report, p. 308.
[740] ITC Report, p. 308.
[741] ITC Report, p. 308.
[742] ITC Report, p. 308.
[743] Japan First written submission, para. 295; Brazil First written submission, para. 260.
[744] ITC Report, Table FLAT-C-8.

2000 (with import market share declining to a still elevated 15.5 percent),[745] the relatively small improvement in import volumes relieved the pressure imposed by imports on the industry's operating income levels somewhat, allowing the industry's operating margins to increase slightly, to -6.1 percent, from a level of -6.9 percent in 1999.[746] The record shows that there was a direct correlation between changes in import volumes in the market and changes in the industry's operating margins, despite the Complainants' arguments to the contrary.

547. Complainants also assert that Commissioner Miller mistakenly found that imports had placed significant downward pressure on domestic prices, noting that the record indicated that the average unit values of imports were higher than domestic average unit values during each year of the period of investigation.[747] Their argument is flawed in two respects. First, Complainants mistakenly believe that downward price pressure can only be exerted by means of underselling. In fact, price-depression can occur when a producer that has been selling its product at a higher price in a market chooses to reduce its prices significantly in the market in order to gain market share. In this situation, to the extent that the higher prices reflect a premium paid by purchasers for the producer's merchandise, the producer's decision to sell its product at a lower price will exert a downward pressure on substitutable products in that marketplace. Accordingly, while it may be true that imports of tin mill steel had not been routinely underselling domestically produced tin mill products during the period, this lack of underselling does not preclude a finding that higher-priced tin mill imports caused price-depression in the market in 1999, 2000, and 2001, as they were sold at increasingly low prices.[748]

548. Second, the record establishes that the surge of imports into the market in 1999 did, in fact, have just such a downward impact on domestic prices. As can be seen from the very charts used by these Complainants to illustrate their point about underselling, the annual average unit prices of domestic and imported tin mill steel remained relatively stable throughout the period from 1996 to 1998.[749] In particular, the net average unit values for domestic commercial sales of tin mill steel ranged between $610 and $616 per ton during this period, while the net average unit values of imported tin mill steel ranged between $657 and $669 per ton. [750]

549. When imports of tin mill steel surged in 1999, however, the average unit values of both domestic and imported merchandise dropped substantially from their levels during 1996 to 1998, with the average unit values of imports falling $73 per ton to $596 in 1999, and the average unit

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[745] ITC Report, Table FLAT-C-8. In this regard, although import volumes fell by 16.9 percent and import market share fell by 2.2 percent in 2000 from their peaks in 1999, import volumes and market share in 2000 remained significantly higher than their levels in 1996 through 1998, before the import surge. Id.

[746] ITC Report, Table FLAT-C-8.

[747] EC First written submission, paras. 481-82; Norway First written submission, paras. 333-34.

[748] ITC Report, Table FLAT-75-76.

[749] *See, e.g.,* EC First written submission, Figure 32; *see also* ITC Report, Table FLAT-C-8.

[750] *See, e.g.,* EC First written submission, Figure 32; *see also* ITC Report, Table FLAT-C-8.

values of domestic merchandise falling by $26 per ton to $584 in 1999.[751] In 2000, even though imports slackened somewhat but remained at elevated levels, the average unit values of imports and domestic product both remained at depressed levels. Finally, in interim 2001, average unit values of imports and domestic merchandise increased somewhat (after the imposition of the antidumping duty order on Japanese goods) but remained at levels that were substantially below the pricing levels seen in 1998, before the surge in imports.[752] However, throughout this period, as import pricing declined, domestic pricing did as well, and caused substantial declines in the industry's operating loss levels. Given this, Complainants arguments about underselling simply fail to appreciate the economic reality of competition in this market.

550. Complainants mistakenly assert that Commissioner Miller "failed" to take into account that a "substantial portion" of imports consisted of tin mill products that were not available domestically,[753] a fact relied on by three other Commissioners who made a negative determination for tin mill steel.[754] In fact, Commissioner Miller did address this very issue, although in a different manner than the other Commissioners, when she found that purchasers considered imported tin mill steel and domestic merchandise to be substitutable for one another.[755] Because the level of substitutability measures the degree to which products are considered similar to one another for pricing purposes,[756] Commissioner Miller's finding indicates that she concluded that the "substantial" difference in product mix between imports and domestic product did not significantly affect the extent to which imports and domestic merchandise competed in the market.[757]

551. Moreover, although the other three Commissioners found the percentage of imports that were not available from the industry to be "substantial," the record showed that this percentage (although confidential) was actually substantially lower than thirty-three percent of all imported tin mill steel. As a result, while it was clearly reasonable for the three other Commissioners to consider this percentage to account for a "substantial" percentage of imports, it was just as reasonable for Commissioner Miller to consider that percentage did not significantly reduce the substitutability of the imported and domestic merchandise. Accordingly, Commissioner Miller's causation finding was not undermined by this record evidence, as Complainants' assert.

552. Finally, China argues that Commissioner Miller failed to recognize that the industry was already in an injured state before the surge of imports in 1998.[758] China's argument is misplaced. As the Appellate Body has stated, the appropriate consideration in a safeguards proceeding is

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[751] *See, e.g.,* EC First written submission, Figure 32; *see also* ITC Report, Table FLAT-C-8.

[752] ITC Report, Table FLAT-C-8.

[753] China First written submission, para. 521; Japan First written submission, para. 298; Brazil First written submission, para. 262; Korea First written submission, para. 145.

[754] ITC Report, p. 77.

[755] ITC Report, p. 307-08.

[756] ITC Report, p. FLAT-54 & FLAT-60, n.42.

[757] ITC Report, p. 308.

[758] China First written submission, para. 525-26.

whether imports have made a genuine and substantial contribution to a significant overall impairment in the condition of the industry during the period of investigation. A competent authority is not required to assess whether an industry's problems were first caused by imports or whether an industry was in a weakened state before an increase in import volumes during the period. Indeed, the fact that an industry is already in a weakened state does not mean that imports cannot enter the market in such volumes that they seriously injure the already weakened industry. On the contrary, it is precisely in such a situation, that is, when an industry is vulnerable to import competition because it is in an otherwise poor condition, that safeguard remedies are especially appropriate.

553. In sum, Commissioner Miller conducted a thorough and unbiased examination of the record and established that there was a genuine and substantial relationship of cause and effect between declines in the industry's condition and increased imports of tin mill steel.

iii. *In Her Analysis for Tin Mill Products, Commissioner Miller Thoroughly Discussed the Injury Purportedly Caused by Other Factors And Ensured That Any Injury Caused By These Factors Was Not Attributed to Imports*

554. Commissioner Miller also conducted a thorough and detailed examination of other factors that were purported to be causing injury to the tin mill steel industry. In particular, Commissioner Miller examined whether demand declines, excess industry capacity, and consolidation of purchasers had been causes of injury to the industry during the period of investigation. For each factor, Commissioner Miller identified and discussed in detail the nature and extent of the injury, if any, that was attributable to that factor during the period of investigation. After doing so, she then ensured that she did not attribute any effects these factors to imports. Complainants' arguments to the contrary are unfounded.

a. *Commissioner Miller Properly Ensured that She Did not Attribute Any Injury Caused by Declines in Demand to Imports*

555. Commissioner Miller examined whether demand declines during the period of investigation had been a cause of injury to the industry during the period of investigation.[759] After examining the evidence relating to demand declines, she explained, in a reasoned and thorough manner, the nature and extent of the effect attributable to these demand declines, and distinguished that effect from the effects of imports.

556. More specifically, in her analysis, Commissioner Miller explicitly recognized that demand for tin mill products had been declining on a long-term basis due to a shift in end user

[759] ITC Report, p. 309.

preferences from tin mill packaging to other forms[760] and that there had been an overall decline in demand for tin mill steel from 1996 to 2000.[761] However, she also correctly found that there had not been a consistent decline in demand throughout the period of investigation, given that demand actually increased in both 1997 and 1999 to the same level as 1996, the first year of the period investigation.[762] Accordingly, Commissioner Miller correctly found, the long-term demand declines that were apparently occurring prior to the period had not been especially evident during the period of investigation itself.[763]

557. Further, Commissioner Miller recognized that there was not a correlation between changes in demand and changes in the industry's prices and operating margins during the period of investigation itself. Although Commissioner Miller recognized that the long-term decline in demand might have caused the industry to be in a weakened state prior to the period, she also correctly noted that demand changes did not appear to correlate directly to changes in the industry's condition.[764] For example, in 1999, when demand increased to the same levels seen in 1996 and 1997 (the beginning of the period), the industry's unit prices and operating income margins dropped dramatically.[765] As Commissioner Miller reasonably noted, if changes in demand had been a cause of deterioration in the industry's condition during the period of investigation, the domestic industry should have experienced some recovery in 1999 when demand increased considerably.[766] However, the industry's condition did not improve. Instead, due to the massive surge of imports in that year, the industry lost significant market share and experienced its heaviest losses of the entire period of investigation.[767] As a result, Commissioner Miller reasonably found that it was imports, not demand declines, that had been the most important cause of the declines in the industry's condition during this period.

558. As can be seen, Commissioner Miller thoroughly discussed the nature and the extent of the injury that was attributable to demand declines during the period. She noted that demand had been declining generally in the tin mill market and that it had declined overall during the period. She correctly noted, however, that the industry lost significant market share and suffered its heaviest losses of the period in 1999, despite the fact that demand increased considerably in that year. In other words, as she found, demand declines could not possibly have contributed to the

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[760] ITC Report, p. 307.

[761] ITC Report, p. 307.

[762] ITC Report, p. 307.

[763] ITC Report, p. 307 & 309. In this regard, Complainants' argument that the demand increase in 1999 was simply a "temporary" increase ignores the record evidence on demand levels during the period. *See* Japan First written submission, para. 297; Brazil First written submission, para. 262; Korea First written submission, para. 145. As noted above, apparent U.S. consumption in 1999 was essentially at the same level as in 1996 and 1997, i.e., 3.9 million tons. ITC Report, Table FLAT-C-8. Given this, it would appear that the demand fluctuations in 2000 and 2001 are more appropriately considered "fluctuations" in demand in the context of the period of investigation, especially given there was a substantial decline in the overall U.S. economy in late 2000 and 2001. Id.

[764] ITC Report, p. 309

[765] ITC Report, Table FLAT-C-8.

[766] ITC Report, p. 309.

[767] ITC Report, p. 309.

serious declines in the condition of the industry that occurred during 1999, when demand was, in fact, increasing.[768] By performing an analysis that assessed whether imports caused injury to the industry during a period of increasing demand, she was able to distinguish the effects of the demand declines later in the period from those attributable to imports in 1999. As a result, Commissioner Miller was able to ensure that it did not attribute the injury caused by these later demand declines to imports.

559. In sum, Commissioner Miller properly separated and distinguished the effects of demand declines from those of imports in its analysis. Complainants' arguments to the contrary[769] have no merit.

b. *Commissioner Miller Properly Ensured that She Did Not Attribute Any Injury Caused by Purchaser Consolidation to Imports*

560. Commissioner Miller also examined whether purchaser consolidation was an other factor that had a negative effect on the tin mill industry during the period of investigation.[770] In her analysis of this issue, she explained, in a reasoned and thorough manner, the nature and extent of the injurious effects of purchaser consolidation during the period. After performing her analysis, she reasonably concluded found that purchaser consolidation was not a factor that contributed significantly to the decline in the industry's condition during the period of investigation.

561. In her analysis, Commissioner Miller discussed the nature and extent of purchaser consolidation in detail.[771] She first noted that the number of large tin mill purchasers declined from 49 in 1990 to 26 in 2000, with four to six manufacturers accounting for 75 to 80 percent of all consumption in 2000.[772] She also recognized that this consolidation had enhanced the negotiating power of purchasers in the tin mill market during this period.[773] However, she also correctly noted that most of this consolidation occurred prior to the period of investigation, and found therefore that purchaser consolidation was not a significant factor in the declines in the condition of the industry during 1999, 2000, and 2001.[774] In this regard, she found that price competition in the market was fiercest in 1999 when imports made their largest surge into the market, which showed that imports, not purchaser consolidation, were "chiefly responsible" for industry declines in 1999 and thereafter.

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[768] ITC Report, p. 309.

[769] *See* Japan First written submission, para. 297; Brazil First written submission, para. 262; Korea First written submission, para. 145; Norway First written submission, para. 321 & 324.

[770] ITC Report, p. 309.

[771] ITC Report, p. 307.

[772] ITC Report, p. 307.

[773] ITC Report, p. 307.

[774] ITC Report, p. 309. Moreover, she added, that this consolidation process was an indication of the intense pricing competition between domestic producers and imports that existed throughout the period. ITC Report, p. 309.

562. Given her analysis of this issue, it is clear that Commissioner Miller thoroughly and adequately discussed the nature and extent of the injury caused by purchaser consolidation. She reasonably found that purchaser consolidation had not been a significant cause of the injury the industry suffered during the latter half of the period of investigation. Commissioner Miller correctly acknowledged that the process of purchaser consolidation had generally predated the period of investigation and did not explain the massive declines in the industry's condition that occurred during 1999, 2000, and 2001. Accordingly, she correctly found that the weight of the record evidence established that imports were chiefly responsible for the declines in the industry's condition in 1999 and properly discounted purchaser consolidation as a source of injury to the industry. Complainants' assertions that Commissioner Miller failed to address this issue adequately, or that she failed to identify the extent of the injury caused by consolidation, have no basis in the record.[775]

c. *Commissioner Miller Properly Ensured that She Did Not Attribute Any Injury Caused by Excess Capacity to Imports*

563. Commissioner Miller also considered whether "excess" domestic capacity was an other factor that was a source of injury to the tin mill industry during the period of investigation.[776] In her analysis of the issue, she explained, in a reasoned and thorough manner, the nature and extent of the effects of "excess" capacity on the condition of the industry. After doing so, she clearly and properly discounted this allegedly "excess" capacity as a significant source of serious injury to the industry.

564. In her analysis, Commissioner Miller discussed the nature and extent of this "excess" domestic capacity in detail.[777] She found that domestic capacity increased slightly between 1996 and 1998 but then declined by 3.7 percent between 1998 and 2000.[778] She also noted that the industry's capacity declined by 9.3 percent between interim 2000 and interim 2001 as well.[779] After noting that the industry had had "some excess capacity" during the early part of the period, she found that the domestic industry had reduced its capacity in this manner as a means of "taking steps to rationalize their production" in the face of the demand declines in the tin mill market.[780] She added that there was evidence that the industry had even taken steps to rationalize their capacity even before the period of investigation.[781]

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[775] *See* Japan First written submission, para. 296; Norway First written submission, para. 324.

[776] ITC Report, p. 309.

[777] ITC Report, pp. 72 & 307. In this regard, we note that Commissioner Miller joined the section of the other three Commissioner's opinion, in which they found that the tin mill steel industry was suffering serious injury. ITC Report, p. 74, n. 402.

[778] ITC Report, p. 72.

[779] ITC Report, p. 72.

[780] ITC Report, p. 307.

[781] ITC Report, p. 309.

565. Having noted that the industry had reduced its capacity levels during the period, she then discounted this "excess" capacity as a significant source of injury to the industry. In particular, she noted that the industry's "excess" capacity levels had not led to the caused the declines in the industry's capacity utilization rates during the latter half of the period, noting that the industry had reduced their aggregate capacity by 3.7 percent between 1996 and 2000, and reduced them even further in 2001.[782] Moreover, she noted that the decline in the industry's capacity utilization rate correlated with the increased levels of imports that began entering the United States in 1999.[783] Given the foregoing, Commissioner Miller was more than justified in concluding that the industry's excess capacity levels had not been a significant cause of the declines in the industry's condition in 1999 and 2000.[784]

566. In sum, Commissioner Miller thoroughly and adequately examined whether "excess" industry capacity had been a cause of injury to the industry during the last two years of the period and reasonably found that they had not. Commissioner Miller concluded that there was little evidence in the record to indicate that excess capacity was related to, or caused, the declines in industry condition in 1999 and 2000. On the contrary, Commissioner Miller found that the industry was actually reducing its aggregate capacity between 1998 and 2001, when the industry's condition seriously deteriorated, thus minimizing the possible adverse effects of this capacity on the condition of the industry in this period. In light of her findings on this issue, it is clear that she correctly found that this capacity was not the cause of the injurious effects that occurred in the market in 1999 and 2000.

567. Complainants' assertions that Commissioner Miller failed to address this issue adequately, or that she failed to identify the extent of the injury caused by consolidation, have no basis in the record.[785]

d. *Commissioner Miller's Causation Analysis Is Not Unreasonable Simply Because Three Commissioners Came To A Different Conclusion*

568. Finally, Complainants strongly suggest that Commissioner Miller's causation analysis is somehow flawed because three other members of the Commission made a different finding with

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[782] ITC Report, p. 309 & Table FLAT-C-8.

[783] ITC Report, p. 309.

[784] ITC Report, p. 309. In this regard, the record indicated that the capacity utilization decline in 1998 was due to the decrease in consumption in 1998 from 1997, as well as a small increase in domestic capacity in 1998. ITC Report, Table FLAT-C-8. Neither factor was relevant in 1999, when the industry had reduced its capacity to levels similar to those in 1996 and when demand had rebounded. Id.

[785] *See* Korea First written submission, para. 145; EC First written submission, paras. 479.

respect to whether imports were an important cause of serious injury to the tin mill industry.[786] This argument has no merit.

569. First of all, the Complainants' argument ignores the fact that there was, in actuality, a substantial degree of agreement between Commissioner Miller and the other three Commissioners with respect to the basic legal issues in the case. In this regard, Commissioner Miller agreed with -- and joined -- the findings of the three other Commissioners that tin mill steel was the appropriate like product, that there had been increased imports of tin mill steel during the period of investigation, and that the industry had suffered serious injury during the period of investigation. Moreover, Commissioner Miller also identified similar conditions of competition as governing the manner in which imports and domestic merchandise competed in the market and even identified the same other factors that might be causing injury to the industry in her analysis. While she disagreed with respect to whether imports were a substantial cause of the serious injury being suffered by the industry, there was, nonetheless, a substantial agreement on the basic issues driving the case.

570. Second, the simple fact that three Commissioners disagreed with Commissioner Miller no more makes her decision unreasonable than does Commissioner Miller's disagreement with those three Commissioners make their decision unreasonable. To put it another way, Commissioner Miller and the three other Commissioners all analyzed a complex record, thoroughly discussed the record evidence relating to causation, and issued a decision that is cogent and reasonable. The issue for this Panel, therefore, is whether Commissioner Miller performed an adequate and thorough analysis of the record and established that there was a genuine and substantial causal relationship between increased imports and the declines in the industry's condition.

571. For the reasons we have outlined above, she clearly did perform a thorough and adequate analysis of these issues. Her decision should be affirmed by the Panel.

iv. *Conclusion*

572. In sum, Commissioner Miller performed a thorough and objective analysis of the record. She established that there was a genuine and substantial causal link between trends in the volume and market share of imports of tin mill steel and the significant declines in the condition of the tin mill industry during the last two-and-a-half years of the period of investigation. Moreover, she thoroughly assessed the nature and extent of the injury caused by other factors in the market and ensured that she did not attribute the effects of these factors, if any, to imports.

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[786] *See, e.g.,* China First written submission, paras. 521; Japan First written submission, paras.. 293-299; Brazil First written submission, para. 258-260; Korea First written submission, paras. 142; Norway First written submission, paras. 317-332; EC First written submission, para. 478;

d. The ITC's Causation Analysis for Hot-Rolled Bar Was Fully in Accordance with Articles 2.1 and 4.2 of the Safeguards Agreement

i. *For Hot-Rolled Bar, the ITC Objectively Analyzed and Fully Explained the Nature of the Causal Link between Imports and the Industry's Serious Injury*

573. 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.[787]

574. The ITC explained that the domestic producers used a variety of strategies over time to compete with the increased imports. Consequently, it provided a detailed analysis for each pertinent time period describing the genuine and substantial causal linkage between the increased imports and factors reflecting the serious injury. A summary of the ITC's findings is provided below:

- *1998*. Import volume surged. Because domestic producers generally maintained their prices, the imports undersold domestically produced product by increasing margins. The domestic industry lost 4.1 percentage points of market share. While the industry's operating margins remained stable, its total operating income fell because its sales quantities and revenues declined from 1997 levels.[788]

- *1999*. The domestic industry responded to the import competition by cutting its prices to match the prices of the imports. Although the industry consequently lost only 0.3 percentage points of market share, the imports still remained a significant competitive factor in the market. Because of the price declines, the industry's sales revenues fell. So did its operating margin.[789]

- *2000*. The domestic industry initially raised prices in the first quarter of the year. Underselling by imports resumed, and the imports gained market share in the first half of the year. Domestic producers cut prices thereafter. These price cuts mitigated, but did not eliminate, further declines in the domestic industry's market share. For the full year, import volume increased by 11.9 percent and imports gained 2.1 percentage points in market share. Because of lower prices, reduced

[787] ITC Report, p. 96.
[788] ITC Report, p. 96, Table LONG-27.
[789] ITC Report, pp. 96-97.

> market share, and reduced sales volumes, the domestic industry suffered poor operating performance and closed productive facilities.[790]

575. China and the EC, the two complainants that challenge the ITC's finding of causal link, do not address the ITC's analysis and findings. The EC merely states that "[t]here is no clear coincidence in trends between the imports and the worsening of the position of the domestic industry."[791] China raises a similar claim.[792] These complainants' arguments are limited to the observation that specific import levels did not produce specific domestic-industry operating income levels. However, the correlation between imports and domestic industry performance is not simply a matter of stating that import level *x* must produce operating income *y*. Instead, imports affect the domestic industry's financial performance through their effects on factors such as output and prices. The ITC's analysis recognized this. Instead of the simplistic comparisons offered by China and the EC, the ITC provided a more sophisticated, and consequently, comprehensive, explanation of the correlation between the increased imports and the serious injury. It explained how the imports, and the domestic industry's competitive responses to the imports, affected factors – namely sales revenues and prices – that critically influenced the level of operating income.[793]

576. China also suggests that the data do not indicate that there is any correlation between underselling of the domestically produced product by the imports and the domestic industry's market share.[794] China is wrong. As the ITC found, the subject imports made their largest gains in market share during those portions of the period of investigation when there was pervasive underselling by the imports.[795]

577. Consequently, the arguments of China and the EC do not detract from the ITC's conclusion that there was a causal link between the increased imports and the serious injury suffered by the domestic hot-rolled bar industry.

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[790] ITC Report, p. 97, Table LONG-C-3.

[791] EC first written submission, para. 492.

[792] China first written submission, para. 405.

[793] The EC also hypothesizes that the ITC did not consider the effect of interest expenses and operating expenses on industry performance. This argument is discussed below.

[794] China first written submission, para. 406. China suggests that the ITC report found price a "very important factor" for purchasers. *Id*. This misstates the actual ITC finding, which is that "[p]rice is a *moderately* important factor in purchasing decisions for hot-rolled bar." ITC Report, p. 95 (emphasis added). China does not address the purchaser questionnaire data that the ITC cited as supporting its conclusion. Nor does it contend that the record would support any conclusion concerning the importance of price in purchasing decisions other than the one made by the ITC.

[795] The imports gained the largest market share from 1997 to 1998 (a gain of 4.1 percentage points) and from 1999 through June 2000 (a gain of 1.7 percentage points). ITC Report, Table LONG-70. During both of these periods the imports undersold U.S.-produced hot-rolled bar. ITC Report, pp. 96-97. By contrast, during 1999, when U.S.-produced product was priced lower than the imports, the domestic industry held its loss in market share to only 0.3 percentage points. ITC Report, p. 97.

ii. *For Hot-Rolled Bar, the ITC Conducted a Reasoned and Adequate Examination of the Injury Purportedly Caused by Factors Other Than Increased Imports and Ensured that Any Injury Caused by These Other Factors Was Not Attributed to Imports*

578. The ITC examined four asserted causes of injury to the domestic hot-rolled bar industry other than increased imports. It concluded that the "alternative causes cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and the deteriorating operating performance leading to negative operating margins for the domestic industry in 2000."[796] The four factors the ITC analyzed were:

- *Intra-industry competition and the so-called "price leadership" of domestic producer Nucor.* The ITC found that this factor provided no explanation for the domestic industry's serious injury. Intra-industry competition could not explain why the domestic industry overall lost market share to imports. Additionally, the pricing data available to the Commission did not indicate that Nucor was a primary source of pricing declines or that its pricing practices otherwise contributed to the industry's difficulties.[797]

- *So-called "inefficient" domestic producers.* The ITC also found that this factor provided no explanation for the domestic industry's serious injury. The U.S. producers that respondents identified as "inefficient," due to higher cost structures, did not lose market share to other, more "efficient" domestic producers during the period of investigation. Moreover, the performance trends of the so-called "inefficient" firms did not differ from more "efficient" domestic producers.[798]

- *Changes in demand*. The ITC found that U.S. apparent consumption of hot-rolled bar increased by 11.7 percent from 1996 to 2000, and that it increased on a year-to-year basis for every available comparison except that for 1998 to 1999. The ITC observed that apparent U.S. consumption increased from 1999 to 2000, the year that domestic industry performance reached injurious levels. Consequently, it concluded that changes in demand could not explain the industry's condition in 2000.[799]

- *Changes in input costs*. The ITC found that unit raw materials costs declined throughout the period of investigation and that unit costs of goods sold (COGS)

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[796] ITC Report, p. 99.
[797] ITC Report, pp. 97-98.
[798] ITC Report, p. 98.
[799] ITC Report, p. 99.

> decreased from 1996 to 1999 before increasing from 1999 to 2000. It observed that, generally speaking, declines in input costs cannot be a "cause" of injury in and of themselves. At most, they may be an alternative explanation for price declines. It found that the declines in input costs could not explain the much larger price declines that occurred from 1996 to 1999. Indeed, because demand increased during this period, prices should have declined less than input costs. From 1999 to 2000, unit COGS increased but prices did not. Instead, domestic producers' attempts to increase prices during the first portion of 2000 could not be sustained because of the import surge.[800]

579. The ITC satisfied its obligation under Article 4.2(b) of the Safeguards Agreement not to attribute to increased imports injury due to other causes. The ITC found that the first three factors it discussed – intra-industry competition, "inefficient" producers, and trends in demand -- provided no explanation for the serious injury suffered by the hot-rolled bar industry. By finding that these factors were *not* alternative causes of the injury it observed, it satisfied its obligation under Article 4.2(b). China's statements to the effect that the ITC recognized that intra-industry competition and "inefficient" producers were alternative sources of injury[801] blatantly misread the opinion. As the ITC explained, competition between domestic producers provides utterly no explanation for the industry's overall decline in market share during the period of investigation.

580. The EC and China also misread the ITC's opinion concerning the impact of changes in input costs. Because the ITC based its conclusion on serious injury principally on data concerning the domestic industry's condition during and after 2000, the most pertinent part of the ITC's discussion concerns input costs in 2000.[802] Here, the ITC found that while unit COGS increased from $362 in 1999 to $380 in 2000, neither unit sales values nor prices increased during this period.[803] The ITC specifically stated that "[i]f the domestic industry could have

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[800] ITC Report, p. 99.

[801] First written submission of China, paras. 388-89, 393-94.

[802] Consequently, China's statement that the decline in costs from 1996 to 1999 "should have received more attention from the investigating authority," China first written submission, para. 400, appears misguided. The ITC's focus was on how cost levels in 2000, not 1999, correlated with price levels in 2000. In any event, as discussed above, the ITC fully explained that declines in prices from 1996 to 1999 were much greater than declines in unit input costs, notwithstanding increasing demand. China appears to posit that this divergence may have been a function of increased domestic supply. This explanation, however, cannot be reconciled with the record. The domestic industry's capacity utilization in 1999 was higher than it was in 1996. ITC Report, Table LONG-16. If anything, tighter domestic supplies, as reflected by increasing capacity utilization, together with increasing domestic demand, should have resulted in domestic hot-rolled bar prices declining less than input costs did. There was, however, another source of increased supply in the U.S. market that China overlooks: the imports. Because of the increased imports, the decline in prices from 1996 to 1999 was in fact greater than the decline in unit input costs.

[803] Unit COGS, as measured by the ITC, consists of three components: (1) raw materials, (2) direct labor costs, and (3) other factory costs. *See*, *e.g.*, ITC Report, Table LONG-27. Consequently, the ITC's analysis of changes in unit COGS incorporates an analysis of changes in all three components of COGS. Specifically, by observing both that unit raw materials costs declined throughout the period examined – including from 1999 to 2000

(continued...)

increased its average unit sales values in 2000 to reflect increasing COGS – a reasonable expectation during a year of increasing demand – the industry could have maintained positive operating margins of at least the levels of 1999." However, the industry could not raise its prices because of the increased imports during that year.[804] Thus, contrary to the representations of China and the EC, the ITC expressly analyzed the nature and effect of the change in input costs from 1999 to 2000 and demonstrated that it was not increased input costs, but the industry's inability to increase its prices to reflect those increased costs because of increased imports, that caused the industry's difficulties in 2000.

581. The EC finally argues that the declines in domestic industry performance in 1999 and 2000 appear to be a function of increased interest expenses and "other" expenses, but this fact was overlooked by the ITC.[805] The EC fails to recognize that the ITC's analysis of the poor financial condition of the domestic hot-rolled bar industry was based on operating income and operating margin data. Interest expenses and "other" expenses were not a component of operating income, as computed by the ITC. Instead, the ITC deducted interest expenses and "other" expenses from operating income to derive net income.[806]

582. Increases in interest expenses and "other" expenses thus could not provide any explanation for the 2000 operating losses cited by the ITC. Consequently, there was no requirement under Article 4.2 for the ITC to have engaged in a further non-attribution analysis concerning these expenses.

583. China and the EC also criticize the ITC for failing in its analysis of non-NAFTA imports to treat imports from NAFTA countries as another cause of injury requiring a separate non-attribution analysis.[807] As explained above, nothing in the Safeguards Agreement, as construed in Appellate Body reports, requires that the ITC conduct such an analysis.

584. Consequently, the ITC's non-attribution analysis for hot-rolled bar satisfied the requirements of Articles 2.1 and 4.2 of the Safeguards Agreement. The ITC separated and distinguished from the serious injury caused by increased imports any injury attributable to other factors.

e. The ITC's Causation Analysis for Cold-Finished Bar Was Fully in Accordance with Articles 2.1 and 4.2 of the Safeguards Agreement

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[803] (...continued)
– and that unit COGS increased from 1999 to 2000, ITC Report, p. 99, the ITC recognized that direct labor costs and other factory costs increased through this period. Consequently, the EC's statement that the ITC overlooked this fact, EC first written submission, para. 497, is simply wrong.

[804] ITC Report, p. 99.

[805] EC first written submission, paras. 495-96.

[806] *See*, *e.g.*, ITC Report, Table LONG-27.

[807] China first written submission, para. 410, EC first written submission, para. 491.

i. *For Cold-Finished Bar, the ITC Objectively Analyzed and Fully Explained the Nature of the Causal Link between Imports and the Industry's Serious Injury*

585. In concluding there was a causal link between the increased imports and the serious injury to the U.S. cold-finished bar industry, the ITC found that aggressive pricing by the imports during the latter portion of the period of investigation caused the domestic industry to lose market share and revenues. This resulted in the serious injury the ITC found, particularly the poor operating performance in 2000.[808]

586. An important condition of competition in the cold-finished bar industry that the ITC emphasized – but that complainants overlook – is that a substantial proportion of cold-finished bar sales are made under contract. As the ITC found, over 40 percent of cold-finished bar purchasers made over 90 percent of their purchases on a contract basis, with contracts commonly six months to one year in length.[809] Purchasers in a market characterized by a high percentage of contract sales, because they do not have the flexibility to change suppliers, are likely to react much more gradually to price changes than purchasers in a market where transactions are typically made on a spot market basis.

587. In light of this market characteristic, it is not surprising that the cold-finished bar market did not react immediately -- in terms of changes to the domestic industry's market share or financial performance -- to the dramatic price reductions in imported cold-finished bar that began to take place in early 1999. The ITC expressly acknowledged this fact.[810]

588. The ITC further observed that aggressive import pricing continued in 2000. The average unit values for all imports declined by 5.1 percent from 1999 to 2000. Prices for the imported CL12L14 product on which the ITC collected data were 14.0 percent lower in the fourth quarter of 2000 than they were in the fourth quarter of 1999. Although prices for the domestically produced product declined as well, the imports undersold the domestically produced product.[811] Significantly, these price declines occurred notwithstanding that U.S. apparent consumption of cold-finished bar was higher in 2000 than in 1999, that U.S. producers' per unit raw material costs were higher in 2000 than in 1999, and that U.S. producers' per units COGS were essentially stable from 1999 to 2000.[812]

589. The ITC found that the continued aggressive pricing of the imports in 2000 led to significant increases in both import volume and market share. This in turn led to declines in

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[808] ITC Report, p. 105.
[809] ITC Report, p. 106.
[810] ITC Report, p. 106.
[811] ITC Report, p. 106.
[812] ITC Report, Tables LONG-28, LONG-71.

domestic industry production, shipments, and revenues, which resulted in the poor financial performance of the domestic industry.[813]

590. The EC challenges the ITC's analysis of causal link for cold-finished bar on two grounds. The EC initially argues that the record does not indicate that increases in import volume were coincident in time with declines in industry financial performance. This argument, however, simply ignores the explanation the ITC provided concerning the prevalence of contracts among cold-finished bar producers, which demonstrated why the effects of aggressive pricing by the imports were not immediately reflected in the market. Moreover, the EC's analysis is based on a mechanical year-by-year approach. By contrast, an examination of the final two full years of the period of investigation demonstrates that when import volume increased sharply, domestic financial performance declined sharply -- exactly the type of temporal correlation that the EC contends is lacking.[814]

591. The EC additionally argues that "a comparison of the trends in demand and the industry's financial performance suggests a closer link between demand and profits than exists between imports and profits."[815] The EC's own Figure 37 indicates that its assertion that "operating income has moved along broadly similar lines to consumption"[816] is simply wrong. For example, although demand increased between 1997 and 1998, profits declined. The enormous 82.3 percent decline in profits between 1998 and 1999 does not track the far more modest 3.6 percent decline in demand between those years. By the same token, between 1998 and 2000, when demand declined by only 1.7 percent, operating income dropped by a very substantial 58.5 percent. The EC's simplistic and incorrect year-by-year comparisons of various indicators, which ignore conditions of competition indicating why certain effects of imports may be lagged, does not in any way demonstrate that the ITC's far more detailed and comprehensive analysis was defective or lacked objectivity.

592. Finally, the EC posits that price declines for cold-finished bar were the function of declines in unit raw material costs. The EC's analysis overlooks that the ITC placed particular emphasis on the price declines that occurred between 1999 and 2000. During this period, as the EC's own Figure 38 shows, unit raw material costs increased.

593. Consequently, the EC's arguments do not detract from the ITC's conclusion that there was a causal link between the increased imports and the serious injury suffered by the domestic cold-finished bar industry.

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[813] ITC Report, p. 106.

[814] The EC also overlooks that, in interim 2001, when imports had their highest market penetration of any point of the period of investigation, the domestic industry had its worst financial performance of the period. ITC Report, Tables LONG-28, LONG-71.

[815] EC first written submission, para. 508.

[816] EC first written submission, para. 509.

ii. *For Cold-Finished Bar, the ITC Conducted a Reasoned and Adequate Examination of the Injury Purportedly Caused by Factors Other Than Increased Imports and Ensured that Any Injury Caused by These Other Factors Was Not Attributed to Imports*

594. The ITC examined two asserted causes of injury to the domestic cold-finished bar industry other than increased imports. It concluded that the "alternative causes proffered by respondents cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share over the course of the period examined, and the poor operating performance in 2000."[817] The two factors the ITC analyzed were:

- *RTI*. The ITC examined respondents' arguments that the domestic industry's poor performance was due more to the presence of a purportedly inefficient producer with structural problems, RTI, than to increased imports. After examining the data concerning RTI, which are confidential, the ITC concluded that RTI's performance was not anomalous and did not skew the overall data for the industry.[818]

- *Demand patterns*. The ITC also examined whether the domestic cold-finished industry's difficulties were due to declines in demand. It concluded that the domestic industry's performance in 1999, a year when import volume and market penetration declined, appeared largely attributable to declines in demand that year. The ITC emphasized, however, that U.S. demand for cold-finished bar was higher in 2000 than it was in 1999. Nevertheless, prices were lower in 2000 than in 1999, and the per unit difference between average unit values and COGS was lower in 2000 than in any full year of the period of investigation other than 1999. Notwithstanding that 2000 was a year in which demand increased, the industry's operating margin that year was less than half the levels of 1997 and 1998.[819]

595. China and the EC contend that the ITC found that demand was an alternative cause of serious injury yet failed to perform the necessary non-attribution analysis required by Article 4.2(b) of the Safeguards Agreement.[820] These arguments must fail, because they are based on a misreading of the ITC opinion.

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[817] ITC Report, p. 107.

[818] ITC Report, p. 107. At least 15 cold-finished bar producers provided the ITC with financial data for each portion of its period of investigation. *Id*., Table LONG-28.

[819] ITC Report, p. 107.

[820] China first written submission, paras. 414-17; EC first written submission, paras. 501, 504. Neither complainant challenges the ITC's discussion of RTI.

596. The ITC ensured that it did not attribute to imports any injury due to declining demand. It did this by focusing on the domestic industry's condition during a period when declining demand was not an issue -- 2000, which was not only the most recent full year of the period of investigation, but one in which U.S. apparent consumption increased from the level of the prior year. As stated above, the ITC found that in 2000, the domestic industry suffered from depressed pricing and poor financial performance. By demonstrating that the domestic cold-finished bar industry was in a seriously injured condition even during a period where demand was increasing, the ITC clearly satisfied its obligation under Article 4.2(b) not to attribute to increased imports injury due to declines in demand.

597. The EC finally argues that the declines in domestic industry performance in 1999 and 2000 appear to be a function of increased interest and "other" expenses and depreciation, and that this fact was overlooked by the ITC.[821] The EC fails to recognize that the ITC's analysis of the poor financial condition of the domestic cold-finished bar industry was based on operating income and operating margin data. Interest and "other" expenses and depreciation were not components of operating income, as computed by the ITC. Instead, the ITC deducted interest expenses and "other" expenses from operating income to derive net income. ITC then added depreciation and amortization to net income to derive cash flow.[822]

598. Increases in interest and "other" expenses and depreciation thus could not provide any explanation for the poor operating performance in 2000 cited by the ITC. Consequently, there was no requirement under Article 4.2 for the ITC to have engaged in a further non-attribution analysis concerning these factors.

599. China and the EC also criticize the ITC for failing in its analysis of non-NAFTA imports to treat imports from NAFTA countries as another cause of injury requiring a separate non-attribution analysis.[823] As explained above, nothing in either the Safeguards Agreement or Appellate Body jurisprudence requires that the ITC conduct such an analysis.

600. Consequently, the ITC's non-attribution analysis for cold-finished bar satisfied the requirements of Articles 2.1 and 4.2 of the Safeguards Agreement. The ITC separated and distinguished from the serious injury caused by increased imports any injury attributable to other factors.

f. The ITC's Causation Analysis for Rebar Was Fully in Accordance with Articles 2.1 and 4.2 of the Safeguards Agreement

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[821] EC first written submission, paras. 510-11.

[822] Consequently, increased depreciation improves cash flow. Nevertheless, the domestic cold-finished bar industry's cash flow was negative during 1999 and barely positive during 2000. ITC Report, Table LONG-28.

[823] China first written submission, para. 421, EC first written submission, para. 503.

i. For Rebar, the ITC Objectively Analyzed and Fully Explained the Nature of the Causal Link between Imports and the Industry's Serious Injury

601. 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. It also prevented domestic producers from fully benefitting from the large increase in domestic consumption over the period of investigation. As a result, operating margins declined and by 2000 the industry's operating income was negative.[824]

602. The ITC report contained a detailed chronological analysis of the causal link between the increased imports and factors reflecting the domestic rebar industry's serious injury:

- *1998*. Rebar imports increased significantly. Domestic producers did not immediately change their pricing strategy. Imports undersold the domestically produced product by substantial margins and took nearly six percentage points of market share from the domestic industry.[825]

- *1999*. Rebar imports rose 49.1 percent above 1998 levels. Notwithstanding increasing demand, prices declined for both the imports and the domestically produced product. Underselling by the imports continued, and the imports gained another five percentage points in market share. The domestic industry's operating margins declined, although it continued to be profitable.[826]

- *2000*. Import volume and market penetration remained significantly above 1998 levels, despite declining from the peak level of 1999. The domestic industry's costs rose. Because U.S. demand also increased, producers should have been able to raise prices to recover these costs. They could not do so, however, because of aggressive pricing by imports, which undersold the domestically produced product by margins in excess of 20 percent. Prices for imported and domestically produced products fluctuated within a narrow range, with the domestic product's prices declining slightly. The depressed prices led to poor operating performance, most notably negative operating margins.[827]

603. Both China and the EC argue that the ITC failed to demonstrate a correlation between the imports and the injury. These complainants argue that domestic industry operating performance does not track the trends in imports. Again, these arguments are based on a mechanical

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[824] ITC Report, p. 112.
[825] ITC Report, p. 113.
[826] ITC Report, pp. 113-14.
[827] ITC Report, p. 114. The ITC observed that the trends observed in 2000 continued in interim 2001. *Id.*

examination of year-to-year trends which ignores the more comprehensive analysis conducted by the ITC. As the ITC explained, once imports surged in 1998, the domestic industry's loss in market share was immediate. The domestic industry subsequently reduced its prices in an attempt to mitigate further losses in market share.[828] Consequently, the industry's declines in financial performance were more gradual than its declines in market share. An examination of the industry over the final two full years of the period of investigation – 1998 to 2000 -- demonstrates that imports increased by 35.8 percent and the domestic industry's operating income deteriorated from a $88.2 million operating profit to a $24.7 million operating loss.[829] This is precisely the type of temporal correlation that China and the EC contend is lacking.

604. The EC next argues that it is "far from clear that imports can be regarded as price setters in what the ITC has admitted is a commodity market."[830] This argument ignores two uncontested ITC findings. First, the ITC found that rebar was a commodity product sold on the basis of price – a proposition no party has disputed.[831] Second, the ITC found that the imports undersold domestically produced rebar by margins over 20 percent since 1998.[832]

605. In a commodity market where purchasing decisions are made on the basis of price, significant volumes of a low-priced product will drive all prices down. The increased quantities of rebar imports were priced much lower than the domestically produced product. As the ITC found, to meet this competition the domestic industry was forced to cut prices to avoid losing even more market share to the imports than it actually did.

606. Consequently, the ITC fully explained the genuine and substantial linkage between the imports and the deteriorating financial condition of the domestic rebar industry. The ITC's explanation fully satisfies the requirements of Article 4.2(b) of the Safeguards Agreement.

ii. For Rebar, the ITC Conducted a Reasoned and Adequate Examination of the Injury Purportedly Caused by Factors Other Than Increased Imports and Ensured that Any Injury Caused by These Other Factors Was Not Attributed to Imports

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[828] China contends that "prices have fallen during only 9 months over a period of 3 years of increasing imports." China first written submission, para. 434. This misstates the ITC record. Prices for the domestically-produced rebar product for which the ITC collected pricing data declined during seven of the 12 quarters in 1998, 1999, and 2000. ITC Memorandum INV-Y-212, Table LONG-ALT93.

[829] ITC Report, Tables LONG-7, LONG-29.

[830] EC first written submission, para. 520.

[831] ITC Report, p. 112.

[832] ITC Report, pp. 113-14; *see also* Table LONG-93.

607. The ITC also examined two asserted causes of injury to the domestic rebar industry other than increased imports.[833]

608. The ITC examined increases in domestic capacity. It concluded that this could not be an alternative cause of injury because the 26.6 percent increase in domestic productive capacity from 1996 to 2000 was much smaller than the 48.1 percent increase in U.S. apparent consumption during that period. Moreover, capacity utilization generally increased during the period of investigation.[834]

609. Thus, contrary to China's argument, the ITC clearly and unambiguously stated that increased capacity was not a cause of injury. China does not provide any basis for the Panel to conclude that the ITC did not objectively examine the evidence concerning this factor and explain the basis for its conclusion.[835]

610. The ITC additionally examined changes in input costs in detail for the period from 1998 to 2000. The ITC noted that unit COGS fell from 1998 to 1999. It stated that, in light of the large increase in demand during this period, this decline in costs should not necessarily have led to a decline in prices. However, there was a decline in unit sales values that exceeded the decline in unit input values.[836] The ITC thus reasonably concluded that the decline in prices was not merely a function of input cost declines. Instead, it found that the increased imports prevented domestic rebar producers from obtaining the full benefits of declining input costs in a growing market.[837]

611. The ITC also performed a detailed examination of changes in input costs from 1999 to 2000. During this period, demand increased and per unit COGS increased, yet prices declined. Consequently, there was no possible causal nexus during this period between price declines and changes in input costs.

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[833] The EC insinuates that there was some unspecified structural difficulty in the rebar industry that caused it to operate unprofitably in 1996. EC first written submission, para. 514. But the EC neither identifies the nature of this purported difficulty, nor explains what, if any, non-import causes of injury the ITC should have investigated other than the ones identified in its report. In any event, even if the rebar industry had structural problems in 1996, it is clear that these problems had been resolved by 1998, when the industry was performing profitably. *See* ITC Report, Table LONG-29.

[834] ITC Report, pp. 109-110, 114-15.

[835] Moreover, because capacity utilization generally increased during the period of investigation, domestic industry supply conditions would not have served to depress price levels, contrary to the speculation of China.

[836] China is thus simply wrong in asserting that the ITC merely stated that "the fall in costs was not as important as the decline in prices." China first written submission, para. 429. The EC also errs when it criticizes the ITC's discussion for "lack of clarity." EC first written submission, para. 515. Both complainants fail to recognize that the ITC referred to empirical data from the questionnaires indicating that sales revenues declined more than costs on a unit basis.

[837] ITC Report, p. 113.

612. The ITC's detailed and comprehensive examination of changes in input costs contrasts markedly with the cursory and inconsistent arguments advanced by the EC in its submission. In one paragraph, the EC asserts that the ITC should have concluded that the price decline from 1999 to 2000 was merely a function of decline in raw material costs.[838] Just three paragraphs later, the EC states that the ITC should have concluded that the domestic rebar industry's financial problems in 2000 were due to an inability to increase prices commensurately with increases in costs such as other factory costs.[839] What the EC appears to overlook is that both raw material costs and other factory costs are components of COGS. Changes in input costs from 1999 to 2000 would have either dictated an increase in prices or a decrease in prices in light of changes in other conditions of competition, such as demand. Input cost changes could not, as the EC seems to envision, have dictated both price increases and declines simultaneously.

613. In marked contrast to the EC, the ITC used a coherent and objective approach in assessing changes in input costs. The ITC properly examined *all* components of COGS in determining that input costs rose from 1999 to 2000. It is not disputed that prices did not follow suit.

614. This raises the question of why the domestic rebar industry could not recover increasing input costs, as well as the increasing selling, general, and administrative expenses cited by the EC, from 1999 to 2000. As the EC notes, this period was "when US production and capacity utilization was at its highest;"[840] moreover, demand was rising. In such a market, one would anticipate that prices would follow costs.[841] The reason that prices for U.S.-produced rebar did not follow costs in 2000 is the one overlooked by the EC: the imports.

615. China and the EC also criticize the ITC for failing in its analysis of non-NAFTA imports to treat imports from NAFTA countries as another cause of injury requiring a separate non-attribution analysis.[842] As explained above, nothing in either the Safeguards Agreement requires that the ITC conduct such an analysis.

616. Consequently, the ITC's non-attribution analysis for rebar satisfied the requirements of Articles 2.1 and 4.2 of the Safeguards Agreement. The ITC separated and distinguished from the serious injury caused by increased imports any injury attributable to other factors.

g. The ITC's Causation Analysis For Certain Welded Pipe Was Fully In Accordance With Articles 2.1 and 4.2 of the Safeguards Agreement

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[838] EC first written submission, para. 521.

[839] EC first written submission, para. 524.

[840] EC first written submission, para. 524.

[841] Indeed, when it attempts to divorce "relatively low prices" from "developments of costs" in para. 524 of its first written submission, the EC appears to overlook that absent price suppression or depression there normally will be a direct relationship between a company's costs and its prices.

[842] China first written submission, para. 439, EC first written submission, para. 517.

617. For certain welded pipe, the ITC established, through a thorough and objective assessment of the record, that there was a genuine and substantial cause and effect relationship between increased imports and the threat of serious injury to the domestic industry. The ITC's analysis showed that there was a clear correlation between increases in the volume of imports in the marketplace and the significant declines in the overall condition of the welded pipe industry that occurred during the latter half of the period of investigation. Moreover, the ITC established that foreign producers had the ability and incentive to increase their exports to the United States and the domestic industry was clearly threatened with serious injury in the "imminent future" from imports. Finally, the ITC conducted a thorough and objective examination of the nature and extent of injury caused by other factors and ensured that it did not attribute the effects of these factors, if any, to imports in its analysis.

618. Accordingly, as we discuss in detail below, Complainants' arguments to the contrary have no merit.

i. For Certain Welded Pipe, the ITC Thoroughly and Objectively Explained the Nature of the Causal Link Between Imports and the Industry's Serious Injury

a. The ITC's Analysis Established That There Was a Clear Correlation Between Import Trends and Declines in the Condition of the Welded Pipe Industry

619. The ITC established that there was a genuine and substantial causal link between trends in the volume and market share of certain welded pipe imports and the threat of serious injury to the welded pipe industry. It also established that this threat of injury was "clearly imminent" in the future.[843]

620. In its analysis, the ITC examined the factors that affected the competitiveness of domestic and imported merchandise in the U.S. market,[844] the trends in import volumes and market share,[845] the pricing effects of imports,[846] correlations between these trends and changes in the various indicia of the industry's condition,[847] and the foreign industries' ability to increase their exports to the United States in the imminent future.[848]

621. In its analysis, it found that several conditions of competition affected the market for certain welded pipe, noting in particular that:

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[843] ITC Report, pp. 158-170.
[844] ITC Report, pp. 158-159.
[845] ITC Report, pp. 162-163.
[846] ITC Report, pp. 163-164.
[847] ITC Report, pp. 162-165.
[848] ITC Report, pp. 164-165.

- Welded pipe is generally considered a commodity product. Domestic and domestic and imported merchandise are used in the same applications and are generally considered interchangeable.[849]

- Demand for welded pipe grew rapidly between 1996 and 1998, with U.S. consumption growing by 8.1 percent in 1997 and 10.0 percent in 1998. Demand stabilized in 1999 and 2000, however, fluctuating by less than 1 percent in each year.[850] Demand grew by 19.3 percent overall from 1996 to 2000.[851]

- Domestic welded pipe production grew by 16.1 percent between 1996 and 1998, but then fell by 3.9 percent in 1999 and 7.9 percent in 2000.[852]

- Domestic capacity rose by 22 percent during the period of investigation to 8.37 million tons in 2000, with the single largest increase occurring in 1998, the middle of the period. Domestic capacity increased by significantly smaller amounts in 1999 and 2000 than in the earlier years of the period of investigation.[853]

- Foreign producers' capacity rose by 5.3 percent – to 21.25 million tons – between 1996 and 1998, but then declined to 20.8 million tons in 2000.[854]

622. Taking the foregoing conditions of competition into account, the ITC then performed a thorough and objective examination of the trends in imports and industry injury factors. It concluded that there was a clear correlation between increased import volume and declines in the overall condition of the industry during the period.[855] In particular, it found that:

- The industry enjoyed a "period of generally good health" between 1996 and 1998.[856] Tracking the growth in consumption, the industry's production, shipment, employment, and capital expenditure levels all increased significantly during this period.[857]

- The industry's overall condition weakened considerably in 1999, 2000, and interim 2001, however.[858] In 1999, the industry's performance became "mixed," as production, capacity utilization, employment, capital expenditures and net sales

[849] ITC Report, p. 158.
[850] ITC Report, pp. 158-59.
[851] ITC Report, Table TUBULAR-C-4.
[852] ITC Report, pp. 159.
[853] ITC Report, pp. 159.
[854] ITC Report, pp. 159.
[855] ITC Report, pp. 59-62.
[856] ITC Report, pp. 159.
[857] ITC Report, pp. 159-60.
[858] ITC Report, pp. 159-60.

values all declined, but shipment volume increased and profitability remained stable.[859] In 2000, the industry showed significant declines in its most important financial and trade indicators, including its profitability levels.[860] The industry, while not yet seriously injured, was in a "weak" condition and serious injury was imminent.[861]

- Imports increased significantly between 1996 and 2000, with their single largest volume increase (of 24.2 percent) occurring in 2000, the last full year of the period.[862] The ratio of imports to production also increased from 1996 to 2000 as well (growing by 21.2 percentage points), with the single largest increase (14.2 percentage points) occurring in the final full year of the period. Finally, import market share grew throughout this period as well (by 8.7 percentage points), with the single largest increase (7.1 percentage points) again occurring during 2000. Import market share increased in interim 2001 as well.[863]

- The increase in imports between 1996 and 1998, though substantial, was largely absorbed by the growth in market demand in those years. When apparent U.S. consumption flattened in 1998 through 2000, however, the substantial additional volumes of imports, especially in 2000, led directly to reductions in numerous industry performance indicia, including market share, capacity utilization, shipments, employment data, and operating income.[864]

- Imports were consistently priced below domestic merchandise during the period of investigation, and import and domestic prices generally declined throughout the period of investigation, especially as import volumes increased.[865] These trends were evident from both the price comparison data and the average unit value data for certain welded pipe. Because of the high level of substitutability and the importance of price in the purchase decision, this underselling by imports had a significant impact on domestic prices.[866]

623. Finally, the ITC found that the declines in the industry's condition and the increases in imports was likely to continue in the imminent future.[867] It found that "increased imports at underselling prices [had] played a key role in bringing about [the] negative trend" in the industry's indicators, and that these "trends were likely to continue in the near future so as to

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[859] ITC Report, pp. 159-60.
[860] ITC Report, pp. 160.
[861] ITC Report, pp. 159.
[862] ITC Report, pp. 162.
[863] ITC Report, pp. 162-63.
[864] ITC Report, pp. 163.
[865] ITC Report, p. 163.
[866] ITC Report, p. 163.
[867] ITC Report, p. 164-65.

cause serious injury to the domestic industry."[868] In this regard, it found that foreign producers had increased their capacity during the period of investigation, that they had increasingly directed their exports of welded pipe to the U.S. market (particularly in 2000), and that they had a substantial amount of available existing capacity to increase their production for the U.S. market.[869]

624. In sum, the ITC's analysis established that there was a clear correlation between increases in imports during the period of investigation, especially in 2000, and the substantial declines in the industry's condition during those years.[870] In particular, the 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 established that there was a clear likelihood of imminent serious injury, given the increasing focus of foreign producers on the U.S. market and the availability of substantial excess foreign producer capacity. Given this, the ITC's analysis established a genuine and substantial correlation between import volume increases during the period of investigation and the threat of serious injury to the domestic industry.

625. Only the EC has bothered to challenge the ITC's finding that there was a genuine and substantial causal link between imports and the threat of serious injury. The EC contends that the ITC failed to examine the increase in domestic capacity and its impact on domestic prices in sufficient detail in its causation analysis.[871] The EC's argument appears to ignore the fact that the ITC discussed the issue of domestic capacity in significant detail at three separate points in its analysis.[872] In its discussions, the ITC correctly noted that domestic capacity had increased during the period but also noted that this increase had tracked the growth in demand during the period of investigation to a substantial degree.[873] Moreover, the ITC also correctly found that, even with this increase in capacity, the domestic industry's production levels had actually declined during the last years of the period, which showed that the industry had not been able to take advantage of its increased capacity as a result of import increases during these years.[874] Given these two facts, it is clear that the ITC examined the record evidence concerning capacity in detail and correctly rejected the EC's argument that this increased capacity had had a significant impact on prices during the last two years of the period of investigation.[875] The EC's argument that the ITC failed to assess this issue in sufficient detail is entirely unfounded.

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[868] ITC Report, p. 164.
[869] ITC Report, p. 164-65.
[870] ITC Report, p. 163-65.
[871] EC First Written Submission, para. 532.
[872] ITC Report, p. 165, 159, 160.
[873] ITC Report, p. 165, 159, 160.
[874] ITC Report, p. 160, 163 & 164.
[875] ITC Report, p. 165.

626. Second, the EC also argues that the ITC failed to acknowledge that the welded pipe industry's operating results must have been impacted by "notable increases in [the industry's] 'other factory costs' and SG & A expenses" in 1999 and 2000.[876] Again, the EC's argument is not persuasive. It is true, as the EC contends, that the industry did experience some increase in its unit other factory costs and unit SG & A expenses between the first three years of the period of investigation and the last two years of the period.[877] However, as can be seen from the ITC's Report -- and even from the EC's own charts, to some extent -- the increases in these costs were more than offset by declines in the industry's unit raw materials costs and its unit direct labor costs during this same period.[878] As a result, the industry's overall unit costs of goods sold declined substantially between the first three years and the last two years of the period of investigation, falling from a range of $537 to $545 per ton during the three-year period from 1996 to 1998 to a range of $502 to $515 per ton in 1999 and 2000.[879] Even with the increases in its other factory and SG&A expenses, therefore, the industry's overall costs of goods sold declined during the two years in which imports made their largest inroads into the market. Given this, it is clear that the ITC placed little weight on the changes in the industry's other factory and sales, general & administrative costs when assessing whether imports had caused the declines in the industry's profitability levels in the latter part of the period of investigation.

627. In sum, the ITC's analysis established that there was a genuine and substantial relationship of cause and effect between declines in the industry's condition and increased imports of certain welded pipe. The EC's arguments to the contrary have no merit.

ii. For Certain Welded Pipe, the ITC Thoroughly Discussed the Injury Purportedly Caused by Factors Other than Increased Imports And Ensured That Any Injury Caused By These Factors Was Not Attributed to Imports

628. The ITC also conducted a thorough and detailed examination of other factors that might be causing injury to the certain welded pipe industry. In particular, the ITC considered whether two factors were other causes of the threat of serious injury to the welded pipe industry during the period of investigation: "excess" domestic capacity and declines in the operating results of a particular welded pipe producer during the period of investigation. For each factor, the ITC identified and discussed in detail the nature and extent of the effects, if any, that were attributable to that factor. It also ensured that did not attribute the effects of these other factors to imports in its analysis.

a. The ITC Properly Ensured that It Did not Attribute Any Injury Caused by Excess Capacity to Imports

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[876] EC First Written Submission, para. 535.
[877] ITC Report, Table TUBULAR-18, Table TUBULAR-C-4; EC First Written Submission, para. 535.
[878] ITC Report, Table TUBULAR-18, Table TUBULAR-C-4; EC First Written Submission, para. 532.
[879] ITC Report, Table TUBULAR-18, Table TUBULAR-C-4.

629. The ITC first considered whether the industry's capacity increases during the period of investigation were a source of injury to the domestic industry.[880] The ITC examined the record evidence relating to industry capacity in a reasoned and thorough manner, and found that the increases in capacity had not contributed to declines in the industry's condition in more than a "minor way"during the period of investigation.[881] Accordingly, the ITC properly found these increases not to be a significant cause of serious injury to the industry during the period of investigation.

630. The ITC discussed the issue of domestic capacity in significant detail at three points in its analysis.[882] It correctly noted that domestic capacity had indeed increased during the period but that most of this increase occurred through the middle of the period of investigation.[883] The ITC also found that, despite the significant increases in the industry's capacity levels from 1996 to 1998, the industry was able to keep its capacity utilization at the same level during this period and, indeed, even experienced a growth in those rates.[884] However, the ITC also properly found that the industry's capacity utilization rates declined "sharply" in the last two years of the period, and that these declines were the direct result of the increasing volumes of imports during a period of stable demand.[885] Finally, the ITC found correctly that the industry's increase in capacity levels during the period only modestly exceeded the increase in consumption during this period. Given the foregoing, the ITC reasonably found that the capacity additions were not "excessive" nor did they contribute "in more than a minor way to the condition of the industry in 2000 or interim 2001.

631. As can be seen, then, the ITC clearly discussed the nature and extent of the effects that these capacity increases had on domestic pricing and the condition of the industry. In particular, the ITC recognized that capacity increases might have an impact on prices in the market but that these particular increases had no such impact because they were in keeping with demand growth in the market. Moreover, as the ITC also noted, it was the declines in production related to import increases in 1999 and 2000 that had the most significant impact on lowered capacity utilization rates in those years. Finally, as previously discussed, the ITC found that imports had been the primary cause of price declines in the market in those years and concluded therefore that the increased capacity levels of the industry were not responsible in more than a "minor way" for any declines in the industry's condition. Accordingly, it is clear that the ITC properly assessed the amount of effect that capacity had on domestic prices, and reasonably concluded that these increases were not a significant source of injury to the industry. Having done so, the ITC clearly ensured that it did not attribute to imports the minimal negative effects of these increases and therefore distinguished the effects of these increases from those of imports.

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[880] ITC Report, p. 165.
[881] ITC Report, p. 165.
[882] ITC Report, p. 165, 159, 160.
[883] ITC Report, p. 159 & 160.
[884] ITC Report, p. 159 & 160.
[885] ITC Report, p. 160.

632. Nonetheless, Complainants assert that the ITC did not pay sufficient attention to the extent of these capacity increases or their possible impact on domestic prices.[886] As we discussed above, the ITC clearly did pay close attention to the record evidence concerning capacity increases and discussed in some detail whether the increases had an impact on domestic prices. As it stated in its analysis, it rejected this argument, finding that the industry's capacity increases had only a minimal impact on price levels in the market because the increases had essentially tracked the growth in market demand. Moreover, even though the industry had increased its capacity levels, the ITC correctly acknowledged that the industry failed to take advantage of these increases by increasing production.[887] Since the production levels of the industry declined in 1999 and 2000, this additional capacity could have, at best, only a minimal and indirect effect on market prices during those two years. Instead, the addition of more than 360 thousand tons of import merchandise to the market on 1999 and 2000 -- sold at consistently lower prices than domestic merchandise -- clearly had a much more substantial and direct impact on prices during that period, as the ITC reasonably found.

633. In essence, Complainants simply disagree with the reasonable conclusions of the ITC. Their argument should be rejected.

b. The ITC Properly Ensured that It Did Not Attribute Any Injury to the "Aberrational" Performance of One Industry Producer to Imports

634. The ITC also considered whether the poor performance of one particular domestic producer was a possible other factor causing injury to the industry during the period of investigation.[888] In its analysis, it examined the evidence relating to this producer's non-import-related difficulties during the period and assessed the extent to which these difficulties caused declines in the industry's performance. It also ensured that it did not attribute any injury allegedly caused by this producer's non-import-related difficulties to imports.

635. Although the details of the producer's problems and its operating results are confidential, the ITC clearly examined the record evidence relating to these issues and discussed the nature and extent of this producer's performance in detail.[889] It specifically noted the arguments made on this issue by the foreign producers and rejected their assertions that the industry's operating results had been skewed by the non-import problems of the producer.[890] It concluded that certain costs of the company appeared to have increased but that the main reason for the decline in the

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[886] Korea First Written Submission, paras. 156-160; EC First Written Submission, paras. 527 & 532; China First Written Submission, paras. 444 & 448; Switzerland First Written Submission, paras. 302 & 306.

[887] In this regard, as the ITC has discussed previously, the addition of capacity is not generally considered to be a direct cause of price declines in the market. Instead, it is the "utilization" of that capacity, in the form of increased production and shipments into the market, that acts to translate prices to the market.

[888] ITC Report, p. 165.

[889] ITC Report, p. 165.

[890] ITC Report, p. 165.

industry's financial performance was the "substantial drop in the unit values of the company's sales beginning in 1999," which was due to the substantial increase in imports.[891] Moreover, the ITC noted, the exclusion of the company from the industry data did not substantially alter the downward trends in the industry's condition in those years.[892] By conducting this analysis, the ITC properly distinguished the effects attributable to this producer's operations from the effects of imports and found that the industry's problems were genuinely and substantially the result of increased imports.[893] Complainants' assertions that the ITC did not conduct such an analysis have no foundation.[894]

c. The ITC Gave the Appropriate Weight to Sectoral Demand Changes in its Analysis

636. Finally, Korea contends that the ITC failed to properly assess differences in demand trends between product sectors in the U.S. market for certain welded pipe. Korea contends that the ITC's assessment of the market demand for all certain welded pipe prevented it from properly analyzing the increase in demand for large diameter line pipe, a smaller segment of the welded pipe market.[895]

637. Actually, the ITC considered this issue fully in its causation analysis for certain welded pipe. The ITC noted that several parties had argued that the welded pipe industry was not threatened with serious injury because of increasing demand in the large diameter line pipe sector of the market but rejected this argument.[896] The ITC stated that the record evidence did, in fact, indicate that there had been a growth in demand for large diameter line pipe in the market and that the growth in demand for that product -- which was expected to continue -- might ameliorate the impact of these imports on the welded pipe industry. However, it also noted that large diameter line pipe only accounted for 20 to 30 percent of market demand for the overall welded pipe product category and that demand in the overall welded pipe market had been constant between 1998 and interim 2001, even with the substantial growth in demand for large diameter line pipe.[897] Accordingly, the ITC reasonably rejected this factor as indicating that the

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[891] ITC Report, p. 165.

[892] ITC Report, p. 165.

[893] In this regard, the United States notes that Complainants' argument is, in essence, an assertion that the ITC should conduct its causation assessment for only a portion of the industry producing welded pipe. As Complainants are aware, however, the ITC is required by the Safeguards Agreement to assess whether imports are causing serious injury to the industry as a whole, not subsegments of it. Thus, even if this producer were affected to some effect by non-import factors, the ITC would nonetheless still need to include this producer in the industry and assess whether the industry as a whole were injured by imports.

[894] Korea First Written Submission, paras. 162; EC First Written Submission, paras. 527; China First Written Submission, paras. 444; Switzerland First Written Submission, paras. 302.

[895] Korea First Written Submission, paras. 150-155.

[896] ITC Report, p. 166.

[897] ITC Report, p. 166.

industry would not continue to deteriorate or that imports would not continue to increase their presence in the market.[898]

638. As can be seen, the ITC clearly did discuss this issue and properly considered it in the appropriate legal context, that is, in the context of how demand trends affected competition in the market for welded pipe, the relevant like product in this proceeding. Korea's argument is simply wrong-headed because it suggests that the ITC should have placed greater weight on demand trends for a subsegment of the like product, large diameter line pipe, than on demand trends for the like product, all certain welded pipe. For this reason, its argument should be rejected.[899]

iii. Conclusion

639. In sum, the ITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of certain welded pipe and the significant declines in the condition of the welded pipe industry during the last years of the period of investigation and how serious injury by such imports was imminent. Moreover, it thoroughly assessed the nature and scope of the effects of other factors and ensured that it did not attribute the effects of these factors to imports.

h. The ITC's Causation Analysis for Fittings, Flanges, and Tool Joints Was Fully in Accordance with Articles 2.1 and 4.2 of the Safeguards Agreement

640. For fittings, flanges, and tool joints ("FFTJ"), the ITC established that there was a genuine and substantial cause and effect relationship between increased imports and serious injury. The ITC's analysis showed a clear correlation between increases in the volume of imports in the marketplace and the significant declines in the overall condition of the FFTJ industry during the period of investigation. Finally, the ITC conducted a thorough and objective examination of the effects of other factors and ensured that it did not attribute the effects of these factors, if any, to imports in its analysis.

i. For FFTJ, the ITC Objectively Analyzed and Fully Explained the Nature of the Causal Link between Imports and the Industry's Serious Injury

a. Declines in Industry Performance Coincided with Increased Imports

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[898] ITC Report, p. 166.

[899] The United States notes that China also asserts that the ITC failed to treat imports from NAFTA countries as another cause of injury requiring a separate non-attribution analysis. As the United States previously described, such an analysis is not required by the Safeguards Agreement but was nonetheless conducted by the United States to the extent necessary.

641. In its report, the ITC emphasized that the causal link between the increased imports and the serious injury experienced by the domestic FFTJ industry was readily apparent. 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 . . . "[900]

642. As the ITC observed, import volume increased every year during the period of investigation and was higher in interim 2001 than in interim 2000. Import market share increased from every year between 1997, when it was 32.9 percent, to 2000, when it was 41.7 percent. Import market penetration was also higher in interim 2001 than it was in interim 2000.[901]

643. As the imports increased their presence in the U.S. market, the domestic industry's condition deteriorated. This may be demonstrated by reference to several factors specified in Article 4.2(a) of the Safeguards Agreement:

- *Sales*. The domestic industry's sales quantities declined every year between 1997 and 2000.[902]

- *Production*. The domestic industry's production was 12.1 percent lower in 2000 than in 1997. Production declined in two of the three year-to-year comparisons between 1997 and 2000. The quantity of U.S. shipments declined each year since 1997.[903]

- *Capacity Utilization*. Capacity utilization was lower in 2000, when it was 67.4 percent, than it was in 1997, when it was 74.1 percent. Capacity utilization declined in two of the three year-to-year comparisons between 1997 and 2000. In the other year, productive facilities were shuttered and domestic capacity declined.[904]

- *Profits and losses*. The domestic industry's profitability declined every year between 1997 and 2000. In 1997, the industry had an operating margin of 7.7 percent. By contrast, in 2000, the industry had an operating margin of negative 0.1 percent. The number of producers reporting operating losses increased from two of 17 in 1997 to eight of 17 in 2000.[905] The ITC further emphasized that in 2000, the year in which import volumes had their greatest annual increase during

[900] ITC Report, p. 176.
[901] ITC Report, p. 176.
[902] ITC Report, Table TUBULAR-C-6.
[903] ITC Report, pp. 171-72, Table TUBULAR-C-6.
[904] ITC Report, p. 172, Table TUBULAR-C-6.
[905] ITC Report, p. 173.

the period of investigation, the industry experienced its worst operating performance.[906]

- *Employment*. The number of production workers was 12.1 percent lower in 2000 than it was in 1997. Employment declined in two of the three year-to-year comparisons between 1997 and 2000.[907]

644. Thus, as the ITC observed, the coincidence in relationship between the increasing presence of imports in the U.S. market and the movement in injury factors establishes a direct and substantial relationship of cause and effect between the increased imports and the serious injury.

b. The ITC Throughly Examined the Role of Pricing

645. The ITC found that price was an important consideration in purchasing decisions for FFTJ. Many of the FFTJ products from both imported and domestic sources were produced to specifications established by industry standards and testing bodies. Once these specifications were met, price often became the most important purchasing criterion.[908]

646. In circumstances where price is an important purchasing consideration and domestic producers lose both sales volumes and market share to imports, it is reasonable to infer that the imports have successfully competed with the domestically produced product on the basis of price. There was no indication in the ITC record that the imports' ability to take sales and market share from the domestic FFTJ industry was a function of non-price product differentials, and complainants do not assert such an argument here.

647. Thus, the ITC could have used the evidence in its record concerning import market share, the domestic industry's sales trends and financial performance, and factors important in FFTJ purchasing decisions to infer that imports competed with the domestically produced product on the basis of price. However, it did not expressly rely on inferences but instead referred to the most probative data in its record concerning pricing.

648. This data concerned a specific high-volume butt-weld pipe fitting product.[909] The pricing data indicated that the imports undersold the domestically produced product in each quarter for which data were available, that margins of underselling were at their highest levels in 2000 and

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[906] ITC Report, p. 177.

[907] ITC Report, p. 173 & Table TUBULAR-C-6. By contrast, productivity fluctuated during this period, and was higher in 2000 than it was in 1997. *Id.*, p 174.

[908] ITC Report, p. 175.

[909] ITC Report, p. TUBULAR-54.

interim 2001, and underselling margins had been in excess of 20 percent since the fourth quarter of 1999.[910]

649. The EC's criticism of the ITC's pricing data as unrepresentative is baseless. The ITC did not rely exclusively on the pricing data for its conclusions on causal link, as the EC mistakenly represents.[911] Instead, as previously explained, the ITC explained that a wide variety of domestic industry's performance factors declined while import penetration increased. The ITC's findings concerning the FFTJ industry's many declines in performance were based on questionnaire data covering the entire industry that no complainant contends was not representative.

650. Additionally, by suggesting that the ITC staff chose to collect data on very low volume products,[912] the EC ignores and distorts information in the ITC's report. The ITC staff did not seek pricing data on a FFTJ product that it believed would yield low data coverage, as the EC implies. The staff stated instead that there was *no* single FFTJ product on which it could obtain extensive coverage. Indeed, there was not even a combination of products that could provide the type of coverage the EC asserts is necessary. In a portion of the report apparently overlooked by the EC, the staff explained that "it is difficult to find high-volume pricing products in a heterogenous market such as the steel tubular market."[913] The report, read in context, indicated that the FFTJ product on which the ITC obtained pricing data was a "high volume" product within the group of FFTJ products.[914]

651. The Appellate Body has observed that no provision of the Safeguards Agreement specifically addresses the extent to which an investigating authority must collect data.[915] In particular, no provision of the Agreement requires an authority to collect any specific quantum of data, or any data at all, pertaining to pricing. The ITC furthered the goal of conducting a thorough investigation, and acted in an objective manner, by collecting pricing data for a particular FFTJ product that would provide data on a high volume of sales relative to other products on which data could be collected. Such conduct cannot in any way contravene the obligations of the United States under the Safeguards Agreement.

652. The ITC also explained the limited probative value of the average unit value data on which the EC apparently believes the ITC should have relied. Average unit value data may serve as a useful proxy for pricing data for some industries. However, in an industry such as the FFTJ industry that is characterized by a wide variety of products, variance between average unit values is often indicative of differences in product mix (*i.e.*, the imports are concentrated in higher-value items, while domestic production is concentrated in lower-value items) rather than differences in

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[910] ITC Report, p. 176.
[911] *See* EC first written submission, para. 547.
[912] EC first written submission, paras. 545-46.
[913] ITC Report, p. TUBULAR-53.
[914] ITC Report, pp. TUBULAR-53-54.
[915] *US – Lamb Meat*, AB Report, para. 129.

price. For this reason, while the ITC referred to the average unit value data for the FFTJ industry, it stated that it was cautious of placing undue weight on the data because of concerns with product mix.[916] The ITC thus had an objective basis, which it fully explained, for relying principally on pricing data relating to an individual product, rather than on the average unit value data relating to a mix of products.

c. The ITC Examined Changes in Input Costs

653. The ITC's discussion of causal link for FFTJ expressly acknowledged that unit input costs increased during its period of investigation. The ITC did not overlook this factor, as the EC contends. Moreover, this factor did not detract from the ITC's conclusion of causal link, but instead supported it.

654. The ITC explained that lower production and shipments during the period of investigation contributed to increases in unit costs.[917] In particular, per unit increases after 1997 in other factory costs and selling, general, and administrative expenses, both of which are emphasized by the EC, can be attributed to the fact that the industry had to spread its costs over a smaller quantity of sales.

655. The EC overlooks the reason why the FFTJ industry's sales quantities declined during a period of stable to increasing demand: the increased volume and market penetration of the imports. As the ITC concluded, "[t]he increasing presence of imports, in at least some cases at substantial underselling margins, prevented the industry from recouping increased costs through higher prices."[918] Thus, the ITC objectively examined the effect of increases in unit costs. It found that they were but one of many factors, most of which have not been addressed by complainants, that established a genuine and substantial causal link between increased imports and the serious injury experienced by the FFTJ industry.

ii. For FFTJ, the ITC Conducted a Reasoned and Adequate Examination of the Injury Purportedly Caused by Factors Other Than Increased Imports and Ensured that Any Injury Caused by These Other Factors Was Not Attributed to Imports

656. The ITC examined several purported alternative causes of injury to the domestic FFTJ industry to ensure that it was not attributing to the imports any injury caused by these factors. The factors the ITC analyzed were:

- *The business cycle.* The ITC stated that the business cycle in the oil and gas industry could not explain the poor performance of the domestic FFTJ industry at

[916] ITC Report, p. 176 n.1087.
[917] ITC Report, p. 176.
[918] ITC Report, pp. 176-77.

the conclusion of its period of investigation. Demand for oil and gas related products was very strong during 2000 and interim 2001, yet the industry's sales quantities and financial performance declined during these periods and were at their lowest levels for the period of investigation.[919] No complainant contests this finding.

- *Increased Capacity*. The ITC concluded that increased capacity was not an explanation for the serious injury experienced by the domestic industry. It stated that capacity increased during the period of investigation at a rate less than the increase in U.S. apparent consumption and thus should not have placed substantial pressure on domestic prices.[920]

- *Industry Inefficiency*. The ITC stated that the record did not support the allegations of the respondents that the domestic industry's declining profitability was due to inefficient or outdated facilities, or difficulties obtaining input materials.[921] No complainant contests this finding.

- *Worker shortage*. The ITC stated that respondents' claims that the industry was suffering from a shortage of qualified workers could not be reconciled with the data indicating employment declines in the FFTJ industry during the latter portion of the period of investigation when the industry was experiencing its worst performance.[922] No complainant contests this finding.

- *Purchaser consolidation*. The ITC acknowledged that purchaser consolidation would be expected to place some pressure on domestic prices. The ITC found, however, that demand for FFTJ was generally stable to increasing during the latter portion of its period of investigation. Moreover, the ITC did not rely solely on price effects in finding that the domestic FFTJ industry was seriously injured but also cited declines in non-price indicators, such as market share, domestic production, shipments, and employment. The ITC stated that purchaser consolidation could not explain the declines that occurred in these non-price indicators.[923]

657. China and the EC's arguments concerning the analysis of increased capacity misstate the ITC's findings. The EC claims a discussion of capacity is "missing" from the ITC's analysis.[924] This argument overlooks the ITC report's express discussion of capacity summarized above.

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[919] ITC Report, pp. 177-78, Table TUBULAR-C-6.
[920] ITC Report, p. 178.
[921] ITC Report, p. 178.
[922] ITC Report, p. 178.
[923] ITC Report, pp. 176-178.
[924] EC first written submission, para. 551.

China argues that the ITC acknowledged capacity to be an alternative source of injury to the domestic industry. This is also wrong. The ITC found that increased capacity could not have been a source of injury to the domestic industry, because over the period of investigation capacity increased less than U.S. apparent consumption.[925] Moreover, from 1999 to 2000, when imports had their largest annual increase in volume and market share during the period of investigation and the domestic industry ceased to operate profitably, U.S. capacity actually declined to its lowest level since 1996.[926] Having found that increased capacity was not an alternative cause of the serious injury it observed, the ITC satisfied its non-attribution obligation under Article 4.2(b).

658. China also misunderstands the ITC's discussion of purchaser consolidation. The ITC acknowledged that purchaser consolidation may have had some impact on prices the domestic FFTJ industry could charge, because fewer purchasers would have relatively greater bargaining power vis a vis producers. There was no basis, however, to conclude that purchaser consolidation would reduce demand for FFTJ; to the contrary, U.S. apparent consumption of the product was generally stable during the latter portion of the period of investigation.[927] Moreover, many of the indicators of serious injury which the ITC identified were not price based. These included declines in market share, declines in shipments and sales quantities, and declines in employment. By explaining that the serious injury it observed for the FFTJ industry was different in nature and broader in scope than the relatively limited price effects that could be attributed to purchaser consolidation, the ITC satisfied its obligation not to attribute to purchaser consolidation serious injury caused by the increased imports.

659. China and the EC also criticize the ITC for failing in its analysis of non-NAFTA imports to treat imports from NAFTA countries as another cause of injury requiring a separate non-attribution analysis.[928] As explained in above, however, nothing in either the Safeguards Agreement or Appellate Body jurisprudence requires that the ITC conduct such an analysis.

660. Consequently, the ITC's non-attribution analysis for FFTJ satisfied the requirements of Articles 2.1 and 4.2 of the Safeguards Agreement. The ITC separated and distinguished from the serious injury caused by increased imports any injury attributable to other factors.

i. The ITC's Causation Analysis For Stainless Steel Bar Was Fully In Accordance With Articles 2.1 and 4.2 of the Safeguards Agreement

661. For stainless steel bar, the ITC established that there was a genuine and substantial cause and effect relationship between increased imports and the serious injury being suffered by the stainless steel bar industry. The ITC found there was a clear correlation between increased imports and the significant declines in the overall condition of the stainless steel bar industry

[925] ITC Report, p. 178.
[926] ITC Report, Table TUBULAR-C-6.
[927] ITC Report, p. 175.
[928] China first written submission, para. 466, EC first written submission, para. 539.

during the period of investigation. Further, the ITC conducted a thorough and objective examination of the effects of other factors on the industry and ensured that it did not attribute any effects of these factors to imports in its causation analysis.

i. For Stainless Steel Bar, the ITC Thoroughly and Objectively Explained the Nature of the Causal Link Between Imports and the Industry's Serious Injury

a. The ITC's Analysis Established That There Was a Clear Correlation Between Import Trends and Declines in the Condition of the Stainless Steel Bar Industry

662. The ITC established that there was a genuine and substantial causal link between trends in the volume and market share of stainless steel bar and the serious injury suffered by the stainless steel bar industry.[929] In its analysis, the ITC examined all relevant factors affecting the competitiveness of domestic and imported merchandise in the U.S. market,[930] the trends in import volumes and market share,[931] the pricing effects of imports,[932] and the correlations between these trends and changes in the various indicia of the industry's injured condition.[933]

663. In its analysis, the ITC found several conditions of competition affected the market for stainless steel bar, noting (among other things) that:

- Demand for stainless steel bar fluctuated somewhat during the period but grew overall by 17.2 percent between 1996 and 2000. Demand declined by 13 percent in interim 2001.[934]

- Four firms accounted for the large majority of U.S. stainless steel bar production during the period, with the industry becoming more concentrated during the period. One firm shut down production in June 2001.[935]

- Aggregate U.S. capacity increased by 5.5 percent from 1996 to 2000 and then by 2.2 percent in interim 2001. Capacity utilization declined from 63 percent in 1996 to 52.1 percent in 1999, but increased somewhat to 55.8 percent in 2000. It declined again in interim 2001.[936]

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[929] ITC Report, pp. 208-213.
[930] ITC Report, pp. 208-210.
[931] ITC Report, pp. 210-211.
[932] ITC Report, pp. 211-212.
[933] ITC Report, pp. 210-212.
[934] ITC Report, p. 208.
[935] ITC Report, p. 209.
[936] ITC Report, p. 209.

- The aggregate capacity of foreign producers of stainless steel bar increased by 10.5 percent during the period of investigation.[937]

- Price is an important factor in purchasing decisions for stainless steel bar. Price is directly affected by the price of nickel. Indeed, to account for fluctuations in the price of nickel, producers impose a surcharge on the price of stainless steel bar when nickel prices increase to a specified level. Nickel prices fell through 1998 but then increased significantly in 1999 and the first half of 2000. Nickel prices then fell through interim 2001.[938]

664. Taking the conditions of competition into account, the ITC then performed a thorough and objective examination of the trends of imports and industry injury factors. It concluded that there was a clear correlation between increased import volume and the declines in the overall condition of the industry during the period.[939] In particular, it found that:

- Between 1996 and 2000, imports increased in a manner that had a serious adverse impact on the production levels, shipments, commercial sales, and market share of the domestic industry.[940]

- In this regard, import volumes and market share increased considerably throughout the period, with the quantity of imports growing by 53.8 percent between 1996 and 2000 and their market share increasing by 11 percentage points during that period as well.[941] The record showed that the growth in import market share continued throughout the period, with import market share growing from 35.4 percent in 1996 to 39.1 percent in 1997, 39.5 percent in 1998, 40.2 percent in 1999, and 46.5 percent in 2000. Import market share fell to 45.1 percent, in interim 2001,[942] but was still nearly 10 percentage points above 1996 levels.

- As a result of these import volume and market share increases, the domestic industry's production volumes, shipments levels, sales revenues, and market share all fell considerably during the period.[943] These indicia all declined despite an overall increase in market demand between 1996 and 2000.[944]

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[937] ITC Report, p. 210.
[938] ITC Report, p. 209.
[939] ITC Report, pp. 210-213.
[940] ITC Report, pp. 210.

[941] ITC Report, pp. 210.
[942] ITC Report, Table STAINLESS-C-4.
[943] ITC Report, pp. 210-11.
[944] ITC Report, pp. 211.

- Even though the industry had added capacity during this period, it was prevented from participating in any of the market growth during the period by the significant increases in imports over the period of investigation.[945]

- Imports and domestic merchandise were highly substitutable during the period and price was an important aspect of the purchase decision. Moreover, imports consistently undersold domestic merchandise throughout the period, underselling domestic merchandise in 47 of 53 possible price comparisons at margins of up to 51 percent.[946]

- This underselling caused price-suppression and depression during the period of investigation. Although prices of stainless steel bar are expected by market participants to track the price of nickel (which fluctuated considerably during the period), the net sales revenues and net unit values of the industry failed to keep pace with nickel costs and its cost of goods sold, thus directly resulting in declines in the industry's unit profits and its operating income margins throughout the period of investigation.[947]

- Moreover, the declines in the industry's operating income levels between 1999 and interim 2001 occurred when imports were at their highest market share levels during the period of investigation and when they were consistently underselling the domestic product throughout this period.[948]

665. In sum, the ITC established a clear correlation between the continued increases of low-priced imports and the substantial declines in the industry's condition throughout the period of investigation.[949] In particular, the industry experienced substantial declines in its market share, operating income margins, operating income, production levels, sales revenues, and shipments, from the very beginning of the period until interim 2001, as imports consistently and persistently increased their share of the domestic market and continued to undersell the domestic merchandise.[950] Accordingly, the ITC reasonably found a genuine and substantial correlation between import volume increases and the serious declines in the overall condition of the domestic stainless steel bar industry during the period of investigation.

b. Complainants' Arguments to the Contrary Are Unfounded

[945] ITC Report, pp. 211.
[946] ITC Report, pp. 211.
[947] ITC Report, pp. 211-212.
[948] ITC Report, pp. 212.
[949] ITC Report, p. 210-213.
[950] ITC Report, p. 210-213.

666. The EC contends that the record failed to establish a substantial causal link between movements in the volumes of stainless steel bar imports and declines in the industry's condition.[951] According to the EC, there was no causal link between imports and declines in the industry's condition because the quantity of imports "fluctuated" during the period of investigation but the industry's operating margins declined throughout the period. Indeed, they argue, the ITC found that serious injury began occurring in 2000, the year of the largest import surge of the period, despite the fact that the industry's operating margins turned from a loss to a profit in that year.[952]

667. The EC's argument is based on a misleading reading of the record. As can be seen from the ITC's decision, it was true that the absolute quantity of imports "fluctuated somewhat (declining slightly in 1998 and 1999)," as the EC asserts. However, the record also showed that apparent U.S. consumption of stainless steel bar fluctuated during the period -- although more significantly than imports. As a result, while import quantities may have fluctuated "somewhat" between 1997 and 1999, the market share of imports increased consistently and substantially throughout the period of investigation, as did the ratio of imports to domestic production.[953] Moreover, the record showed that, while imports made these market share gains, they also continued to undersell the domestic producers at significant margins throughout the period.[954] Given this uncontroverted record evidence, it should not be surprising that the ITC found that the substantial increases in import market share -- that were accompanied by substantial underselling -- had an increasingly injurious effect in the industry during the period of investigation.[955] In essence, by focusing on minor fluctuations on the absolute quantities in imports during a selected time during the period of investigation, the EC is simply hoping to distract the Panel's attention from the larger picture: import market share grew substantially over the period of investigation as a result of underselling and, during that period, the industry's market share, production and shipment levels, and profitability levels went into a free-fall.

668. Moreover, the EC's argument also misconstrues the ITC's findings. The ITC did not find, as the EC asserts, imports only caused injury to the industry in the year 2000. While it is true that the ITC acknowledged that imports surged to their highest levels of the period of investigation in 2000 and that they caused the industry's condition to deteriorate substantially in that year, the ITC also explicitly found that imports had increased their market share throughout the period and that they had, through increased volumes and underselling, significantly and adversely impacted the industry's condition during the years before 2000.[956] Nonetheless, the EC ignores these clear findings and simply creates out of whole cloth a finding the ITC simply did

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[951] IC First Written Submission, para. 563-567.
[952] IC First Written Submission, para. 563-567.
[953] ITC Report, Table STAINLESS-C-4.
[954] ITC Report, p. 211-12, Table STAINLESS-99.
[955] ITC Report, p. 210-12.
[956] ITC Report, p. 210-12.

not make. It seems clear that the EC has done so because that "finding" would be arguably more amenable to criticism than the findings actually issued by the ITC.

669. Finally, the EC makes much of the fact that the industry managed to return to profitable operating income margins in 2000, despite the fact that imports made their largest surge into the market in that year. Their argument has two flaws. First, even aside from the industry's profitability levels, the industry's market share reached its lowest level of the period of investigation in the face of this import surge.[957] Accordingly, even aside from the declines in the industry profitability levels, imports had a significant negative impact on the industry's condition in that year.

670. Moreover, the EC's argument ignores the fact that the industry's operating income margin was substantially lower in 2000 than in 1996, 1997, and 1998, the first three years of the period of investigation. Although the exact numbers are confidential, the ITC explicitly stated that the industry's operating margins declined "consistently and significantly" through the period of investigation, noting that operating margins fell in 1997 and in 1998, and then dropped to a loss in 1999.[958] Although the industry's margins returned to a profit in 2000, the ITC explicitly noted that this increase was only "slight" and that it was followed by a drop to the lowest margin of the period in interim 2001.[959] Although the exact data is confidential, the industry's operating income level remained substantially below its levels in 1996, 1997, and 1998. Accordingly, the record clearly indicates that there was not a substantial improvement in the industry's injured condition in 2000, as the EC suggests; instead, the record shows that the industry's condition continued to remain poor in the face of import competition.

671. The EC further asserts that the ITC failed to consider that the industry's capacity "continued to increase" well in excess of the rate of domestic demand during the period. This argument is factually wrong and mischaracterizes the ITC's opinion. It is factually wrong because the industry's capacity increases did not, in fact, exceed the growth in demand during the period. More specifically, the industry's capacity levels only increased by 5.5 percent between 1996 and 2000.[960] Apparent U.S. consumption grew by 17.2 percent between those years.[961] In fact, because of this differential, the industry's total capacity was slightly lower than total demand in 2000.[962] Thus, although there were fluctuations in demand during the period, the record does not indicate that the industry's capacity increases were in excess of the growth in market demand.

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[957] ITC Report, Table STAINLESS-C-4.
[958] ITC Report, p. 207.
[959] ITC Report, p. 207.
[960] ITC Report, Table STAINLESS-C-4.
[961] ITC Report, Table STAINLESS-C-4.
[962] ITC Report, Table STAINLESS-C-4.

672. Secondly, the ITC clearly did discuss the industry's capacity increases during the period, noting specifically that industry capacity had grown during the period and that capacity utilization had declined.[963] Moreover, the ITC directly addressed the relationship of these capacity increases to demand changes in the market and their impact on the condition of the industry. In particular, it found that the industry's capacity increases had not enabled the industry to take advantage of the growth in the market during the period, specifically noting that:

> In fact, the declines in the industry's production, shipment, and market share levels occurred despite the fact that the industry added significant amounts of capacity during a period of reasonably strong growth in demand for stainless bar. Even with this increased capacity, the industry was unable to take advantage of the growth in demand for stainless bar as imports obtained an increasingly larger share of the domestic market for bar over the period of investigation. In particular, while apparent consumption of stainless bar grew by 48 thousand short tons between 1996 and 2000, the quantity of imports grew at a more accelerated rate, increasing by nearly 53 thousand short tons during this same period. This growth in imports effectively foreclosed the domestic industry from participating in the growth in demand during the period of investigation.[964]

Given this discussion, it is unclear how the EC could possibly believe that the ITC ignored the relationship between the industry's capacity increases and the growth in demand. The ITC clearly considered the growth in industry capacity in its analysis and reasonably explained why it was not a factor in the decline in market prices or in the industry's condition.[965]

673. Finally, the EC asserts that the ITC's finding of a causal link is flawed because the record supposedly indicated that declines in domestic prices during the first half of the period were caused by nickel price declines. Indeed, the EC asserts that the ITC "baldly conclude[d]" that imports suppressed or depressed prices in the market "without attempting to separate the effects of developments in the nickel price" on domestic prices. Again, it is unclear how the EC can make such an assertion in light of the fact that the ITC discussed this issue at length in its opinion.

674. In its analysis, the ITC examined the relationship between nickel price movements and movements in the price of stainless steel bar in its opinion and concluded that nickel price movements had not caused the price suppression in the market. In particular, the ITC specifically

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[963] ITC Report, pp. 206, 209, 210-11.

[964] ITC Report, p. 211.

[965] In this regard, we note that the EC's claim that price developments mirror developments in demand is also wrong. Aside from the fact that most market participants believe that price generally will track nickel prices in a typical market situation, ITC Report, pp. 209 & 211, the EC's own chart shows that the single largest decline in domestic net unit commercial sales values occurred between 1996 and 1997, dropping by 10 percent. ITC Report, Table STAINLESS-18, EC First Written Submission, Figure 49. However, in that year, consumption increased by 6.5 percent. What then caused the declines in that year? As the ITC noted in its analysis, the decline was effected by an increase in import market share of 5.9 percent. ITC Report, pp. 210-212.

found that market participants expect stainless prices to move in tandem with nickel prices because of the importance of nickel in the production of stainless steel bar.[966] As a result, it specifically analyzed whether movements in the industry's net unit prices for stainless steel bar and its costs had tracked the price of nickel during the period.[967] Although it found that stainless bar prices had tracked nickel prices somewhat during the first years of the period, it also stated that the industry's net sales revenues and unit sales prices failed to keep pace with movements in nickel prices during the second half of the period of investigation, which resulted in decreasing unit profitability margins for the industry during this period.[968] Moreover, the ITC found, the decreasing spread between its unit costs and unit prices -- the result of price declines exceeding declines in its cost of goods sold, including nickel costs -- directly caused declines in the industry's net sales values and its operating income margins during the last two-and-a-half years of the period of investigation, even as nickel prices increased.[969]

675. Clearly, then, the ITC did examine this issue in detail and correctly concluded that nickel prices had not caused the declines in the industry's profitability levels during the period. The EC's argument concerning the ITC's discussion of nickel prices has no merit whatsoever.

676. In sum, the ITC established that there was a genuine and substantial relationship of cause and effect between increased imports of stainless steel bar and declines in the stainless steel industry's condition.

ii. For Stainless Steel Bar, the ITC Thoroughly Discussed the Injury Purportedly Caused by Factors Other than Increased Imports And Ensured That Any Injury Caused By These Factors Was Not Attributed to Imports

677. The ITC also conducted a thorough and detailed examination of other factors that might be causing injury to the stainless steel bar industry. In particular, the ITC considered whether three factors were causing injury to the stainless steel bar industry during the period of investigation: demand declines during late 2000 and 2001, energy declines during the same period, and the poor operating results of two producers during the period. For each factor, the ITC identified and discussed in detail the nature and extent of the effects of these factors on the industry and distinguished the effects of each factor from the effect of imports.

a. The ITC Properly Ensured that It Did not Attribute Any Injury Caused by Late Period Demand Declines to Imports

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[966] ITC Report, p. 209-210, 211-12.
[967] ITC Report, p. 209-210, 211-12.
[968] ITC Report, p. 211-12.
[969] ITC Report, p. 211-12.

678. The ITC first assessed whether declines in demand during the last months of the period of investigation were a possible source of injury to the domestic industry.[970] In its analysis of these demand declines, the ITC explained, in a reasoned and thorough manner, the nature and extent of the effect that was attributable to demand declines, and distinguished that effect from the effects of imports.

679. In its analysis, the ITC recognized that, after growing 1996 to late 2000, demand for stainless steel bar did decline in late 2000 and interim 2001.[971] However, the ITC correctly noted that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the years prior to 2000 and 2001, when imports had been increasing as well. Indeed, it specifically found that the industry's inability to maintain its operating profits in the face of demand changes in late 2000 and 2001 were the "direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period," not the result of demand declines.[972]

680. As can be seen, the ITC closely examined the effects that were attributable to demand declines during the period. In particular, the ITC properly noted that demand declines had been become evident only during the final three quarters of the period of investigation.[973] However, it also correctly noted that these late-period demand declines could not possibly have contributed to the serious declines in the condition of the industry during the three years prior to this period, when demand was, in fact, increasing.[974] Moreover, given that demand actually increased substantially on a full year basis in 2000 as well,[975] it is clear that demand declines were not a cause of injury to the industry in that year as well. Given the foregoing, the ITC reasonably concluded that the declines in the industry's condition that occurred during interim 2001 were primarily caused by imports, even with the decline in demand in that period.

681. By performing an analysis that assessed whether imports were causing injury to the industry during a period of increasing demand, the ITC was able to distinguish the effects of the demand declines in the final quarters of the period of investigation from those attributable to imports during prior periods. As a result, the ITC ensured that it did not attribute the injury caused by demand declines to imports. Accordingly, in its analysis of the effect of demand declines on the industry, the ITC properly separated and distinguished the effects of demand

[970] ITC Report, p. 212.
[971] ITC Report, p. 212.
[972] ITC Report, p. 212.
[973] ITC Report, p. 212.
[974] ITC Report, p. 212.
[975] ITC Report, Table STAINLESS-C-4.

declines during the last months of the period of investigation from the injurious effects of imports in its causation analysis. Complainants' arguments to the contrary[976] are meritless.

b. The ITC Properly Ensured that It Did not Attribute Any Injury Caused by Late Period Energy Cost Changes to Imports

682. The ITC also considered whether energy cost increases during the last months of the period of investigation were a source of injury to the domestic industry.[977] In its analysis, the ITC recognized that there was an increase in energy costs during late 2000 and interim 2001.[978] However, the ITC correctly noted that there was no record evidence of specific energy cost increases in the period prior to late 2000 and 2001, and that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels as a result of increasing import volumes in the years prior to 2000 and 2001 as well. Indeed, it specifically found that the industry's inability to maintain its operating profits in the face of energy cost increases in late 2000 and 2001 were the "direct result of the increasing share of the market obtained by imports and their consistent underselling of domestic merchandise during the period."[979] Accordingly, the ITC properly discounted these late-period energy cost increases as a source of injury during the period.

683. As can be seen, the ITC closely examined the effects of energy cost increases on the condition of the industry during the period of investigation. In particular, the ITC properly noted that energy cost issues had been become evident only during the final three quarters of the period of investigation.[980] However, it also correctly noted that these late-period energy cost increases could not possibly have contributed to the serious declines in the condition of the industry during the three years prior to this period, when there was no evidence of significant changes in energy costs.[981] As a result, it reasonably concluded that the declines in the industry's condition that occurred during 2000 and interim 2001 were substantially caused by imports, even though energy costs increased during the latter months of 2000 and in interim 2001.

684. By performing an analysis that assessed whether imports appeared to be causing injury to the industry during a period without energy cost increases, the ITC was able to distinguish the effects of the energy costs increases in the final quarters of the period of investigation from those attributable to imports during prior periods. As a result, the ITC ensured that it did not attribute the injury caused by energy costs to imports. In sum, the Commission properly separated and

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[976] EC First Written Submission, para. 556; China First Written Submission, para. 481.
[977] ITC Report, p. 212.
[978] ITC Report, p. 212.
[979] ITC Report, p. 212.
[980] ITC Report, p. 212.
[981] ITC Report, p. 212.

distinguished the effects of energy costs from those of imports in its analysis, despite Complainants' arguments to the contrary.[982]

c. The ITC Properly Ensured that It Did Not Attribute Any Injury to the "Aberrational" Performance of Two U.S. Producers to Imports

685. The ITC also considered whether the poor performance of two particular domestic producers was a possible source of injury to the industry during the period of investigation.[983] Although the specific information on these producers' operations is confidential, the ITC discussed the nature and extent of the injury attributable to these producers' difficulties during the period. Moreover, the ITC also distinguished and separated the impact of these producers' operations from those attributable to imports. By doing so, it ensured that it did not attribute any injury allegedly caused by these difficulties to imports.

686. Although the details of the two producers problems and their operating results are confidential, the ITC's discussion of the issue makes clear that it examined the record evidence relating to these issues and discussed the nature and extent of these producers' difficulties in detail.[984] In this regard, it specifically noted that it took into account the arguments made by the foreign producers and rejected their assertions that the industry's operating results had been skewed by the non-import problems of the producers.[985] Moreover, the ITC considered whether exclusion of the two companies from the industry data would substantially alter the downward trends in the industry's condition in those years, and found that it did not.[986] By engaging in this analysis, the ITC clearly separated and distinguished the impact of imports on the industry from the effects of these producers operations and found that the industry's problems were genuinely and substantially the result of increased imports.[987] Complainants' assertions that the ITC did not conduct such an analysis[988] have no foundation.

d. The ITC Properly Discounted Industry Capacity Increases and Nickel Costs as Alternative Sources of Injury to the Injury

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[982] EC First Written Submission, para. 556; China First Written Submission, para. 481.

[983] ITC Report, p. 212.

[984] ITC Report, p. 212.

[985] ITC Report, p. 212.

[986] ITC Report, p. 212.

[987] In this regard, the United States notes that Complainants' argument is, in essence, an assertion that the ITC should have conducted its causation assessment for only a portion of the industry producing stainless steel bar. As Complainants are aware, however, the ITC is required by the Safeguards Agreement to assess whether imports are causing serious injury to the industry as a whole, not whether they are causing injury to subsegments of the industry. Thus, even if these two producers were affected to some degree by non-import factors, the ITC would nonetheless still need to include this producer in the industry and assess whether the industry as a whole was injured by imports.

[988] EC First Written Submission, paras. 557; China First Written Submission, paras. 481.

687. In addition to arguing that the ITC failed to adequately address nickel costs and capacity increases when assessing whether there was a causal link between imports and the industry's injured condition, the EC also contends that the ITC failed to separate and distinguish the effects of these factors from those of imports in its analysis.[989]

688. However, as we have discussed in detail above, the ITC very clearly considered these issues, discussed them in detail, and discounted them as a source of injury to the industry during the period of investigation. Moreover, in its analysis of these two factors, it very clearly distinguished their effects from the effects of imports on the industry. For example, by focusing on the change in spread between the industry's costs (which included its nickel costs) and its sales values in its discussion of the impact of nickel costs on domestic pricing, the ITC was clearly able to assess the extent to which the industry was unable to increase its prices to fully recover its nickel costs because of import competition. Accordingly, the ITC clearly separated and distinguished the effects of imports from the effects of nickel cost changes in its analysis. Similarly, by noting that capacity increases had been outstripped by demand increases, the ITC was able to conclude that the capacity utilization declines had been caused by the growth in imports rather than the growth in industry capacity during the period. Again, this analysis enabled the ITC to distinguished the effects of capacity increases from those of imports on the industry during the period of investigation. The EC's arguments to the contrary are meritless.

iii. Conclusion

689. In sum, the ITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between trends in the volume and market share of imports of stainless steel bar and the significant declines in the condition of the stainless steel bar industry during the period of investigation. Moreover, it thoroughly assessed the nature and scope of the effects of other factors and ensured that it did not attribute the effects of these factors to imports.

j. The ITC's Causation Analysis For Stainless Steel Rod Was Fully In Accordance With Articles 2.1 and 4.2 of the Safeguards Agreement

690. For stainless steel rod, the ITC established that there was a genuine and substantial cause and effect relationship between increased imports of stainless steel rod and serious injury to the stainless steel rod domestic industry. The ITC found that there was a clear correlation between increased imports and the significant declines in the overall condition of the stainless steel rod industry during the latter half of the period of investigation. Further, the ITC conducted a thorough and objective examination of the nature and extent of injury caused by other factors and ensured that it did not attribute the effects of these factors, if any, to imports in its analysis.

[989] EC First Written Submission, paras. 555 & 558.

691. Accordingly, as we discuss in detail below, Complainants' arguments to the contrary have no merit.

i. The ITC Properly Treated Data for the Stainless Steel Rod Industry As Confidential Information In Its Injury Analysis

692. In its brief, the EC first asserts that the ITC did not provide an adequate and reasoned analysis for its stainless steel rod determination because the ITC has bracketed all of the numeric data in the determination that relates to the stainless steel rod industry's operations.[990] According to the EC, because of the redaction of this data, it is impossible to ascertain whether the ITC's determination with respect to stainless steel rod is justified.[991]

693. As an initial matter, the United States notes that the ITC has treated as confidential and therefore not disclosed the bulk of the trade, employment, and financial data for the stainless steel rod industry. The ITC redacted this data from its opinion because the stainless rod industry is dominated by the only large domestic producer of stainless steel rod, Carpenter/Talley[992] and Carpenter/Talley's operating and trade data essentially are the same as the aggregate industry data. Disclosing the aggregate confidential competitive data of the industry would therefore actually reveal the specific details of Carpenter/Talley's operations. The ITC is barred by U.S. law – as well as Article 3.2 of the Safeguards Agreement – from disclosing such confidential company-specific competitive information without the consent of the provider.[993] However, when the ITC is prohibited from disclosing confidential competitive data for a company, the ITC treats only the specific numeric data of the company as confidential; it may and does discuss trends in industry data (or other confidential data) in general but descriptive terms.[994]

694. Keeping this in mind, the EC's contention that the ITC failed to provide an adequate statement of its rationale for stainless steel rod is misplaced. First, as the United States had previously discussed, the Safeguards Agreement not only permits, but indeed requires, a competent authority not to disclose any information that is submitted to it on a confidential basis, unless the submitting party submitting consents to the disclosure.[995] In fact, two panels have stated that the Safeguards Agreement authorizes the United States not to disclose

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[990] EC First Written Submission, para. 570.

[991] EC First Written Submission, para. 570.

[992] ITC Report, pp. 217-218.

[993] 19 U.S.C. § 1332(g). We note that the United States sought the consent of Carpenter/Talley to release this information in this proceeding but consent was not granted. The issue of confidentiality is treated at greater length in Section N, *infra*, to which we refer the Panel.

[994] 19 C.F.R. § 201.6(a)(1). Moreover, it should be noted that this data was not made available only to members of the public. As the Panel may be aware, as authorized by the U.S. statute, 19 U.S.C. §2252(i), the ITC does permit the disclosure of this information to counsel for all parties under the terms of an administrative protective order that requires counsel to agree not to disclose this information to their clients and the public. 19 C.F.R. § 206.17. Thus, the parties were able to defend their interests fully before the ITC.

[995] Safeguards Agreement, Article 3.2.

confidential data in its determination, even if that data is aggregated data.[996] Moreover, these Panels have rejected the argument that the ITC's analysis does not constitute a "reasoned and adequate explanation" of its findings simply because it has not disclosed confidential data in its analysis.

695. Second, even though a substantial amount of confidential industry data is redacted from the ITC's opinion, its analysis is still sufficiently detailed and clear that the Panel can read the analysis and assess whether it meets the causation requirements of the Safeguards Agreement. The ITC's decision, while deleting specific numeric data reflecting the operations of Carpenter/Talley, nonetheless describes in detail the trends in import and industry data, the clear correlations between those trends, and the extent to which other factors impacted the industry. Indeed, as we will discuss below, all of the issues raised by Complainants in their arguments, are specifically and clearly addressed in the opinion, even though certain confidential data and information is redacted from the opinion. It is clear that redaction of the data should not hamper the Panel's review of the ITC's analysis, especially given that redaction of this data is fully consistent with the provisions of the Safeguards Agreement.

ii. For Stainless Steel Rod, the ITC Thoroughly and Objectively Explained the Nature of the Causal Link Between Imports and the Industry's Serious Injury

a. The ITC's Analysis Established That There Was a Clear Correlation Between Import Trends and Declines in the Condition of the Stainless Steel Rod Industry

696. The ITC established that there was a genuine and substantial causal link between trends in the volume and market share of stainless steel rod imports and the serious injury suffered by the stainless steel rod industry.[997] In its analysis, the ITC examined the relevant factors affecting the competitiveness of domestic and imported merchandise in the U.S. market,[998] the trends in import volumes and market share,[999] the pricing effects of imports,[1000] and the correlations between these trends and changes in the various indicia of the industry's condition.[1001]

697. The ITC first noted that several conditions of competition affected the market for stainless steel rod, including the fact that:

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[996] *US - Lamb Meat*, Panel Report, para. 5.65; *US - Wheat Gluten*, Panel Report, para. 8.24.
[997] ITC Report, pp. 217-222.
[998] ITC Report, pp. 217-219.
[999] ITC Report, pp. 219-220.
[1000] ITC Report, pp. 220-221.
[1001] ITC Report, pp. 219-221.

- Demand for stainless steel rod essentially remained stable throughout the period of investigation between 1996 and 2000. As the overall economy declined in interim 2001, demand for stainless steel rod declined as well.[1002]

- Only four U.S. firms produced stainless steel rod during the period, with the only large producer of stainless steel rod being Carpenter/Talley. Carpenter/Talley is the dominant U.S. producer of stainless steel rod in the market.[1003]

- Aggregate U.S. capacity increased during the period of investigation. Capacity utilization declined from 1996 to 1999, and then declined further in 2000 and interim 2001.[1004]

- The aggregate capacity of foreign producers of stainless steel rod increased by 16.5 percent during the period of investigation.[1005]

- Price is an important factor in purchasing decisions for stainless steel rod. Moreover, the price of stainless steel rod is directly affected by the price of nickel. Indeed, to account for fluctuations in the price of nickel, producers impose a surcharge on the price of stainless steel rod when nickel prices increase to a specified level. The price of domestic stainless steel rod generally followed the trend in nickel prices through the period of investigation.[1006]

698. Taking these conditions of competition into account, the ITC then performed a thorough and objective examination of the trends of imports and industry injury factors. It concluded that there was a clear correlation between increased import volume and declines in the overall condition of the industry during the period.[1007] In particular, it found that:

- During a period of stable demand, imports increased between 1996 and 2000 in a manner that had a serious adverse impact on the production levels, shipments, commercial sales, and market share of the domestic industry.[1008]

- Because of demand stability, the increase in import volumes throughout the period resulted in a dramatic increase in import market share. With this growth in volume and market share, the industry's production levels, shipment volumes, net commercial sales and net commercial sales revenues all declined dramatically,

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[1002] ITC Report, p. 217.
[1003] ITC Report, pp. 217-218.
[1004] ITC Report, p. 218.
[1005] ITC Report, p. 219.
[1006] ITC Report, p. 218.
[1007] ITC Report, pp. 219-222.
[1008] ITC Report, p. 219.

especially during 2000 when imports surged dramatically. Moreover, as import market share generally grew throughout the period, the industry's market share declined dramatically during the period as well.[1009]

- The most serious adverse impact of imports occurred during 2000, the last year of the period of investigation, when import quantities grew by 25 percent over their level in 1999. With this growth in import volume, the industry's market share, production, shipments, and net commercial sales fell further. Moreover, in combination with the negative price effects of imports, these increased volumes caused a decline in industry profitability as well.[1010]

- Imports had a negative effect on domestic prices during the period of investigation. The record indicated that imports and domestic merchandise were highly substitutable during the period and price was an important aspect of the purchase decision.[1011] Moreover, imports consistently undersold domestic merchandise throughout the period, underselling domestic merchandise in every single possible price comparison, at margins ranging from 6.5 to 23 percent.[1012]

- In addition to causing purchasers to shift significant volumes of purchases to low-priced imports, consistent underselling by imports caused price-suppression and depression during the period of investigation.[1013] Although prices of stainless steel rod are expected by market participants to track the price of nickel (which fluctuated considerably during the period), the net unit sales values of the industry failed to keep pace with nickel prices and its unit cost of goods sold during the second half of the period. In sum, increasing volumes of imports that consistently undersold the industry suppressed and depressed domestic sales prices, thus leaving the industry unable to effectuate changes in its sales prices that would allow it to recoup its costs of goods sold. This led directly to declines in the industry's operating income level during this period.[1014]

- Further, the record showed there was a "clear and direct correlation" between changes in import volumes and the overall condition of the industry. For example, the industry's operating income margins declined in 1997, 1999, and 2000, all of which were years in which import quantities nad market share increased from their level in the previous year. The only year in which industry operating income margins actually increased was 1998, when import quantities

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[1009] ITC Report, pp. 219-220.
[1010] ITC Report, p. 220.
[1011] ITC Report, p. 220.
[1012] ITC Report, p. 220 & n. 1419.
[1013] ITC Report, p. 220.
[1014] ITC Report, pp. 220-221.

decreased by 21.5 percent, and their market share level declined significantly as well.[1015]

699. In sum, the ITC established that there was a clear correlation between the growing volumes of low-priced imports in the market and the substantial declines in the industry's condition throughout the period of investigation.[1016] In particular, 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 considerably from their levels in 1998 and as imports continued to undersell the domestic industry and lead domestic prices downward.[1017] The largest declines in the industry's condition during the period occurred in 2000, when the largest import increase occurred. Given the very clear correlation of import volume and pricing trends and industry declines in these years, the ITC correctly found there was a genuine and substantial correlation between import volume increases and the serious injury being suffered by the domestic industry during the period of investigation.

b. Complainants' Arguments to the Contrary Are Unfounded

700. Despite the clear correlation between import volume and pricing trends and declines in industry condition, the EC nonetheless contends that the record failed to establish a substantial causal link between movements in import volumes and declines in the stainless steel rod industry's condition.[1018] According to the EC, the ITC failed to recognize that industry profitability levels declined in 1999 and interim 2001 when import volumes were at the same levels they had been at in 1996.[1019] Although the EC can perhaps be forgiven for basing their arguments on data that was redacted from the opinion as confidential, it is nonetheless clear from the available data and the face of the opinion that their argument is factually mistaken.

701. First, the EC's argument with respect to the relationship of profits and import levels in 1999 is flawed because imports were not "relatively close" to their 1996 levels in 1999, as the EC suggests. Instead, import volumes and market share were both substantially higher in 1999 than 1996, with the absolute quantity of imports being 8.9 percent higher than 1996[1020] and their market share in 1999 being substantially higher than in 1996.[1021] In addition, as the ITC clearly

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[1015] ITC Report, pp. 221. The exact market share level is confidential because it would reveal Carpenter/Talley's market share.

[1016] ITC Report, pp. 219-222.

[1017] ITC Report, pp. 219-222.

[1018] IC First Written Submission, para. 563-567.

[1019] EC First Written Submission, para. 574.

[1020] ITC Report, Table STAINLESS 7.

[1021] Although the exact market share numbers are confidential, we note that the fact that import market share was higher in 1999 than 1996 is evident from the discussion of import and domestic market share that is set

(continued...)

explained in its analysis (even with the redaction of confidential data), imports undersold domestic merchandise in every period of the period of investigation, including 1999, which resulted in the suppression and depression of domestic prices during the last two-and-a-half years of the period of investigation, thus preventing the industry from keeping its prices at a level that would allow it to recoup its nickel costs during this period, including 1999.[1022] In other words, the ITC correctly found that, in 1999, the industry's operating income margins fell in direct correlation with the substantial increase in the volume and market share of imports that occurred during that year, and as a direct result of the persistent underselling by imports that occurred throughout the period.

702. In fact, the ITC specifically noted that the "record shows a clear and direct correlation between changes in the volume of imports and the overall condition of the industry," finding in particular that the industry's operating income level declined in 1999 in conjunction with an increase in import volumes. Given this direct statement on the matter, it is clear not only that the ITC considered the issue raised now by the EC but squarely rejected it because it was not consistent with the record evidence.[1023]

703. Similarly, the EC's argument that import volumes fell back to their 1996 levels in interim 2001 is misleading as well. The record showed that the decline in absolute import volumes in interim 2001 was related to the decline in demand in interim 2001 and had little impact on the elevated market share of imports or their continued underselling of domestic stainless steel rod. More specifically, while it is true that import volumes on an absolute level fell substantially in interim 2001 from the comparable period in 2000, the decline in import volumes between those two periods was essentially similar to the decline in demand between interim 2000 and 2001, resulting in a minimal decrease in import market share between interim 2000 and 2001,[1024] Further, as the ITC noted, imports also undersold domestic merchandise in interim 2001, thus

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[1021] (...continued)
forth in the ITC's analysis. *See, e.g.,* ITC Report, 220 (noting that, due to import quantity and market share increases, the "share of the market held by the domestic industry declined dramatically as well, falling from *** percent in 1996 to *** in 1999 and to *** percent in 2000"). We further note that the ITC also stated there was a flat level of demand in the market during the period, which would make the growth of 8.9 percent in import volumes a significant growth in market share as well.

[1022] ITC Report, p. 220-221.

[1023] ITC Report, p. 221. In this regard, the United States also notes that the EC mistakenly asserts that the United States could only focus on the increase in imports in the year 2000 as the basis for its injury finding because that was the only period of import increases sufficiently recent to form a basis for a finding of serious injury. The EC's argument is flawed because there was, clearly, a substantial increase in import market share in 1999, whether compared to 1996 or to 1998, and this increased market share led to substantial declines in the industry's condition. The fact that there was a very substantial amount of additional injury in 2000 and 2001 does not change the fact that the ITC found that increased imports did have an adverse impact on the condition of the industry in 1999 as well.

[1024] ITC Report, p. 215 (noting that import market share "declin[ed] slightly from *** percent in interim 2000 to *** percent in interim 2001.")

further suppressing and depressing U.S. prices in that period.[1025] Thus, imports retained their substantially increased market share even in the face of declining demand. Again, the record showed, as the ITC found, that there was a clear correlation between import volumes and pricing in interim 2001 and the declines in industry profitability in that year.[1026] The EC's arguments to the contrary are simply wrong, and can be seen as such from the face of the ITC's opinion, even with certain confidential data redacted.

704. In sum, the ITC established that there was a genuine and substantial relationship of cause and effect between increased imports of stainless steel rod and declines in the stainless steel rod industry's condition. The EC's arguments are simply not consistent with the record evidence.

iii. For Stainless Steel Rod, the ITC Thoroughly Discussed the Injury Purportedly Caused by Factors Other than Increased Imports And Ensured That Any Injury Caused By These Factors Was Not Attributed to Imports

705. The ITC also conducted a thorough and detailed examination of other factors that might be causing injury to the stainless steel rod industry. In particular, the ITC addressed three factors as possible other factors causing injury to the stainless steel rod industry during the period of investigation, including demand declines during late 2000 and 2001, energy cost increases during the same period, and the poor operating results of one domestic producer during the period.[1027] For each of these factors, the ITC examined in detail the nature and extent of the effects of that factor during the period of investigation and distinguished its effects, if any, from those of imports.

a. The ITC Properly Ensured that It Did not Attribute Any Injury Caused by Late Period Demand Declines to Imports

706. The ITC first considered whether declines in demand during the last months of the period of investigation were a possible source of injury to the domestic industry.[1028] In its analysis of these demand declines, the ITC explained, in a reasoned and thorough manner, the nature and extent of the injurious effect attributable to these demand declines, and distinguished that effect from the effects of imports.

[1025] ITC Report, p. 221.

[1026] ITC Report, p. 221.

[1027] ITC Report, p. 221. In this regard, the United States notes that the EC is therefore clearly wrong when it states that the ITC identified only one alternative source of injury in its analysis.

[1028] ITC Report, p. 221.

707. More specifically, the ITC recognized that, after while remaining stable through most of the period of investigation,[1029] demand for stainless steel rod did decline in late 2000 and interim 2001.[1030] However, the ITC correctly noted that the industry had been experiencing declines in its market share, production volumes, sales levels, employment levels, and profitability levels during the period from 1996 to 1999, when imports had exhibited increasing volumes as well.[1031] Moreover, it also specifically found that "it is clear imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than demand declines" because there had been a "substantial increase in import quantities and market share during the last year-and-a-half of the period" of investigation.[1032] Accordingly, the ITC properly discounted this downturn in demand as a significant cause of injury to the industry during the latter half of the period of investigation.

708. Given this, it is clear that the ITC closely examined the nature of the injury that was attributable to demand declines during the period. In particular, the ITC properly noted that demand declines had become evident only during the final three quarters of the period of investigation.[1033] However, it also correctly noted that these late-period demand declines could not possibly have contributed to the serious declines in the condition of the industry during the three years prior to this period, when demand remained stable.[1034] Indeed, given that demand not only remained stable but actually increased slightly in 2000 over 1999 and 1998,[1035] it is clear that demand declines had no impact at all on the condition of the industry during 2000 as well.

709. By examining whether imports caused injury to the industry during a period of increasing demand, the ITC was able to distinguish the effects of the demand declines in the final quarters of the period of investigation from those attributable to imports during prior periods. After concluding correctly that the industry had been impacted by imports in those years prior to late 2000 and interim 2001, the ITC clearly and correctly concluded that demand declines had not contributed to the industry's declines in those years. Moreover, for the later stages of the period of investigation, the ITC qualitatively assessed whether imports had a more substantial impact on the condition of the industry than did demand declines. By concluding that even the injury suffered by the industry in 2000 and interim 2001 was primarily caused by imports and not demand declines, the ITC properly assessed the amounts of injury attributable to both demand

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[1029] Although the data on consumption is confidential, the record showed that the only year in which demand did not remain at a level similar to that seen in 1996 was 1997, when there was a significant increase in demand.

[1030] ITC Report, p. 221.

[1031] ITC Report, p. 221.

[1032] ITC Report, p. 221.

[1033] ITC Report, p. 221.

[1034] ITC Report, p. 221.

[1035] The United States notes that the exact numbers are confidential.

declines and imports during the later stages of the period of investigation.[1036] Accordingly, the Commission properly separated and distinguished the effects of demand declines from those of imports in its analysis. Complainants' arguments to the contrary[1037] are meritless.

b. The ITC Properly Ensured that It Did not Attribute Any Injury Caused by Late Period Energy Cost Changes to Imports

710. The ITC also examined whether energy cost increases during the last months of the period of investigation as a possible source of injury to the domestic industry.[1038] In its analysis, the ITC recognized that there was an increase in energy costs during late 2000 and interim 2001.[1039] However, the ITC correctly noted that there was no record evidence of specific energy cost increases in the period prior to late 2000 and interim 2001, and that the industry had been experiencing serious declines in its market share, production volumes, sales levels, employment levels, and profitability levels as a result of increasing import volumes from 1996 through 1999.[1040] Moreover, it specifically found that "it is clear imports had a greater impact on the declines in the industry's condition in 2000 and interim 2001 than . . . energy cost increases," noting that there had been a "substantial increase in import quantities and market share during the last year-and-a-half of the period" of investigation.[1041] Accordingly, the ITC properly discounted these late-period energy cost increases as a significant source of injury to the industry during the period of investigation.

711. As can be seen, as with its demand declines analysis, the ITC closely examined the effects of energy cost increases on the industry during the period of investigation. In particular, the ITC properly noted that energy cost issues had been become evident only during the final three quarters of the period of investigation.[1042] It also correctly noted that these late-period energy cost increases did not significantly contribute to the decline in the condition of the industry during the three years prior to this period, when there was no evidence of significant changes in energy costs.[1043] By performing an analysis that assessed whether imports appeared to be causing injury to the industry during a period without substantial energy cost increases, the ITC was able to distinguish the effects of these increases in the final three quarters of the period of investigation from those attributable to imports during prior periods. As a result, the ITC was able to ensure that did not attribute any injury caused by energy costs to imports.

[1036] It bears repeating that, since demand did not decline on an overall basis in 2000, there was clearly no injurious impact of a demand decline in that year on the industry on an overall basis.

[1037] EC First Written Submission, para. 572; China First Written Submission, para. 498.

[1038] ITC Report, p. 221.

[1039] ITC Report, p. 212.

[1040] ITC Report, p. 221.

[1041] ITC Report, p. 221.

[1042] ITC Report, p. 221.

[1043] ITC Report, p. 221.

712. Moreover, even for the period 2000 and interim 2001, the ITC qualitatively assessed whether imports had a more substantial impact on the condition of the industry than did energy cost increases. By doing so, and by concluding that even the injury suffered by the industry in 2000 and interim 2001 was primarily caused by imports and not energy costs, the ITC appropriately assessed the extent of the injury attributable to imports even in those periods.[1044] In sum, the ITC properly separated and distinguished the effects of demand declines from those of imports in its analysis, despite Complainants' arguments to the contrary.[1045]

c. The ITC Properly Ensured that It Did Not Attribute Any Injury to the "Aberrational" Performance of One Industry Producer to Imports

713. The ITC also considered whether the poor performance of one domestic producer, AL Tech/Empire, was a source of the declines in the industry's condition during the period of investigation.[1046] Although the particular information on the producer's operations is confidential, the ITC discussed the nature and extent of the injury attributable to this producer's difficulties during the period. Moreover, the ITC also distinguished and separated the impact of the producer's operations from those attributable to imports. By doing so, it ensured that it did not attribute any injury allegedly caused by this producer's non-import-related difficulties to imports.[1047]

714. Although the details of the producer's problems and its operating results are confidential, the ITC's discussion of the issue makes clear that it examined the record evidence relating to these issues and discussed the nature and extent of this producer's difficulties in some detail.[1048] In this regard, the ITC specifically noted that it took into account the arguments made by the foreign producers and obviously rejected their assertions that the industry's operating results had been skewed by the non-import problems of the producer.[1049] Moreover, the ITC also considered whether exclusion of the company's data from the aggregate data for the industry would

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[1044] It bears repeating that, since demand did not decline on an overall basis in 2000, there was clearly no injurious impact of a demand decline in that year on the industry on an overall basis.

[1045] EC First Written Submission, para. 556; China First Written Submission, para. 481.

[1046] ITC Report, p. 221-22.

[1047] Again, the United States notes that Complainants' argument is, in essence, an assertion that the ITC should have conducted its causation assessment for only a portion of the industry producing stainless steel rod. Under the Safeguards Agreement, however, the ITC is required to assess whether imports are causing serious injury to the industry as a whole, not whether they are causing injury to certain segments of the industry. Thus, even if this producer were affected to some effect by non-import factors, the ITC would nonetheless still need to include this producer in the industry and assess whether the industry as a whole, including this producer, was seriously injured by imports. This is especially true, given that the producer in question only constituted a small portion of overall industry production. (As the United States noted above, Carpenter/Talley was the dominant producer in the stainless steel rod industry).

[1048] ITC Report, p. 221-22.

[1049] ITC Report, p. 221-222.

substantially alter the downward trends in the industry's condition in those years, and found that it did not.[1050]

715. Given the foregoing, it is clear that ITC adequately discussed the effects of this producer's non-import-related difficulties on the condition of the overall industry. After reviewing the record evidence, it found that the industry's declines were not the result of this producer's problems. More to the point, it performed a check of this analysis by analyzing whether the industry's trends would change if this producer was excluded from the industry's overall financial operating results. It found that excluding this producer did not have a significant effect on the trends for the remaining producers. By engaging in this analysis, the ITC clearly separated and distinguished the impact of imports on the industry from the effects of this producer's operations and found that the industry's problems were genuinely and substantially the result of increased imports. Complainants' assertions that the ITC did not conduct such an analysis[1051] have no foundation.

d. The ITC Properly Discounted Industry Capacity Increases as An Alternative Source of Injury to the Injury

716. Finally, the EC also contends that the ITC failed to adequately address whether capacity increases was an alternative cause of serious injury to the domestic industry during the period of investigation.[1052] The EC's argument is misplaced in two respects.

717. First, none of the parties, including counsel for the European stainless steel rod industry, argued before the ITC that the industry's increased capacity levels was a source of injury to the industry during the period of investigation. While Members are not barred from raising before panels issues that were not raised before the ITC during its investigation, it remains the case, however, that the EC's arguments on this score, if valid, should have been significant enough for the European rod producers to have raised this as an argument before the ITC. The fact that they did not strongly suggests, as a matter of fact, that the European participants in the stainless steel rod market did not view industry capacity as an especially significant factor in the industry's declines during the period of investigation.

718. Secondly, the ITC clearly did recognize the fact that the industry had increased its aggregate capacity levels during the period and that the industry's capacity utilization rates declined during the period as well.[1053] However, even with this capacity increase, the record also showed -- as the ITC found -- that the industry's actual production levels and shipments actually declined during the period from 1996 through 2000, primarily because imports increased their

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[1050] ITC Report, p. 221-222.
[1051] EC First Written Submission, para, 572; China First Written Submission, para. 498.
[1052] EC First Written Submission, para. 573.
[1053] ITC Report, p. 218.

volumes and market share through price underselling during the period of investigation.[1054] Accordingly, the ITC properly recognized that the industry's capacity increases had little effect in the market because the industry's production, shipment and market share levels would have declined by the same amounts even if the industry had not increased its capacity levels. Moreover, because the industry's production and shipment levels declined substantially from 1996 through 2000 a a result of import competition, it is also clear that the import increases had an effect on the industry's capacity utilization rates as well, as the ITC found.

719. In sum, the ITC was aware of the industry's capacity increases, discussed them in some detail, and correctly found that they had not had an impact on the declines in the industry's overall condition. The ITC properly considered their effects and discounted them as a source of serious injury.

iv. Conclusion

720. In sum, the ITC performed a thorough and objective analysis of the record. It established that there was a genuine and substantial causal link between increased volumes of stainless steel rod imports and significant declines in the condition of the stainless steel rod industry during the period of investigation. Moreover, it thoroughly assessed the nature and scope of the injury caused by alternative factors and ensured that it did not attribute the effects of these factors to imports.

k. Commissioner Koplan's Causation Analysis For Stainless Steel Wire Was Fully In Accordance With Articles 2.1 and 4.2 of the Safeguards Agreement

721. For stainless steel wire, Commissioner Koplan established that there was a genuine and substantial cause and effect relationship between increased imports and the threat of serious injury to the domestic industry. His analysis established a direct link between increases in the volume of imports during interim 2001 and the significant declines in the overall condition of the stainless steel wire industry during the interim period. He also reasonably found that these trends indicated that there was an imminent threat of serious injury from imports. Finally, he conducted a thorough and objective examination of the effects of other factors and ensured that he did not attribute the negative effects of these other factors to imports in his analysis.

722. Accordingly, as we discuss in detail below, Complainants' arguments to the contrary have no merit.

i. The President Did Not Rely Solely on Commissioner Koplan's Causation Analysis

[1054] ITC Report, p. 219-220.

723. As an initial matter, the United States notes that China mistakenly asserts in its brief that the President relied solely on Commissioner Koplan's causation findings for stainless steel wire products when determining to impose a safeguard remedy on stainless steel wire.[1055] As the United States addresses in more detail below,[1056] three Commissioners found that stainless steel wire was causing serious injury or threatening to cause such injury to the domestic tin mill industry: Commissioners Koplan, Bragg and Devaney.[1057] Commissioner Koplan found stainless steel wire to be a separate like product and made an affirmative threat of injury finding for that product;[1058] Commissioners Bragg and Devaney found stainless wire to be part of the same like product as stainless steel wire rope and made an affirmative determination for that like product.[1059]

724. Under the U.S. statute, the President cannot simply decide to treat an individual affirmative finding of one Commissioner as a basis for imposing a remedy, as Complainants allege. Instead, under the U.S. statute, the President may only impose a remedy if at least half of the Commissioners then in office make an affirmative finding of causation and injury.[1060] In this case, the President was able to impose a remedy on stainless steel wire only because three of the six Commissioners had found that stainless steel wire, whether or not treated as a separate like product, had caused or threatened to cause serious injury to the industry. Indeed, in his official announcement of the imposition of these remedies, the President specifically stated that he considered the "determinations of the groups of Commissioners voting in the affirmative with regard to" stainless steel wire to be the determination of the ITC.[1061] In other words, the President specifically and clearly stated that he relied on the affirmative determinations of Commissioners Koplan, Bragg, and Devaney as grounds for his stainless steel wire remedy. Accordingly, even though Complainants appear to believe otherwise, the President's remedy finding simply does not indicate that he adopted the like product decision or injury finding of Commissioner Koplan as his own.

725. Thus, it is legally and factually incorrect for China to assert that the President adopted the injury and causation findings of Commissioner Koplan as the sole basis for his remedy decision. Nonetheless, because China -- and the EC as well -- focus their arguments concerning stainless steel wire entirely on Commissioner Koplan's causation analysis for stainless steel wire, the United States also focuses its discussion on his analysis as well.

726. However, the United States does note that neither China nor the EC make any arguments challenging the affirmative injury findings of Commissioners Bragg and Devaney on stainless

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[1055] China First Written Submission, para. 534.
[1056] See section H below.
[1057] ITC Report, p. 27.
[1058] ITC Report, pp.201, 255.
[1059] ITC Report, p. 27.
[1060] 19 U.S.C. §2253(a), 19 U.S.C. § 1330(d)(1).
[1061] Presidential Proclamation No. 7259, 3 March 2002, paragraph 3.

steel wire and rope. Accordingly, they have failed to make a *prima facie* showing that Commissioners Bragg and Devaney's analysis violated the causation requirements of the Safeguards Agreement. The panel should therefore find that the causation analyses of these Commissioners have not been placed at issue in these proceedings and should affirm them.

ii. For Stainless Steel Wire, Commissioner Koplan Thoroughly and Objectively Explained the Nature of the Causal Link Between Imports and the Industry's Serious Injury

a. Commissioner Koplan's Analysis Established That There Was a Clear Correlation Between Import Trends and Declines in the Industry's Condition

727. Commissioner Koplan established that there was a genuine and substantial causal link between trends in the volume and market share of stainless steel wire in interim 2001 and the threat of serious injury to the stainless steel wire industry. He also established that this threat of injury was "clearly imminent."[1062]

728. In his analysis, Commissioner Koplan examined the factors that affected the competitiveness of domestic and imported merchandise in the U.S. market,[1063] the trends in import volumes and market share,[1064] the pricing effects of imports,[1065] and correlations between these trends and changes in the various indicia of the industry's condition.[1066]

729. In his analysis, he found several conditions of competition affected the market for certain welded pipe, noting in particular that:

- Apparent consumption of stainless steel wire grew by 22. 4 percent during the period of investigation, with increases in each year during 1996-2000. With the decline in the overall U.S. economy in interim 2001, consumption of stainless steel wire fell as well, declining by 16.1 percent between interim 2000 and interim 2001.[1067]

- The industry is composed of both integrated and non-integrated producers of stainless steel wire. Integrated producers produce internally the stainless steel rod used to draw stainless steel wire. Non-integrated producers, who produce the

[1062] ITC Report, pp. 258-259.
[1063] ITC Report, pp. 258.
[1064] ITC Report, pp. 258-259.
[1065] ITC Report, pp. 258-259.
[1066] ITC Report, pp. 258-259.
[1067] ITC Report, p. 258.

large majority of wire in the market, must buy stainless steel rod from import or domestic sources of stainless rod.[1068]

- The price of stainless steel rod is directly affected by the price of nickel. To account for fluctuations in the price of nickel, producers impose a surcharge on the price of stainless steel rod when nickel prices increase to a specified level. The price of domestic stainless steel wire generally followed the trend in nickel prices through the period of investigation.[1069]

730. Taking the foregoing conditions of competition into account, Commissioner Koplan then performed a thorough and objective examination of the trends of imports and industry injury factors. He concluded that there was a clear correlation between increased import volume and the threat of serious injury to the industry.[1070] In particular, he found that:

- During the five full years of the period of investigation, the domestic stainless steel wire industry maintained low but positive and stable profits in a growing market, in which prices and costs were generally declining and imports generally increasing.[1071] Between 1996 and 1999, the industry's unit costs and unit sales values fell at equal rates. The industry's costs and average unit values rose modestly in 1999 and 2000 but remained below its 1998 levels. Accordingly, even though imports consistently undersold the industry during this period, the industry was able to keep its prices in line with its costs during this period and remained somewhat profitable.[1072]

- However, the industry's overall condition declined in interim 2001.[1073] Three important factors contributed to the decline in industry performance: demand declined rapidly falling by 16.1 percent; imports continued to increase and quickly capture substantial additional market share in that interim period; and the industry's unit cost of goods sold increased as well.[1074]

- In interim 2001, imports increased in absolute terms by 2.7 percent and in market share terms by 5 percentage points, when compared to interim 2000.[1075]

[1068] ITC Report, p. 258.
[1069] ITC Report, p. 258.
[1070] ITC Report, pp. 258-59.
[1071] ITC Report, pp. 258.
[1072] ITC Report, pp. 258-59.
[1073] ITC Report, pp. 256-57.
[1074] ITC Report, pp. 259.
[1075] ITC Report, pp. 259.

- The combination of falling demand and increasing imports caused the price of domestic stainless steel wire to fall. Falling stainless steel wire prices and an increase in costs led to a decline in the industry's operating income margins in interim 2001 when compared to interim 2001.

- The increase in imports and the decline in the market share of the industry, at a time of falling consumption, indicates that imports are an important cause of a threat of serious injury to the industry that is clearly imminent.[1076]

731. In sum, Commissioner Koplan's analysis established that there was a direct correlation between the significant increase in import market share in interim 2001, and the substantial declines in the industry's condition in that period.[1077] In particular, 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.[1078] Accordingly, Commissioner Koplan reasonably found that there was a genuine and substantial link between import volume increases and the threat of serious injury to the domestic industry in interim 2001.

732. The EC contends, however, that Commissioner Koplan's findings of a correlation between import trends and declines in the industry's condition are "directly contradicted" by the finding of Commissioners Miller, Hillman, and Okun that stainless steel wire imports had not had a clear adverse impact on domestic prices during the period because there was no correlation between import underselling and domestic price movements.[1079] As an initial matter, the Safeguards Agreement does not require that all six individual decision-makers reach the same conclusion, or that the individual Commissioners must rebut the findings of others with different conclusions, but requires that the determination, as the Appellate Body said in *Line - Pipe*, meets the obligations contained in the Safeguards Agreement.[1080] The determination of Commissioner Koplan meets those requirements. Indeed, as the United States stated previously with respect to Commissioner Miller's opinion on tin mill steel, the fact that Commissioners Miller, Hillman, and Okun disagreed with Commissioner Koplan no more makes his analysis unreasonable than his disagreement with them makes their analysis unreasonable.

733. Second, Commissioner Koplan's pricing analysis is actually not inconsistent with the pricing findings of Commissioners Miller, Hillman and Okun. Like these three Commissioners,[1081] Commissioner Koplan specifically found that imports had consistently undersold domestic stainless steel wire during the period from 1996 to 2000, but that this

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[1076] ITC Report, pp. 259.
[1077] ITC Report, p. 259.
[1078] ITC Report, pp. 256-57, 258-59, Table STAINLESS-C-6.
[1079] EC first written submission, paras. 580-581.
[1080] *US - Line Pipe*, AB Report, para. 158.
[1081] *See, e.g.,* ITC Report, pp. 238.

consistent underselling had not impacted domestic pricing adversely because the "domestic industry had kept prices of the domestic [wire] product in line with its costs" during that five year period.[1082] However, unlike the other three Commissioners, Commissioner Koplan also focused his analysis on pricing data for imports and domestic product in interim 2001 and noticed that lowered import pricing had begun interfering with the ability of domestic industry to keep its prices in line with its costs.[1083] In particular, he found that, in combination with declining demand, the increase in import volumes and market share caused the price of domestic wire to fall during a period of rising costs and led directly to a decline in the industry's operating income levels in interim 2001.[1084] As a result, he reasonably found, the increase in imports and their concurrent underselling had caused the substantial declines in the industry's condition in the final months of the period of investigation, thus showing that imports threatened the industry with imminent serious injury. In other words, Commissioner Koplan's findings about price competition in the market during the first five years of the period were, in fact, consistent with the findings of the other three Commissioners. However, Commissioner Koplan simply placed more emphasis than the other Commissioners on the pricing effects of imports during the last six months of the period, which is a reasonable choice given his finding that imports threatened serious injury to the stainless steel wire industry.

734. In sum, Commissioner Koplan's analysis established that there was a genuine and substantial relationship of cause and effect between declines in the industry's condition in interim 2001 and increased imports of stainless steel wire. He reasonably found that these trends indicated that serious injury from imports was clearly imminent. The EC's arguments to the contrary have no merit.

b. Commissioner Koplan Thoroughly Discussed Any Injury Purportedly Caused by Factors Other than Increased Imports And Ensured That The Effects of These Factors Were Not Attributed to Imports

735. Commissioner Koplan also considered whether other factors were causing injury to the stainless steel wire industry. In particular, he identified two non-import factors as possibly causing injury to the stainless steel wire industry during interim 2001: the decline in demand for stainless steel wire in interim 2001 and an increase in the industry's unit costs of goods sold.[1085] For each factor, he identified and discussed in detail the nature and extent of the injury attributable to the factor during the period of investigation and distinguished the effects of the factor, if any, from the effects of imports.

[1082] ITC Report, pp. 259.
[1083] ITC Report, pp. 259.
[1084] ITC Report, p. 259.
[1085] ITC Report, p. 259.

c. Commissioner Koplan Properly Ensured that It Did not Attribute to Imports the Effects of Increases In Industry Costs

736. Commissioner Koplan first identified increases in the industry's unit costs of good sold as a source of possible injury to the industry during interim 2001.[1086] In his analysis, he explained, in a reasoned and thorough manner, the nature and extent of the effects attributable to these cost increases in interim 2001. He also distinguished and separated the impact of these increases from those attributable to imports. By doing so, he ensured that he did not attribute any effects of these cost increases to imports.

737. In his analysis, Commissioner Koplan found that the industry's operating income margins had fallen dramatically in interim 2001. Accordingly, as one aspect of his analysis, he assessed whether these declines had been caused by increases in the industry's costs of good that occurred during interim 2001. After recognizing that the industry's unit costs had increased in interim 2001, he nonetheless correctly recognized that the industry's cost increases had also been accompanied by declines in the industry's unit prices that occurred as a result of increased import volumes and falling demand in interim 2001.[1087] Thus, unlike earlier in the period -- when the industry had been able to ensure that its price levels kept track with movements in its unit costs – he found that the industry was unable to keep its prices in line with the increasing costs in interim 2001 and that the industry's price declines were directly attributable to increased import volumes and declines in demand in 2001.

738. Given the foregoing, Commissioner Koplan very clearly did "consider the effects of increased costs of goods sold on the deteriorating operating margin of the industry,"[1088] although the EC asserts otherwise. As can be seen from the foregoing, he discussed in detail the nature and extent of the effects that cost increases had on the condition of the industry. Although the industry's unit costs had increased in interim 2001, Commissioner Koplan correctly acknowledged that the industry had not been able to maintain its profitability margins in interim 2001 as it had earlier in the period, by keeping its prices in line with changes in its unit costs. He also reasonably concluded that the price declines in interim 2001, which directly led to reduced industry profitability, had been caused by imports and demand changes, after noting that the two major changes in the market in interim 2001 had been a substantial increase in import market share and a decline in demand.

739. By focusing on the changes in unit margins that occurred during interim 2001, he was able to separate and distinguish the effects of increasing costs from those of imports and demand changes in his analysis. In this regard, his examination of the unit profits of the industry, and the relationship between the industry's profits, costs and prices, enabled him to establish that the

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[1086] ITC Report, p. 259.
[1087] ITC Report, pp. 259.
[1088] EC First Written Submission, para. 579.

decline in industry profitability in interim 2001 was caused not by rising costs but by a decline in the prices related to price competition from imports during a period of demand decline. Accordingly, it is clear that he properly assessed the amount of effect that these cost increases had had on declines in domestic operating income levels during interim 2001 and reasonably concluded that these declines were more appropriately considered to be a result of falling prices, not increasing costs.[1089] By doing so, he ensured that he was able to distinguish the effects of the cost increases from those of imports on the declines in the industry's condition and ensured that he did not attribute to imports the effects of these cost increases.

740. Commissioner Koplan's finding of a direct correlation between increased imports and the threat of serious injury to the industry was reasonable and consistent with the evidence of increased import competition during interim 2001. The EC's arguments to the contrary lack merit.

d. Commissioner Koplan Also Properly Ensured that He Did Not Attribute to Imports The Effects of Demand Declines in Interim 2001

741. Commissioner Koplan also considered whether a decline in demand in interim 2001 was a source of injury to the industry.[1090] Commissioner Koplan explained, in a reasoned and thorough manner, the nature and extent of the effect this decline in demand had on the condition of the industry in interim 2001. Moreover, he distinguished and separated the effect of the demand decline from that attributable to imports. By doing so, he ensured that he did not attribute any injury allegedly caused by this decline to imports during that same period.

742. In this regard, Commissioner Koplan thoroughly examined the record evidence relating to the demand decline in interim 2001 and discussed the nature and extent of that decline in detail,[1091] despite the arguments of China to the contrary.[1092] In this regard, he recognized that apparent consumption of stainless steel wire declined by 16.1 percent between interim 2000 and 2001 and noted that the decline was related to the overall decline in the U.S. economy in interim 2001.[1093] He specifically acknowledged that the demand decline in interim 2001 had -- together with imports -- caused prices to fall in the market during interim 2001 and that therefore "some portion of the observed declines in the industry's performance between the interim periods is attributable to an apparent decline in demand."[1094] Nonetheless, he also found that the decline in demand did not "explain the rapid deterioration in the domestic industry's financial

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[1089] In this regard, the record showed, as Commissioner Koplan noted, that the industry had been able to keep its pricing in line with changes in its costs during the five full years of the period before interim 2001. ITC Report, p. 258-59.

[1090] ITC Report, p. 259.

[1091] ITC Report, p. 259.

[1092] China First Written Submission, paras. 537-540.

[1093] ITC Report, p. 259.

[1094] ITC Report, p. 259.

performance" in interim 2001, because the "decline in U.S. production and shipments exceeded the total decline in apparent domestic consumption."[1095] After noting that there had been a "significant increase in imports" and a "rapid increase in the proportion of the domestic market supplied by imports" during interim 2001, he correctly concluded that imports had had a greater impact on domestic price and profitability declines in interim 2001 than demand declines.[1096]

743. Given the foregoing, it is clear that Commissioner Koplan thoroughly and adequately discussed the nature and extent of the effects of the demand declines in interim 2001 and distinguished the effects of this decline from that of imports during the period of investigation. In particular, he acknowledged that some of the price and profitability declines suffered by the industry were attributable to the demand decline in interim 2001, but he also found that the industry's production and shipment levels had declined at a substantially faster rate than demand in interim 2001, which was due to the substantial increase in import market share during interim 2001.[1097]

744. Given these trends, it was reasonable for Commissioner Koplan to conclude that imports had had a greater hand in price declines in interim 2001 than demand. Moreover, by focusing on the fact that there was a faster rate of change for industry production levels than demand in interim 2001, he was able to separate and distinguish the effects of the demand declines from those attributable to imports in interim 2001. In other words, by examining the differences in the rates of decline between industry production and shipment levels and demand declines in interim 2001, he was able to conclude that the differential between these declines had been caused by the substantial increases in import volumes and market share in interim 2001.[1098] As a result, he was able to, and did, attribute to imports the bulk of the declines in the industry's pricing and profitability levels that occurred in interim 2001.[1099] By performing this qualitative assessment of the extent of the effects attributable to imports, he was able to distinguish the effects of the two factors and ensure that he did not attribute to imports the effects of the demand decline.[1100]

iii. Conclusion

[1095] ITC Report, p. 259.
[1096] ITC Report, p. 259.
[1097] ITC Report, p. 259.
[1098] ITC Report, p. 259.
[1099] ITC Report, p. 259.
[1100] The United States notes that China contends that the Commission should have considered the effects of imports from Mexico and Canada to be an alternative cause of injury and to distinguish those effects from the effects of other imports. China First Written Submission, para. 541. As it has previously discussed, the United States believes that this analysis is not required in its initial assessment of injury or its "parallel" injury analysis for non-NAFTA imports. However, it also believes that the ITC performed such an analysis when it separated the pricing and volume effects of NAFTA imports from non-NAFTA imports in its "parallelism" finding.

745. In sum, Commissioner Koplan performed a thorough and objective analysis of the record. He established that there was a genuine and substantial causal link between trends in the volume and market share of imports of stainless steel wire and the significant declines in the condition of the stainless steel wire industry during the last six months of the period of investigation. He reasonably found that these trends indicated that there was an imminent threat of serious injury from stainless steel wire imports. Moreover, he thoroughly assessed the nature and scope of the effects of other factors and ensured that he did not attribute the effects of these factors to imports.

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

1. A Combination of Findings For Imports from All Sources and Findings for Imports from Non-FTA Sources, As Provided in the ITC Report, Satisfies Articles 3.1 and 4.2

746. The findings of the ITC, as they appear in the ITC report, satisfy the parallelism obligation under Articles 2.1, 2.2, and 4.2. They provide "findings and reasoned conclusions," as required by Article 3.1, that imports from non-FTA sources by themselves satisfy the requirements of Articles 2.1 and 4.2. They further provide the "detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined," as required by Article 4.2(c). The ITC met these obligations by first analyzing the increase in imports from all sources, serious injury to each industry, and whether imports from all sources caused injury to the domestic industry. It then made findings specific to the effect of increased imports from non-NAFTA sources by themselves. In doing so, it did not engage in the redundant task of repeating findings that were not changed by the exclusion of particular WTO Members.

747. Complainants contend that the Safeguards Agreement does not permit the competent authorities to take this approach to the parallelism analysis. The Agreement does not support this conclusion.

748. Most of the Complainants cite the Appellate Body's conclusion in *US – Line Pipe* that FTA partners' imports may only be excluded from a safeguard measure if:

> the competent authorities have also established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2.[1101]

[1101] *US – Line Pipe*, AB Report, para. 198, quoted in EC first written submission, para. 600; Japan first written submission, para. 304. *See also* China first written submission, para. 560; New Zealand first written

(continued...)

They conclude from this passage that the competent authorities must "carry out the full analysis required under Articles 2.1 and 4.2" for non-FTA imports.[1102] Some go on to argue that this analysis must include an evaluation of each of the Article 4.2(a) factors, the establishment of a causal link based on trends in imports and other indicators, and non-attribution.[1103]

749. The text of the Safeguards Agreement, as interpreted by panels and the Appellate Body, does not require separate findings specific to non-NAFTA imports for all the Article 4.2 factors. The sole requirements under Articles 3.1 and 4.2(c) are for the competent authorities to publish "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law," and providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." The Agreement does not require the use of a particular structure or format for the report, or a particular analysis. As the Appellate Body concluded in *US – Line Pipe*:

> [W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself. . . .[1104]

750. In this matter, the U.S. competent authorities' explanation relevant to the question of parallelism appeared in various sections of the ITC report. Some of the discussion appeared in the portions of the report containing the analysis for all imports. Some of the discussion appeared in the analysis specifically pertaining to non-FTA imports in the Second Supplemental Report. These two portions of the report were meant to be read together, as reflected in the designation of the later-prepared portion as "supplemental." The ITC's findings with regard to most of the requirements of Article 4.2 appeared in the ITC's analysis of all imports. Insofar as the exclusion of FTA imports did not change these findings, the ITC was not required to repeat them. For example, the exclusion of FTA imports did not change the shipments of the domestic producers, their employment levels, their profits and losses, or trends in those indicators. The Safeguards Agreement did not require the ITC to perform these analyses again to satisfy the parallelism requirement. Similarly, it is possible that FTA imports are so minor that their exclusion would not change certain indicators, or that any changes were so small as to be meaningless.

751. Therefore, the ITC's provision of findings and analysis concerning non-FTA imports, and continued reliance on portions of its analysis of all imports that remained applicable, was a

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[1101] (...continued)
submission, para. 4.172; Switzerland first written submission, para. 327.

[1102] EC first written submission, para. 601; Japan first written submission, para 305.

[1103] Japan first written submission, para. 305.

[1104] *US -Line Pipe*, AB Report, para. 158.

permissible means to comply with Articles 3.1 and 4.2(c). The ITC's issuance of the supplemental report after it finished its analysis of all imports does not make the supplemental report – as Japan asserts – an "*ex post facto* analysis."[1105] The ITC provided the response prior to the decision to apply the safeguard measures, which meets the requirement under Article 2.1 of the Safeguards Agreement to apply a measure "only if that Member has determined" that increased imports of a product are causing serious injury.

752. Finally, Complainants return repeatedly to the argument that the ITC's analysis of non-NAFTA imports does not meet the Appellate Body's requirement in *US – Line Pipe* to provide "a reasoned and adequate explanation that establishes explicitly" that non-FTA imports caused serious injury.[1106] This focus improperly elevates the Appellate Body's *description* of an obligation above the words of the text. Articles 3 and 4 do not require an "explicit" finding, and the Appellate Body has never related such a requirement to the text of the Safeguards Agreement. Nor is "explicitness" necessary to provide the findings and reasoned conclusions required under Article 3.1, or the "detailed analysis" required under Article 4.2(c).

753. Moreover, Appellate Body reports do not make an "explicit" explanation a separate requirement. The term first appeared in the context of parallelism in *US – Wheat Gluten*, in the finding that the ITC's analysis of imports from Canada did not provide an "explicit determination relating to increased imports, *excluding imports from Canada*."[1107] The Appellate Body then used the same term in *US – Line Pipe* to describe its finding that the ITC's more detailed analysis in that case still did not establish explicitly that increased imports from non-NAFTA sources alone caused serious injury.[1108] In both cases, it used the term in connection with the absence of a "clear and unambiguous" statement that increased imports from non-NAFTA sources alone caused serious injury. It then inquired as to whether the explanations of the statements that the ITC did make provided a "reasoned and adequate explanation," but did not require that the explanation be "explicit." Thus, the Appellate Body's use of the term "explicit" is best understood as referring to the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury, and does not require an "explicit" recitation of the results of each step of the analytical process leading to that conclusion.[1109]

2. The ITC's Findings Regarding the Minuscule Quantity of Imports from Israel and Jordan Satisfy the Requirement to Provide Findings and

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[1105] Japan first written submission, para. 308.

[1106] *E.g.*, China first written submission, paras. 588-89; Japan first written submission, para. 316; New Zealand first written submission, para. 4.183; Switzerland first written submission, paras. 355-57.

[1107] *US – Wheat Gluten*, AB Report, para. 98 (emphasis in original).

[1108] *US – Line Pipe*, AB Report, para. 194.

[1109] As we noted in Section E, the Appellate Body has found with regard to a finding of causation that "[t]hese steps are not legal 'tests' mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities." *US – Lamb Meat*, AB Report, para. 178.

Reasoned Conclusions that Imports from Other Sources By Themselves Caused Serious Injury

754. The ITC found that imports from Israel were "small and sporadic," while there were "virtually no imports" from Jordan[1110] for each of the ten covered steel products. These findings provide a reasonable and adequate explanation of the findings by ITC and the individual Commissioners that the exclusion of imports from these FTA partners would not change their conclusions.[1111]

755. There can be no question that imports from Jordan were essentially nonexistent. The import data for all products and countries, which the ITC used extensively, show that Jordan exported only two of the ten products to the United States, and then only in three years during the five and one-half year investigation period:

Product	Period imported	Quantity	Total Imports	Percentage
FFTJ	1997	6 tons	105,313 tons	0.006%
Stainless steel wire	1999	1 ton	24,766 tons	0.004%
Stainless steel wire	2000	3 tons	31,340 tons	0.010%

Source: ITC Dataweb (US-40)

Thus, exclusion of Jordan from the analysis of serious injury would not change *any* of the figures upon which the ITC relied. In fact, since the ITC reported percentages with a single decimal place, imports from Jordan were less than the rounding error in some of the ITC's statistics. In this situation, the observation that there were "virtually no imports from Jordan" provides a succinct – and thoroughly reasonable and adequate – explanation of why exclusion of such imports would not change the determinations of the ITC or of the individual Commissioners. Any further analysis would simply repeat verbatim the conclusions provided elsewhere in the ITC report. Thus, the ITC's explanation with regard to Jordan complies fully with the requirements of Articles 3.1 and 4.2(c).

756. Imports from Israel present a similar situation:

						January -June	
	1996	1997	1998	1999	2000	2000	2001
CCFRS	0.00%	–	–	0.00%	0.00%	0.00%	0.00%
Hot-rolled bar	0.00%	0.01%	0.00%	0.00%	0.00%	0.00%	0.01%

[1110] *E.g.*, ITC Report, p. 366. Findings to this effect for all of the products are cited on page 4, in footnote 26, of the Second Supplemental Report.

[1111] Second Supplemental Report, p. 4.

Certain welded pipe	0.33%	0.36%	0.04%	0.00%	--	--	
FFTJ	0.63%	0.62%	0.18%	0.24%	0.24%	0.19%	0.27%
Stainless steel bar	0.01%	--	--	0.01%	0.12%	0.21%	0.05%
Stainless steel wire	0.08%	--	0.02%	0.09%	--	--	0.01%

Source: ITC Report, Tables LONG-C-3, TUBULAR-C-4, TUBULAR-C-6, STAINLESS-C-4, STAINLESS-C-7, E-3; ITC Memorandum INV-Y-209, Table FLAT-ALT7 (US-33)

During the entirety of the investigation period, there were no imports from Israel for four of the ten covered products (cold-finished bar, rebar, stainless steel rod, and tin mill). For CCFRS and hot-rolled bar, imports from Israel were never more than 0.01 percent of total imports. For stainless steel wire, imports from Israel never rose above 0.1 percent of total imports. For certain welded pipe, there were essentially no imports after 1998, and imports before that time never amounted to more than 0.4 percent of total imports. For FFTJ and stainless steel bar, imports after 1997 were never more than 0.3 percent of total imports.

757. These statistics, which appear in the ITC report,[1112] show that imports from Israel were at levels comparable to imports from Jordan for six products. For the remaining four products, imports from Israel were invariably so small – especially in the latter half of the investigation period – that they could not alter overall statistics related to imports or trends in imports in any noticeable way. Thus, the ITC's observation that these imports were "small and sporadic" provides a reasoned and adequate explanation of why exclusion of such imports would not change the determinations of the ITC. Any further analysis would simply repeat verbatim the analysis provided elsewhere in the ITC report.

758. The EC criticizes this type of analysis as reading into the Safeguards Agreement a *de minimis* rule that the text does not support.[1113] To the contrary, this type of analysis derives directly from the requirement under Article 3.1 to provide findings and reasoned conclusions. If a particular factor is so insignificant that it does not change the results of the analysis, a reasoned explanation of that conclusion says just that, and no more. Article 3.1 reflects this approach to reasoning in its requirement that the report of the competent authorities address all "pertinent" issues. In other words, the report need not address an issue that is not "pertinent," which could be the case if that factor is either too insignificant to matter or unrelated to the case at hand.

[1112] Data on imports from Israel appear on page E-5 of the ITC Report. Thus, the EC is plainly wrong in stating that "[n]owhere does the ITC establish through a table or otherwise that these imports were indeed 'small and sporadic'." EC first written submission, para. 621.

[1113] EC first written submission, para. 616.

759. China and Norway argue that this analysis "failed to establish 'explicitly' that increased imports from sources other than Israel and Jordan satisfy the conditions as set out in Article 2.1 and elaborated in Article 4.2 of the SGA."[1114] As we noted above, there was nothing more to be said about imports from sources other than Israel and Jordan except what the ITC said – that exclusion would not change the conclusions of the ITC or the individual Commissioners. Thus, the ITC's findings in this regard were consistent with Articles 3.1 and 4.2(c) of the Safeguards Agreement.

3. Parallelism Does Not Prevent a Member From Excluding Certain Items from Application of a Safeguard Measure As Long As It Does So Without Regard to Their Source

760. Parallelism, as enunciated by the Appellate Body, requires application of a safeguard measure to imports from all of the *sources* subject to the determination of serious injury. (Article 9.1 provides an exception to this requirement, which we discuss below.) Neither the text of Articles 2.1, 2.2, and 4.2 nor interpretations of that text by the Appellate Body preclude the exclusion from a safeguard measure of an imported item covered by the determination of serious injury. Indeed, the Complainants now challenging the validity of the product exclusions are among those who most actively sought – and received – exclusions for products of interest to their own domestic producers.

761. The Appellate Body explained in *US – Wheat Gluten* that the parallelism requirement arises from the text of paragraphs 1 and 2 of Article 2:

> The same phrase – "product . . . being imported" – appears in *both* these paragraphs of Article 2. . . . To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.[1115]

[1114] China first written submission, para 578; Norway first written submission, para. 389. New Zealand makes a similar argument, that the statements by the Commissioners in the Second Supplemental Response do not "provide a reasoned and adequate explanation" with regard to parallelism. New Zealand first written submission, para. 4.188.

[1115] *US – Wheat Gluten*, AB Report, para. 96 (emphasis in original).

As this explanation shows, parallelism relates to the *sources* of the imports. It requires that the sources subject to the determination of serious injury be "parallel" to the sources subject to application of the safeguard measure.

762. The EC and New Zealand argue that the Appellate Body's reasoning also requires that a safeguard measure be applied to each and every one of the items covered by a determination of serious injury.[1116] We will refer to this concept as "scope parallelism" to distinguish it from the "source parallelism" adopted by the Appellate Body.

763. The Appellate Body's reasoning does not require scope parallelism. As noted above, the discussion in *US – Wheat Gluten* addresses only the source of the products. This limitation on parallelism reflects its textual basis in Article 2.2, which provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." Article 2.2 does not require that the safeguard measure have a particular scope. Neither does Article 2.1, which specifies the circumstances under which a Member may apply a safeguard measure.

764. Other provisions of the Safeguards Agreement confirm that scope parallelism is not required. Article 5.1, first sentence, allows a Member to apply a safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." As we discuss in more detail in Section I, the obligation under the first sentence places a limit on the application of a safeguard measure, but does not restrict a Member's discretion to apply a measure to a lesser extent. The admonition to "choose measures most suitable for the achievement of these objectives" indicates further that there are many permissible options for the extent to apply a safeguard measure, and that a Member is free to choose among them.

765. The text of Article 5 indicates further that a safeguard measure need not apply equally to all of the items covered by a determination of serious injury. The second sentence of Article 5.1 envisages the application of quantitative restrictions, which place no restriction on imports below the quota level, while prohibiting imports above that level. The Appellate Body has also recognized that a safeguard measure may take the form of a tariff-rate quota ("TRQ").[1117] In that situation, one tariff applies to imports below a specified level, and another tariff to imports above that level.

766. Exclusion of products from the scope of a safeguard measure is no different from the application of a TRQ or quota, in that some imports covered by the determination of serious injury are unaffected by the measure, while others are. In one regard, product exclusions should be less burdensome for exporting Members because they know with certainty that the safeguard measure will not apply to a particular export. In contrast, the exporting Member faces uncertainty with a quota or TRQ, which might be filled by the time a particular shipment arrives.

[1116] EC first written submission, para. 611; New Zealand first written submission, paras. 4.190-4.192.
[1117] *Korea – Dairy*, AB Report, para. 96.

767. Finally, we note that the United States undertook the exclusion of particular products from the scope of the safeguard measures at the behest of exporters and exporting Members, including the EC.[1118] Exporting Members' desire for exclusions was the subject of consultations under Article 12.3 of the Safeguards Agreement. EC officials made public statements to the effect that satisfactory resolution of exclusion requests was necessary to defuse the dispute regarding application of the steel safeguard measures.[1119]

768. The United States assumed that Members such as the EC would not request exclusions if they believed such an action to be inconsistent with U.S. WTO commitments. That the EC, having received the treatment it requested, now considers such treatment to be inconsistent with WTO rules, appears to be a change in its position. In any event, if it now has a different view, it would seem to be more logical to seek revocation of the exclusions, rather than performing an additional parallelism inquiry.

4. There Was No Need For the ITC to Conduct A Separate Analysis Treating FTA Imports as a "Factor Other Than Increased Imports" Under Article 4.2(b)

769. The ITC report contains the ITC's analysis with regard to total imports, its analysis of non-FTA imports, and its analysis of FTA imports. The findings and reasoned conclusions in these analyses separate and distinguish the injury attributable to non-FTA imports from the injury attributable to FTA imports, and ensure that the one was not attributed to the other. Therefore, the ITC did not have to perform a separate analytical step treating "cumulated imports from Canada, Mexico, Israel, and Jordan as an 'other factor' causing injury."[1120]

770. The ITC report contains the ITC's explicit conclusions with regard to total imports, its explicit conclusions that the exclusion of FTA imports would not change those conclusions, and explicit conclusions that non-FTA imports were a substantial cause of serious injury. This combination of conclusions has the effect of separating and distinguishing the injury attributable to non-FTA imports from the injury attributable to FTA imports.

771. The ITC began its analysis by making a series of conclusions regarding total imports and the injury they caused to the domestic industry. As we have shown above, these conclusions identified the injury attributable to total imports, separated and distinguished the injury attributable to increased imports from injury attributable to other factors, and ensured that injury attributable to other factors was not attributed to total imports. This process would by itself

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[1118] Lamy Waffles on Steel Compensation, Highlights Exclusions, *Inside U.S. Trade* (28 June 2002) (US-59).

[1119] *Ibid.*

[1120] EC first written submission, para. 624; Japan first written submission, para. 310; Norway first written submission, para. 377 n. 309.

separate injury attributable to the combination of FTA and non-FTA imports from injury attributable to other factors.

772. The ITC also analyzed the injury caused by non-FTA imports. It typically couched the results of this analysis in terms of whether the exclusion of FTA imports would change its conclusions with regard to total imports. Since there were only two factors – non-FTA imports and FTA imports – that could possibly be responsible for the injury attributable to imports from all sources, the comparison of conclusions with regard to non-FTA imports with the conclusions with regard to total imports by process of elimination indicates any injury attributable to FTA imports.

773. For example, with regard to hot-rolled bar, the ITC noted that non-NAFTA imports increased at a greater rate than imports from other sources (*i.e.*, FTA imports). It noted further that non-NAFTA imports increased significantly in both absolute and relative terms, especially at the end of the period, which caused domestic producers to lose market share, suffer decreased profits and, in some cases, enter bankruptcy. It noted that the bulk of the domestic industry loss in market share was a result of non-NAFTA imports, and that unit values for non-NAFTA imports decreased at a greater rate than unit values for total imports. Finally, the ITC noted that non-NAFTA imports undersold domestic products by greater margins than did total imports.[1121] Therefore, FTA imports were responsible for a minor portion of domestic producers' lost market share, suffered a shallower decrease in unit values, and did not set the low prices in the market.

774. This example shows that the methodology used by the ITC in addressing injury caused by non-FTA imports separated and distinguished the injury attributable to non-FTA imports from the injury attributable to FTA imports. Subsection 6 demonstrates that the ITC's findings with regard to each of the ten products satisfy the requirement of parallelism.

5. Parallelism Does Not Require a Separate Analysis of Imports After Exclusion of Certain Developing Countries Pursuant to Article 9.1

775. The exclusion of WTO Members from application of a safeguard measure pursuant to Article 9.1 is an exception to Article 2.2 and, as such, is not subject to parallelism. As discussed in subsection 3, parallelism derives from the use of the term "products . . . being imported" in both paragraphs 1 and 2 of Article 2. Article 9.1 provides that "[s]afeguard measures shall not be applied against a product originating in a developing country Member" under certain conditions. Thus, it acts as an exception to the Article 2.2 obligation that "[s]afeguard measures shall be applied to a product being imported irrespective of source." This exception relates exclusively to the application of a safeguard measure, and not to the underlying investigation or determination of serious injury. Thus, a Member may include developing country Members in the investigation

[1121] Second Supplemental Response, pp. 5-6.

and determination of serious injury, but still exclude them from the safeguard measure if the Article 9.1 criteria so require.

776. In *US – Wheat Gluten*, the Appellate Body confirmed that Article 9.1 acts as an exception to parallelism:

> The United States relies on Article 9.1 of the *Agreement on Safeguards* in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure. Article 9.1 is an exception to the general rules set out in the *Agreement on Safeguards* that applies only to developing country Members.[1122]

777. However, Japan argues that the Panel should consider data that subtracts excluded developing country imports from total imports in evaluating whether the increase in imports for each of the ten products covered by the safeguard measures met the requirements of Article 2.1.[1123] Since Article 9.1 acts as an exception only to the application of the safeguard measure, the United States was under no obligation to exclude developing country exports from the analysis of whether imports increased. Indeed, Article 4.2(a) requires the competent authorities to evaluate "the rate and amount of the increase in imports of the product concerned." Absent an exception to this requirement, which Article 9.1 does not provide, the ITC was required to include developing country imports in its analysis of injury.

6. The ITC's Analysis for Each of the Ten Domestic Industries Satisfies the Requirements of Parallelism

a. The ITC's Conclusions Concerning Non-NAFTA Imports Must Be Read in the Context of the Entire ITC Report

778. The ITC found that increased imports from non-NAFTA sources (*i.e.*, all sources other than Canada and Mexico) caused serious injury to the domestic industries 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.

779. The ITC's analysis of non-NAFTA imports can be found in several places in its report. Several Complainants focus exclusively on the Second Supplemental Report of the ITC in criticizing the adequacy of the ITC's findings concerning non-NAFTA imports.[1124] These Complainants overlook how the ITC structured its report. As discussed above, while Article 3.1

[1122] *US – Wheat Gluten*, AB Report, para. 96 n. 96.

[1123] Japan first written submission, paras. 203-208.

[1124] *E.g.*, China first written submission, para. 588; EC first written submission, paras. 605-08; Korea first written submission, para. 185; New Zealand first written submission, paras. 4.183-4.185; Switzerland first written submission, paras. 355-57.

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 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 Report. 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.

780. 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.[1125] 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.

781. 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 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.

782. 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 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.[1126]

[1125] *E.g.*, China first written submission, para. 589; New Zealand first written submission, para. 4.184; Norway first written submission, para. 381.

[1126] As discussed in section D above, several of the "serious injury" issues identified by Complainants were not ones that the ITC was required to analyze under Article 4.2(a) of the Safeguards Agreement, either because they concerned causal link issues or because they related to discrete industry segments rather than to the entire industry.

783. Thus, the ITC report, when viewed in its entirety, contains the requisite discussion concerning conditions of competition and serious injury to the domestic industry pertinent to any analysis of non-NAFTA imports. Complainants that criticize the ITC for failing to provide such findings in the portions of its report that focused specifically on non-NAFTA imports fail to recognize the extensive discussion relevant to non-NAFTA imports that the ITC provided in the other portions of the report.

784. 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. As we explain below, for each pertinent domestic industry the ITC provided a particularized discussion of increased imports and causal link for non-NAFTA imports.

785. 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 were the same regardless of the set of imports examined.

786. 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. As discussed further below, 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.

787. Several Complainants additionally criticize the ITC for failing to conduct a separate analysis to distinguish injury caused by NAFTA imports, on the one hand, from injury caused by non-NAFTA imports, on the other. They contend that injury from NAFTA imports should have been treated as an "other" cause of injury subject to the non-attribution requirement of Section 4.2(b) of the Safeguards Agreement. As discussed above, Complainants' arguments are without merit.

b. The ITC Fully Analyzed Increased Imports and Causal Link with Respect to Non-NAFTA Imports for Each Domestic Industry

788. As discussed above, the general discussion of conditions of competition and serious injury that the ITC provided in its analysis of all imports was equally applicable to consideration of all imports, on the one hand, and non-NAFTA imports, on the other. The only two issues where consideration of non-NAFTA imports required the ITC to refer to distinct facts and consider distinct analytical issues pertained to increased imports and causal link. As discussed

below, in its report the ITC provided specific consideration of these issues for each domestic industry on which the ITC made an affirmative determination.

i. *CCFRS*

789. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of certain carbon flat-rolled steel (CCFRS) from non-NAFTA sources.

790. In its analysis of non-NAFTA imports, the ITC found that non-NAFTA imports increased at a rate similar to all imports. Non-NAFTA imports of CCFRS increased by 46.8 percent between 1996 and 1998, and non-NAFTA imports in 2000 were still well above 1996 levels.[1127]

791. The ITC also considered the change in non-NAFTA import volume relative to domestic production. Non-NAFTA imports were equivalent to a higher share of domestic production in 2000 than in 1996.[1128]

792. Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The EC also criticizes the ITC for failing to find that the increase was "recent, sudden, sharp, and significant," and for failing to use full-year 2001 data.[1129] We discussed above why the ITC was not required to compile full-year 2001 data.[1130] Additionally, as previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities...and under such conditions as to cause or threaten to cause serious injury."[1131]

793. The ITC provided this analysis by demonstrating the causal link between non-NAFTA imports and the serious injury experienced by the domestic industry producing CCFRS. The nature of that injury was discussed in great detail in the ITC's analysis of all imports.

794. As discussed above, the ITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The ITC determined that the increased quantities of imports caused domestic producers first to lose market share, then to lose revenue as they attempted to bring domestic prices into line with low-priced imports. There were several basic elements to the causal link finding: (1) substitutability and thus price-based competition

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[1127] ITC Second Supplemental Report, p. 5.
[1128] ITC Second Supplemental Report, p. 5.
[1129] EC first written submission, paras. 622-623.
[1130] *See* section B.3. above.
[1131] *See* section B.1. above.

between imports and domestically-produced CCFRS; (2) imports increasing in volume and market share at the expense of the domestic industry; and (3) declining prices despite increased apparent domestic consumption. These elements collectively led to the domestic CCFRS industry's loss of market share, declining revenues, poor financial performance, and loss of employment.

795. In its analysis of non-NAFTA imports, the ITC found that each of these causal link elements was applicable to non-NAFTA imports. The ITC found a moderate to high degree of substitutability between domestically-produced CCFRS and imported CCFRS, and there was little difference between purchaser appraisals of non-NAFTA imports and all imports.[1132] Non-NAFTA imports followed the same volume trends as did all imports. Non-NAFTA imports followed the same pricing trends as did imports from all sources, generally peaking in 1997 and then falling notably in 1998 and 1999.[1133] In fact, non-NAFTA imports actually undersold the domestic products in a greater share of direct quarterly comparisons and by greater margins than did imports from either NAFTA country.[1134]

796. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC did not reach this conclusion by "jump[ing] into some generalizations," as alleged by the EC.[1135] The ITC reached its conclusions on the basis of an objective, fact-based analysis of the volume and pricing data specifically pertaining to non-NAFTA imports.

797. As discussed above, in its analysis of all imports the ITC examined several factors other than increased imports alleged to be causes of serious injury to the domestic industry producing CCFRS. The ITC specifically examined: (1) declines in demand; (2) increases in domestic production capacity; (3) legacy costs; (4) intra-industry competition; (5) poor business decisions by the domestic industry; and (6) purchaser consolidation. The ITC identified and discussed in detail the nature and extent of any adverse effects attributable to each of these factors during the period of investigation and thus ensured it did not attribute to imports any injury caused by another factor. The ITC's analysis of the effects, if any, attributable to those other factors was also equally applicable to non-NAFTA imports.

[1132] ITC Report, p. 58; ITC Memorandum INV-Y-212, pp. 15-19 (US-39).

[1133] ITC Second Supplemental Report, p. 5.

[1134] ITC Report, Table FLAT-77.

[1135] EC first written submission, para. 625. China raises a similar objection. China first written submission, para. 592.

798. In its discussion of all imports, the ITC distinguished from the serious injury attributable to imports any effects attributable to declines in demand.[1136] It observed that declines in demand had only become evident during the last three calendar quarters of the period of investigation and could not possibly have caused the previous serious declines in the condition of the industry which occurred when demand was increasing.[1137] As the ITC noted in its analysis of non-NAFTA imports, the volume and pricing of non-NAFTA imports followed the same trends over the period of investigation as did imports from all sources.[1138] Thus the ITC's conclusions were based on the timing and trends of those imports it examined. Because the ITC found a close similarity in the trends in volume and pricing of all imports, on the one hand, and non-NAFTA imports, on the other, it was not obliged further to discuss this factor in its analysis of non-NAFTA imports.

799. The ITC also examined whether domestic capacity increases were a cause of injury to the domestic industry during the period of investigation. The ITC acknowledged that the additional capacity might have had some effect on prices, but the available pricing data indicated that imports had consistently undersold the domestic products, including minimill products.[1139] Thus the ITC found that all imports, rather than any capacity increases, had a far more significant and negative impact on prices. In its analysis of non-NAFTA imports, the ITC noted the similarity in pricing trends between non-NAFTA imports and all imports.[1140] Indeed, as noted, non-NAFTA imports actually undersold domestic products with greater frequency than did all imports.[1141] Thus, the ITC's conclusion, which distinguished negative effects on prices due to imports from those due to increases in domestic capacity, was unchanged when it specifically considered non-NAFTA imports, and there was no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

800. Additionally, none of the ITC's comparisons in its analysis of all imports relating domestic capacity and shipment changes, on the one hand, to foreign capacity and import increases, on the other, was appreciably changed by the exclusion of imports from NAFTA countries. Foreign production capacity in non-NAFTA countries also increased between 1996 and 2000, an increase well above the increase in domestic production capacity.[1142] Similarly, the increase in non-NAFTA imports between 1996 and 1998 was 2.4 million tons above the increase in domestic shipments in the same period.[1143] Imports of non-NAFTA imports were significantly larger than the shipments of minimill producers into the commercial market. Finally, the

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[1136] ITC Report, p. 63.
[1137] ITC Report, p. 63.
[1138] ITC Second Supplemental Report, p. 5.
[1139] ITC Report, p. 64.
[1140] ITC Second Supplemental Report, p. 5.
[1141] ITC Report, Table FLAT-77.
[1142] ITC Report, Tables FLAT-33 through FLAT-38.
[1143] ITC Memorandum INV-Y-209, Table FLAT-ALT7 (US-33).

domestic industry was unable to increase its market share vis-a-vis non-NAFTA imports over the level it held in 1996.[1144]

801. As noted above, legacy costs did not contribute to the declines in the domestic industry's financial condition during the period from 1996 to 2000, and the ITC specifically found that legacy costs were not responsible for the decline in prices that injured the domestic industry. Thus the ITC's analysis of all imports contained the requisite discussion of this factor, and the ITC was not obliged to discuss this factor further in its analysis of non-NAFTA imports.

802. The ITC also considered intra-industry competition as a possible cause of injury to the domestic industry during the period of investigation. The ITC found that imports, rather than minimills, had led prices for CCFRS down during the period of investigation. As noted above, prices for non-NAFTA imports followed the same pattern as did imports from all sources, and non-NAFTA imports actually undersold domestic products more frequently than did imports from all sources. Thus, the ITC's conclusion, that imports had a greater negative effect on prices than did minimills, was unchanged, and there was no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

803. The ITC also considered, and rejected, the possibility that bad management decisions or purchaser consolidation explained the price declines which injured the domestic industry. Thus, there was no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

804. Thus, the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

805. Consequently, the ITC's report contains a complete and detailed analysis establishing that increased imports from non-NAFTA countries caused serious injury to the domestic CCFRS industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

ii. *Tin Mill*

806. The EC complains that the ITC did not make a finding that non-NAFTA imports of tin mill fulfilled the necessary conditions for applying a safeguard measure.[1145] This is incorrect.

[1144] ITC Memorandum INV-Y-209, Table FLAT-ALT7 (US-33).

[1145] EC first written submission, para. 614. China and Norway make similar objections. China first written submission, para. 614; Norway first written submission, para. 395.

807. Both Commissioner Miller and Commissioner Bragg provided separate analyses of non-NAFTA imports relating to tin mill. These analyses, read in conjunction with each Commissioner's discussion of other pertinent issues contained in her analysis of all imports, demonstrate that the analyses specifically considered all issues relating to imports from non-NAFTA sources.

808. Commissioner Miller's analysis is found in footnotes 28 and 29 of her separate opinion analyzing all tin mill imports. In footnote 28, she observes that tin mill exports from Mexico were minuscule, never exceeding 286 tons in any calendar year.[1146] In footnote 29, she notes that she would have found increased imports of tin mill to be a substantial cause of serious injury if she had excluded imports from Canada.[1147] Given the minuscule volumes of imports from Mexico cited in footnote 28, the analysis Commissioner Miller provides in footnote 29 is clearly applicable when imports from both Canada and Mexico are excluded.

809. Commissioner Miller's footnote was not an ambiguous statement made "in passing," as asserted by Norway.[1148] Instead, it demonstrates that she specifically considered all issues relating to imports of tin mill from imported sources, including increased imports and causal link.

810. In her analysis, Commissioner Miller observed that imports from non-NAFTA sources increased by 22.4 percent from 1996 to 2000.[1149] The greatest annual percentage increase in non-NAFTA imports occurred between 1998 and 1999, the same year imports from all sources increased by the greatest percentage.[1150]

811. Commissioner Miller's analysis also demonstrated that there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic tin mill industry. The nature of that serious injury was discussed in great detail in Commissioner Miller's analysis of all imports.

812. As discussed above, Commissioner Miller's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. She determined that increased imports of tin mill put price pressure on domestic producers. Her analysis demonstrated that: (1) imports were generally substitutable with the domestically-produced product; (2) the average unit values of both imports and the domestically produced product declined during the period of investigation; and (3) there was some underselling by imports. The

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[1146] ITC Report, p. 310 n.28.
[1147] ITC Report, p. 310 n.29.
[1148] Norway first written submission, para. 392.
[1149] ITC Report, p. 310 n.29.
[1150] ITC Report, Table FLAT-C-8.

combination of these factors resulted in serious injury, most particularly the industry's deteriorating financial condition.

813. Each of these elements was applicable for non-NAFTA imports as well. Commissioner Miller had observed in her analysis of all imports that purchasers generally considered imported and domestically produced tin mill products to be substitutable.[1151] Because the questionnaire data indicated that non-NAFTA imports were not different from all imports in this respect, there was no need for Commissioner Miller to discuss this factor further in her analysis of non-NAFTA imports.[1152]

814. Commissioner Miller concluded that the second of these elements was applicable to non-NAFTA imports. She found that the decline in average unit values for non-NAFTA imports during the period of investigation was greater than that for all imports.[1153]

815. Commissioner Miller also concluded that the third of these elements was applicable to non-NAFTA imports. Exclusion of NAFTA imports increased the frequency of underselling.[1154]

816. Consequently, Commissioner Miller's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined.

817. As discussed above, in her analysis of all imports Commissioner Miller examined three factors other than increased imports alleged to be causes of serious injury to the domestic tin mill industry. With respect to the first of these factors, declining demand, Commissioner Miller separated and distinguished the effects of declining demand from those of all imports by observing the lack of correlation between changes in demand and changes in the industry's prices and operating margins during the period of investigation. Because Commissioner Miller's findings concerning this factor were based on a combination of overall U.S. marketplace data and domestic industry data, neither of which changed depending on which imports were being examined, there was no need for her to discuss this factor further in her analysis of non-NAFTA imports. With respect to the other two factors, purchaser consolidation and excess domestic capacity, she also focused exclusively on domestic industry data which did not change depending on which imports were being examined. Consequently, there was also no need for further discussion of these factors in her analysis of non-NAFTA imports.

[1151] ITC Report, p. 307.
[1152] ITC Memorandum INV-Y-209, p. 20 (US-33).
[1153] ITC Report, pp. 308, 310 n.29.
[1154] ITC Report, p. 310 n.29.

818. Thus Commissioner Miller's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, also establishes that the she did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in her consideration of non-NAFTA imports Commissioner Miller did not need to conduct a separate non-attribution analysis for NAFTA imports.

819. Commissioner Bragg performed her analysis of non-NAFTA tin mill imports in the context of her like product analysis encompassing certain carbon and alloy flat products. Commissioner Bragg first examined the increase in import volume. She found that non-NAFTA imports of carbon and alloy flat products including tin mill increased by 16.2 percent between 1996 and 2000. The largest single year increase occurred between 1997 and 1998, but an additional increase occurred between 1999 and 2000.[1155] Commissioner Bragg also noted that non-NAFTA imports accounted for a substantial majority of all imports.[1156]

820. Commissioner Bragg demonstrated a genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic industry. The nature of that serious injury was discussed in her analysis of all imports.[1157]

821. In conducting her analysis of causal link for all imports, Commissioner Bragg considered the various economic models presented but found trends analysis controlling.[1158] Commissioner Bragg found that the serious injury sustained by the domestic industry was caused solely by the increased volume of imports. Commissioner Bragg found imports and domestic products were generally highly substitutable. She further found that low-priced imports entered the U.S. market at relatively high levels, forcing down domestic prices and depriving domestic producers of revenue.[1159] Commissioner Bragg expressly stated that the same considerations were applicable to her analysis of non-NAFTA imports.[1160]

822. In her analysis of all imports, Commissioner Bragg specifically examined several other factors alleged to be the cause of serious injury. These included increased domestic capacity; integrated mills taking on additional liabilities despite rising energy and legacy costs as well as structural problems and high debt levels; slow productivity growth; high labor costs; old integrated plants too small for modern, efficient production; and the abundance of cheap scrap raw materials, an advantage for minimills. Commissioner Bragg rejected each of these factors as a cause of injury. She found that the increase in domestic production capacity was reasonable in light of the forecasted growth in apparent domestic consumption. She further found that increased import volume at low prices had prevented domestic producers from garnering

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[1155] ITC Second Supplemental Report, p. 15.
[1156] ITC Second Supplemental Report, p. 17 n.87.
[1157] *See* ITC Report, pp. 282-283.
[1158] ITC Report, pp. 292-293.
[1159] ITC Report, p. 294.
[1160] ITC Second Supplemental Report, pp. 16-17.

sufficient income during a period of rising demand to adequately address future investments as well as energy, legacy, and labor costs and to withstand any temporary productivity declines. Commissioner Bragg found that imports had pre-empted the domestic industry from pursuing a pro-active business strategy. Finally, she found that declining scrap prices did not explain the sharp decline in domestic prices during a period of rising U.S. consumption.[1161]

823. Because Commissioner Bragg's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Safeguards Agreement, and she rejected the other factors as causes of injury, she was not obliged to discuss these factors further in her analysis of non-NAFTA imports, as she had not attributed any of the serious injury suffered by the domestic industry to any of these other factors.[1162]

824. The analyses of non-NAFTA imports of both Commissioner Miller and Commissioner Bragg, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Commissioner Miller and Commissioner Bragg reached their conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

iii. *Hot-Rolled Bar*

825. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of hot-rolled bar from non-NAFTA sources, including increased imports and causal link.

826. In its analysis of non-NAFTA imports, the ITC found that non-NAFTA imports of hot-rolled bar increased at a greater rate than imports from all sources. Non-NAFTA imports increased by 107.9 percent from 1996 to 2000, and had major increases from 1997 to 1998 (when they increased by 70.4 percent) and from 1999 to 2000 (when they increased by 31.2 percent). In its analysis, the ITC also provided information concerning the annual evolution of non-NAFTA import volumes.[1163]

827. Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The EC also criticizes the ITC for failing to find that the increase was "recent, sudden, sharp, and

[1161] ITC Report, pp. 294-295.
[1162] ITC Second Supplemental Report, p. 17 & n.87.
[1163] ITC Second Supplemental Report, p. 5.

significant," and for failing to discuss full year 2001 data.[1164] We discussed above why the ITC was not required to compile full-year 2001 data.[1165] Additionally, as we previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury."[1166]

828. The ITC provided this analysis by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic hot-rolled bar industry. The nature of that serious injury was discussed in great detail in the ITC's analysis of all imports.

829. As discussed above, the ITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The ITC determined that through price-based competition increased imports caused domestic hot-rolled bar producers to lose market share at the same time prices were falling. Thus, there were three basic elements of the finding of causal link relating to all imports: (1) price-based competition between imports and the domestically produced product; (2) imports gaining market share at the expense of the domestically produced product; and (3) declining prices. These elements collectively led to the hot-rolled bar industry's declines in production, sales volumes and revenues, and employment, as well as its poor financial performance during the latter portion of the period of investigation.

830. In its analysis of non-NAFTA imports, the ITC found that each of these three causal link elements was applicable for such imports. First, the non-NAFTA imports were even more competitive on price with the domestically-produced product than were all imports, inasmuch as their prices were lower than those for all imports. The ITC found that the non-NAFTA imports undersold the domestically produced product by substantial margins during the principal period it examined in its causal link analysis – 1998 through 2000.[1167]

831. Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the ITC emphasized the domestic industry's loss of market share to imports in 1998 and 2000 and explained why this period was germane to its analysis. In its analysis of non-NAFTA imports, the ITC found that those imports were responsible for most of this loss, as they gained 3.7 of the 4.1 percentage points of market share the domestic industry lost from 1997 to 1998, and gained even more market share than the domestic industry lost from 1999 to 2000.[1168]

[1164] EC first written submission, paras. 622-63.
[1165] *See* section B.3. above.
[1166] *See* section B.1. above.
[1167] ITC Second Supplemental Report, p. 6.
[1168] ITC Second Supplemental Report, p. 6; ITC Report, Table LONG-C-3.

832. Third, the ITC found that the value of the non-NAFTA imports fell by an even greater proportion during the period of investigation than did imports from all sources.[1169]

833. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC did not reach this conclusion by "jump[ing] into some generalizations," as alleged by the EC.[1170] Instead, the ITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

834. As discussed above, in its analysis of all imports the ITC examined four factors other than increased imports alleged to be causes of serious injury to the domestic hot-rolled bar industry. It found that three of the four other factors (intra-industry competition, "inefficient" domestic producers, and changes in demand) did not cause the injury it observed. Because the ITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Safeguards Agreement, and its conclusions were not based upon the particular set of imports it examined, the ITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports. The fourth factor, relating to the domestic industry's input costs, related exclusively to domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

835. Thus the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

836. Consequently, the ITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic hot-rolled bar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

iv. *Cold-Finished Bar*

837. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC

[1169] ITC Second Supplemental Report, p. 6.

[1170] EC first written submission, para. 625. China raises a similar objection. China first written submission, para. 595.

specifically considered all issues relating to imports of cold-finished bar from non-NAFTA sources, including increased imports and causal link.

838. In its analysis of non-NAFTA imports, the ITC found that non-NAFTA imports of cold-finished bar increased at a greater rate than did imports from all sources both from 1999 to 2000 and over the entire period examined. Non-NAFTA imports increased by 51.0 percent from 1999 to 2000, the year that imports from all sources increased most sharply. In its analysis, the ITC also provided information concerning the annual evolution of non-NAFTA import volumes.[1171]

839. Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The EC also criticizes the ITC for failing to find that the increase was "recent, sudden, sharp, and significant," and for failing to discuss full year 2001 data.[1172] We discussed above why the ITC was not required to compile full-year 2001 data.[1173] Additionally, as we previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury."[1174]

840. The ITC provided this analysis by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic cold-finished bar industry. The nature of that serious injury was discussed in great detail in the ITC's analysis of all imports.

841. As discussed above, the ITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The ITC determined that aggressive pricing by the imports during the latter portion of the period of investigation caused the domestic industry to lose market share and revenues. This resulted in serious injury, most particularly the industry's poor performance in 2000.

842. The ITC found that each of two causal link elements that were applicable for all imports -- aggressive pricing and increased market share -- were also applicable for non-NAFTA imports. First, non-NAFTA imports for the C12L14 cold-finished bar product – the same product on which the ITC focused in its analysis of underselling by all imports – consistently undersold the domestically-produced product from the second quarter of 1999 to the fourth quarter of 2000. There were significant price declines for non-NAFTA imports during 1999 and prices declined further during 2000, particularly during the final quarter. The ITC emphasized that the pricing

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[1171] ITC Second Supplemental Report, pp. 6-7.
[1172] EC first written submission, paras. 622-63.
[1173] *See* section B.3. above.
[1174] *See* section B.1. above.

trends and underselling data from non-NAFTA imports were similar to those on which it relied in its analysis of imports from all sources.[1175]

843. Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the ITC emphasized the domestic industry's loss of market share to imports in 2000. In its analysis of non-NAFTA imports, the ITC found that those imports were responsible for the entire increase in market share both between 1999 and 2000 and between 1996 and 2000.[1176]

844. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC did not reach this conclusion by "jump[ing] into some generalizations," as alleged by the EC.[1177] Instead, the ITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

845. As discussed above, in its analysis of all imports the ITC examined two factors other than increased imports alleged to be causes of serious injury to the domestic cold-finished bar industry. It found that one of these factors (the performance of domestic producer RTI) did not cause the injury it observed. Because the ITC's analysis of all imports contained the requisite discussion of this factor to satisfy Article 4.2(b) of the Safeguards Agreement, and its conclusions were not based upon the particular set of imports it examined, the ITC was not obliged to discuss this factor further in its analysis of non-NAFTA imports. The ITC satisfied its obligation to perform a non-attribution analysis of the other factor, demand patterns, by focusing on domestic industry data for 2000, a year in which demand for cold-finished bar increased. Because the ITC's discussion of this factor related exclusively to domestic industry data which did not change depending on which imports were being examined, there was also no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

846. Thus the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

[1175] ITC Second Supplemental Report, p. 7.

[1176] ITC Second Supplemental Report, p. 7.

[1177] EC first written submission, para. 625. China raises a similar objection. China first written submission, para. 598.

847. Consequently, the ITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic cold-finished bar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

v. *Rebar*

848. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of rebar from non-NAFTA sources, including increased imports and causal link. China and the EC assert that the ITC failed to provide any discussion of non-NAFTA rebar imports.[1178] Both Complainants, however, overlook footnote 704 of the ITC's analysis of all imports, which provides a detailed analysis of non-NAFTA rebar imports.

849. In that footnote, the ITC expressly found that "the conclusions we have made concerning the effects of increased imports are equally applicable whether or not imports from Canada and Mexico are included among the imports evaluated."[1179] The meaning of this sentence is unambiguous: it is an ITC finding that increased imports from non-NAFTA sources caused serious injury to the U.S. rebar industry. Moreover, the ITC expressly incorporated into its analysis of non-NAFTA imports the pertinent portions of its analysis for all imports. Because the ITC expressly made this finding in its analysis of imports from all sources, there was no need for the Trade Representative to request the ITC to make supplemental findings on this issue.

850. In its analysis of non-NAFTA imports, the ITC emphasized that non-NAFTA imports of rebar increased by 434.8 percent from 1996 to 2000, by 183.5 percent from 1997 to 1998, and by 50.2 percent from 1998 to 1999. Each of these increases was greater than that for all imports for the applicable time period. In its analysis, the ITC also provided information concerning the annual evolution of non-NAFTA import volumes.[1180]

851. The ITC's analysis also demonstrated that there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic rebar industry. The nature of that serious injury was discussed in great detail in the ITC's analysis of all imports.

852. As discussed above, the ITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The ITC determined that increased imports of rebar put price pressure on domestic producers. The ITC's analysis

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[1178] China first written submission, para. 601; EC first written submission, para. 614.
[1179] ITC Report, p. 116 n.704.
[1180] ITC Report, p. 116 n.704.

demonstrated that: (1) imports consistently undersold the domestically produced product by large margins from 1998 to 2000; (2) imports took market share from the domestic industry after 1998; and (3) the domestic industry was forced to cut prices to meet the import competition. The combination of these factors resulted in serious injury, most particularly the industry's poor operating performance in 2000.

853. In its analysis of non-NAFTA imports, the ITC concluded that the first of these elements was applicable for those imports as well. It observed that there were no pricing observations for rebar from Canada, and that rebar from Mexico oversold the domestically produced product for all periods after the first quarter of 1997. Thus, it concluded that non-NAFTA imports had larger margins of underselling than did all imports for all periods after 1998.[1181]

854. The ITC further concluded that the second of these elements was applicable to non-NAFTA imports. It found that focusing on non-NAFTA imports "serves to accentuate the increase in market share. . ." Indeed, the non-NAFTA imports' gains in market share exceeded the domestic industry's losses in market share from 1997 to 1998. From 1998 to 1999, non-NAFTA imports were responsible for 5.1 of the 5.3 percentage points in market share that the domestic industry lost.[1182]

855. The third element in the ITC's analysis of causal link focused on domestic industry pricing and cost data. Because this data did not change depending on which imports were being examined, there was no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

856. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

857. As discussed above, in its analysis of all imports the ITC examined two factors other than increased imports alleged to be causes of serious injury to the domestic rebar industry. It found that one of these factors (increases in domestic capacity) did not cause the injury it observed. Because the ITC's analysis of all imports contained the requisite discussion of this factor to satisfy Article 4.2(b) of the Safeguards Agreement, and its conclusions were not based upon the particular set of imports it examined, the ITC was not obliged to discuss this factor further in its analysis of non-NAFTA imports. The second factor, relating to the domestic industry's input costs, related exclusively to domestic industry data which also did not change depending on

[1181] ITC Report, p. 116 n.704.
[1182] ITC Report, p. 116 n.704; Table LONG-C-5.

which imports were being examined. Consequently, there was also no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

858. Thus the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

859. Consequently, the ITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic rebar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

vi. *Certain Welded Pipe*

860. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of certain welded pipe from non-NAFTA sources, including increased imports and causal link.

861. In its analysis of non-NAFTA imports, the ITC found that non-NAFTA imports increased by 80.7 percent from 1996 to 2000, and had major increases of 20-30 percent in every year of the period examined except 1999.[1183] Non-NAFTA imports of certain welded pipe increased at a greater rate than imports from all sources.[1184]

862. Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The EC also criticizes the ITC for failing to find that the increase was "recent, sudden, sharp, and significant," and for failing to discuss full year 2001 data.[1185] We discussed above why the ITC was not required to compile full-year 2001 data.[1186] Additionally, as we previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury."[1187]

[1183] ITC Second Supplemental Report, p. 10.
[1184] ITC Report, Table TUBULAR-C-4.
[1185] EC first written submission, paras. 622-63.
[1186] *See* section B.3. above.
[1187] *See* section B.1. above.

863. The ITC provided this analysis by demonstrating the genuine and substantial causal link between non-NAFTA imports and the threat of serious injury experienced by the domestic industry producing certain welded pipe. The nature and timing of that threat of serious injury was discussed in great detail in the ITC's analysis of all imports.

864. As discussed above, the ITC's analysis of all imports also described the causal link between all imports and the threat of serious injury in considerable detail. The ITC determined that, through price-based competition, increased imports caused domestic producers of certain welded pipe to lose market share at the same time prices were falling. The ITC also determined that increases in exports to the U.S. market resulting from increases in foreign capacity would continue unabated in the imminent future. Thus, there were three basic elements of the finding of causal link relating to all imports: (1) price-based competition between imports and the like product with declining prices; (2) imports gaining market share at the expense of the domestically produced product; and (3) increases in foreign production, capacity, and share of exports to the United States. These elements collectively led to the domestic industry's continuing declines in production, sales volumes and revenues, and employment, as well as declines in its performance during the period of investigation, and would likely continue to cause serious injury to the domestic industry in the imminent future, if these trends continued unabated.

865. In its analysis of non-NAFTA imports, the ITC found that each of these three causal link elements was applicable for such imports. First, the non-NAFTA imports undersold the domestically produced product in all but one quarter (32 of 33 quarters) for which data were available, and the prices for such imports declined over the period examined including during the most recent quarters.[1188] The value of the non-NAFTA imports fell by an even greater amount during the period of investigation than did imports from all sources.[1189]

866. Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the ITC emphasized the domestic industry's loss of market share to imports, particularly between 1999 and 2000. In its analysis of non-NAFTA imports, the ITC found that market share for non-NAFTA imports increased from 13.1 percent in 1996 to 19.8 percent in 2000.[1190] Non-NAFTA imports gained 6.7 of the 10.5 percentage points of market share the domestic industry lost from 1996 to 2000.[1191]

867. Third, the ITC found that foreign capacity, production, and exports to the United States from non-NAFTA countries are all projected to reach new peaks during the period 2001-2002,

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[1188] ITC Second Supplemental Report, p. 10.
[1189] ITC Report, Table TUBULAR-C-4.
[1190] ITC Second Supplemental Report, p. 10; ITC Report, Table TUBULAR-C-4.
[1191] ITC Report, Table TUBULAR-C-4.

and thus projections regarding these factors for all imports were not appreciably altered by considering only non-NAFTA imports.[1192]

868. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that established the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC did not reach this conclusion by "jump[ing] into some generalizations," as alleged by the EC.[1193] Instead, the ITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

869. As discussed above, in its analysis of all imports the ITC examined three factors other than increased imports alleged to be causes of the threat of serious injury to the domestic certain welded pipe industry. It found that these other factors (changes in demand, increased domestic capacity, and non-import difficulties of a particular producer) did not cause the injury it observed. Because the ITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Safeguards Agreement, and its conclusions were not based upon the particular set of imports it examined, the ITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports.

870. Thus the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

871. Consequently, the ITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries threatened to cause serious injury to the domestic industry producing certain welded pipe. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

vii. *FFTJ*

872. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of FFTJ from non-NAFTA sources, including increased imports and causal link.

[1192] ITC Second Supplemental Report, p. 10; ITC Report, Tables TUBULAR-30-32.

[1193] EC first written submission, para. 625. China raises a similar objection. China first written submission, para. 603.

873. In its analysis of non-NAFTA imports, the ITC found that non-NAFTA imports of FFTJ increased during the period of investigation. Non-NAFTA imports increased from 76,079 short tons in 1996 to 100,592 short tons in 2000; there were annual increases during each year of the period of investigation except 1997. The ratio of non-NAFTA imports to U.S. production also increased during each year of the period of investigation except 1997, rising from 37.1 percent in 1996 to 51.8 percent in 2000.[1194]

874. Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong. The EC also criticizes the ITC for failing to find that the increase was "recent, sudden, sharp, and significant," and for failing to discuss full year 2001 data.[1195] We discussed above why the ITC was not required to compile full-year 2001 data.[1196] Additionally, as we previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury."[1197]

875. The ITC provided this analysis by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic FFTJ industry. The nature of that serious injury was discussed in great detail in the ITC's analysis of all imports.

876. As discussed above, the ITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The ITC emphasized that the increasing presence of imports in the U.S. market from 1997 to 2000 coincided with declines in the domestic industry's sales, production, capacity utilization, employment, and profitability. The ITC also emphasized that, for the butt-weld pipe fitting product for which it collected pricing data, imports consistently undersold the domestically produced product, with the highest margins of underselling occurring at the conclusion of the period of investigation.

877. In its analysis of non-NAFTA imports, the ITC found that the first of the three causal link elements on which it relied in its analysis of all imports -- increasing import presence in the U.S. market -- was applicable for non-NAFTA imports. The ITC specifically noted the increases in market share for non-NAFTA imports during its period of investigation. Indeed, non-NAFTA imports were responsible for 7.7 of the 8.8 percentage points of market share the domestic industry lost between 1997 and 2000.[1198]

[1194] ITC Second Supplemental Report, p. 8. The ITC also found that non-NAFTA import volume, both on an absolute basis and relative to U.S. production, was higher in interim 2001 than in interim 2000. *Id.*

[1195] EC first written submission, paras. 622-63.

[1196] *See* section B.3. above.

[1197] *See* section B.1. above.

[1198] ITC Second Supplemental Report, p. 8; ITC Report, Table TUBULAR-C-6.

878. The second element in the ITC's analysis of causal link for all imports focused on domestic industry performance data. Because these data did not change depending on which imports were being examined, there was no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

879. The third element of the causal link analysis -- underselling -- was also applicable to non-NAFTA imports, as the ITC found. Non-NAFTA imports undersold domestically-produced product by margins in excess of 20 percent for every quarter in the period of investigation after the third quarter of 1999.[1199]

880. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC did not reach this conclusion by "jump[ing] into some generalizations," as alleged by the EC.[1200] Instead, the ITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

881. As discussed above, in its analysis of all imports the ITC examined five factors other than increased imports alleged to be causes of serious injury to the domestic FFTJ industry. It found that four of the five other factors (demand for oil and gas related products, increased capacity, industry inefficiency, and worker shortages) did not cause the injury it observed. Because the ITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Safeguards Agreement, and its conclusions were not based upon the particular set of imports it examined, the ITC was not obliged to discuss these factors further in its analysis of non-NAFTA imports. Its analysis of the remaining factor, relating to purchaser consolidation, focused exclusively on domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

882. Thus the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

[1199] ITC Second Supplemental Report, p. 8; ITC Report, Table TUBULAR-61. The ITC also made this finding in its analysis of all imports. ITC Report, p. 176.

[1200] EC first written submission, para. 625. China raises a similar objection. China first written submission, para. 606.

883. Consequently, the ITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic FFTJ industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

viii. *Stainless Steel Bar*

884. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of stainless steel bar from non-NAFTA sources, including increased imports and causal link.

885. In its analysis of non-NAFTA imports, the ITC found that non-NAFTA imports increased by 61.1 percent from 1996 to 2000, and while the quantity of such imports fluctuated somewhat during the period of investigation, the largest single increase occurred from 1999 to 2000 (when they increased by 42.1 percent).[1201] Non-NAFTA imports of stainless steel bar increased at a greater rate than imports from all sources from 1996 to 2000 and from 1999 to 2000.[1202] Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong.

886. The EC also criticizes the ITC for failing to find that the increase was "recent, sudden, sharp, and significant," and for failing to discuss full year 2001 data.[1203] We discussed above why the ITC was not required to compile full-year 2001 data.[1204] Additionally, as we previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in the abstract, but whether there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury."[1205]

887. The ITC provided this analysis by demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury experienced by the domestic stainless steel bar industry. The nature of that serious injury was discussed in great detail in the ITC's analysis of all imports.

888. As discussed above, the ITC's analysis of all imports also described the causal link between all imports and the serious injury in considerable detail. The ITC determined that, through price-based competition, increased imports caused domestic stainless steel bar producers to lose market share, particularly in the latter half of the period of investigation. Thus, the basic

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[1201] ITC Second Supplemental Report, pp. 8-9.
[1202] ITC Report, Table STAINLESS-C-4.
[1203] EC first written submission, paras. 622-63.
[1204] *See* section B.3. above.
[1205] *See* section B.1. above.

elements of the finding of causal link relating to all imports were: (1) price-based competition between imports and the like product; and (2) imports gaining market share at the expense of the domestically produced product. These elements collectively led to the stainless steel bar industry's declines in production, sales volumes and revenues, and employment, as well as its poor financial performance.

889. In its analysis of non-NAFTA imports, the ITC found that each of the causal link elements was applicable for such imports. First, the non-NAFTA imports were even more competitive on price with the domestically-produced product than were all imports, inasmuch as the percentage of price comparisons in which underselling occurred during the period was greater for non-NAFTA imports than for all imports. The ITC found that the non-NAFTA imports undersold the domestically produced product by margins of up to 51 percent.[1206] The average unit values of the non-NAFTA imports fell by an even greater amount during the period of investigation than did imports from all sources.[1207]

890. Second, the non-NAFTA imports gained market share at the expense of the domestic industry. In its analysis of causal link for all imports, the ITC emphasized the domestic industry's loss of market share to imports. In its analysis of non-NAFTA imports, the ITC found that those imports were responsible for all of this loss, as they gained all 11 percentage points of market share the domestic industry lost from 1996 to 2000.[1208]

891. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. The ITC did not reach this conclusion by "jump[ing] into some generalizations," as alleged by the EC.[1209] Instead, the ITC reached its conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

892. As discussed above, in its analysis of all imports the ITC examined three factors other than increased imports alleged to be causes of serious injury to the domestic stainless steel bar industry. It found that these other factors (changes in demand during late 2000 and 2001, increases in energy costs, and the poor operating results of two producers during the period) did not cause the injury it observed. Because the ITC's analysis of all imports contained the requisite discussion of these other factors to satisfy Article 4.2(b) of the Safeguards Agreement, and its conclusions were not based upon the particular set of imports it examined, the ITC was not

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[1206] ITC Second Supplemental Report, p. 9.

[1207] ITC Report, Table STAINLESS-C-4.

[1208] ITC Second Supplemental Report, p. 9; ITC Report, Table STAINLESS-C-4.

[1209] EC first written submission, para. 625. China raises a similar objection. China first written submission, para. 609.

obliged to discuss these factors further in its analysis of non-NAFTA imports. Moreover, the third factor, relating to two producers' performance, related exclusively to domestic industry data which also did not change depending on which imports were being examined. Consequently, there was also no need for the ITC to discuss this factor further in its analysis of non-NAFTA imports.

893. Thus, the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

894. Consequently, the ITC's report contains a reasoned and adequate explanation of how the facts supported its conclusion that increased imports from non-NAFTA countries caused serious injury to the domestic stainless steel bar industry. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement

ix. *Stainless Steel Rod*

895. The ITC's analysis of non-NAFTA imports, read in conjunction with its discussion of other pertinent issues contained in the analysis of all imports, demonstrates that the ITC specifically considered all issues relating to imports of stainless steel rod from non-NAFTA sources. China and the EC assert that the ITC failed to provide any discussion of non-NAFTA stainless steel rod imports.[1210] Both Complainants, however, overlook footnote 1437 of the ITC's analysis of all imports.

896. In that footnote, the ITC found that imports from Canada and Mexico accounted for an extremely small percentage of total imports during the investigation.[1211] In no single year of the period of investigation did combined imports from NAFTA sources exceed 0.08 percent of total imports.[1212] Exclusion of this volume of imports had no effect on the ITC's increased import determination, as the timing and the rate of the changes in import volume were essentially unchanged.

897. Consequently, the EC's argument that the ITC report provided insufficient information concerning the nature and significance of the increases in non-NAFTA imports is wrong.[1213] Additionally, as previously discussed, the appropriate consideration under the Safeguards Agreement is not whether the increase in imports was "recent, sudden, sharp, and significant" in

[1210] China first written submission, para. 612; EC first written submission, para. 614.
[1211] ITC Report, p. 223 n.1437.
[1212] ITC Memorandum INV-Y-180, Table G26 (US-40).
[1213] EC first written submission, para. 614.

the abstract, but whether there were imports "in such increased quantities...and under such conditions as to cause or threaten to cause serious injury."

898. The ITC provided this analysis by demonstrating the causal link between non-NAFTA imports and the serious injury experienced by the domestic industry producing stainless steel rod. The nature of that injury was discussed in great detail in the ITC's analysis of all imports.

899. As discussed above, the ITC's analysis of all imports described the causal link between all imports and the serious injury in considerable detail. The ITC determined that the increased quantities of imports caused domestic producers first to lose market share, then to lose revenue as they attempted to bring domestic prices into line with low-priced imports. There were several basic elements to the causal link finding: (1) high substitutability between imports and domestic merchandise in a market where price was an important consideration; (2) import increases during a period of stable demand; (3) persistent underselling by imports; and (4) consequent losses by the domestic industry of market share, production, shipments, net commercial sales and net commercial revenues. The ITC found a "clear and direct correlation" between changes in import volumes and the overall condition of the industry.[1214]

900. In its analysis of non-NAFTA imports, the ITC found that each of these causal links was applicable to non-NAFTA imports. The ITC found specifically that exclusion of imports from Canada and Mexico did not change its volume or pricing analysis in any significant way.[1215] Non-NAFTA imports exhibited the same trends in import volume and in underselling as did imports from all sources.

901. Consequently, the ITC's analysis of non-NAFTA imports, when read in conjunction with the analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined.

902. As discussed above, in its analysis of all imports the ITC examined several factors other than increased imports alleged to be causes of serious injury to the domestic industry producing stainless steel rod. The ITC specifically examined: (1) demand declines late in the period; (2) energy cost changes late in the period; and (3) the "aberrational" performance of one domestic producer. The ITC identified and discussed in detail the nature and extent of any adverse effects attributable to each of these factors during the period of investigation and thus ensured it did not attribute to imports any injury caused by another factor. The ITC's analysis of what effects, if any, were attributable to those other factors is also equally applicable to non-NAFTA imports.

[1214] ITC Report, pp. 220-221.
[1215] ITC Report, p. 223 n.1437.

903. In its discussion of all imports, the ITC distinguished from the serious injury attributable to imports any effects attributable to declines in demand. It noted that demand declines only occurred late in the period under investigation.[1216] By contrast, the domestic industry had experienced declines in market share, production volumes, sales, employment, and profitability before the decline in demand began but after import volumes had increased.[1217] As the ITC noted in its analysis of non-NAFTA imports, the volume and pricing of non-NAFTA imports followed the same trend over the period of investigation as did imports from all sources; indeed, non-NAFTA imports accounted for essentially all imports and all underselling observations.[1218] Thus the ITC's conclusion regarding the nature and extent of injury attributable to increased imports was unchanged, and the ITC was not obliged to further discuss demand declines in its analysis of non-NAFTA imports.

904. The examination of the remaining two factors -- increased energy costs and the poor performance of one domestic producer during the period of investigation -- pertained exclusively to domestic industry data which did not change depending on which imports were being examined. Consequently, there was also no need for the ITC to discuss these factors further in its analysis of non-NAFTA imports.

905. Thus, the ITC's analysis of non-NAFTA imports, when read in conjunction with its analysis of all imports, also establishes that the ITC did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in its consideration of non-NAFTA imports the ITC did not need to conduct a separate non-attribution analysis for NAFTA imports.

906. Consequently, the ITC's report contains a complete and detailed analysis establishing that increased imports from non-NAFTA countries caused serious injury to the domestic industry producing stainless steel rod. This analysis satisfies all requirements of Articles 2.1 and 4.2 of the Safeguards Agreement.

x. *Stainless Steel Wire*

907. The EC complains that the ITC did not make a finding that non-NAFTA imports of stainless steel wire fulfilled the necessary conditions for applying a safeguard measure.[1219] This is incorrect.

908. Both Chairman Koplan and Commissioner Bragg provided separate analyses of non-NAFTA imports relating to stainless steel wire. These analyses, read in conjunction with each

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[1216] ITC Report, p. 221.
[1217] ITC Report, p. 221.
[1218] ITC Second Supplemental Report, p. 5.
[1219] EC first written submission, para. 614. China makes a similar objection. China first written submission, para. 616.

Commissioner's discussion of other pertinent issues contained in his or her analysis of all imports, demonstrate that the analyses specifically considered all issues relating to imports from non-NAFTA sources.

909. In his analysis of non-NAFTA imports, Chairman Koplan found that Canada and Mexico together accounted for a small and declining share of apparent domestic consumption over the period of investigation, while non-NAFTA imports accounted for an increasing share, with a particularly notable increase occurring between the interim periods.[1220] These were the same import volume trends he had identified in his analysis of all imports.[1221] Chairman Koplan thus found that the conclusions he had made concerning the effects of increased imports were equally applicable for non-NAFTA imports.[1222]

910. Consequently, China's argument that the ITC report provided no particular findings establishing serious injury by non-NAFTA imports is wrong.[1223] Chairman Koplan provided the necessary analysis by demonstrating an increase in non-NAFTA imports in the latter portion of the period and by further demonstrating the genuine and substantial causal link between non-NAFTA imports and the serious injury which threatened the domestic stainless steel wire industry. The nature of that threat of serious injury was discussed in great detail in Chairman Koplan's analysis of all imports.

911. As discussed above, Chairman Koplan's analysis of all imports described the causal link between all imports and the threat of serious injury in some detail. Chairman Koplan established a direct correlation between the significant increase in the market share of all imports in interim 2001 and the substantial decline in the industry's condition in that period.[1224]

912. In his analysis of non-NAFTA imports, Chairman Koplan found this causal link was applicable to non-NAFTA imports. Chairman Koplan specifically found that imports from Canada and Mexico did not account for substantial shares of all imports during the period of investigation. He further specifically found that non-NAFTA imports increased late in the period, with a particularly notable increase occurring between the interim periods, at the time the domestic industry's performance deteriorated.[1225]

913. Chairman Koplan specifically found that non-NAFTA imports gained market share at the expense of the domestic industry. In his analysis of all imports, Chairman Koplan emphasized

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[1220] ITC Report, p. 260 n.36.
[1221] ITC Report, p. 259.
[1222] ITC Report, p. 260 n.36.
[1223] China first written submission, paras. 616-617.
[1224] ITC Report, p. 258-259.
[1225] ITC Report, pp. 259-260 & n.36.

the loss of market share late in the period of investigation. In his analysis of non-NAFTA imports, Chairman Koplan found that non-NAFTA imports were responsible for this loss.[1226]

914. Consequently, Chairman Koplan's analysis of non-NAFTA imports, when read in conjunction with his analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined.

915. As discussed above, Chairman Koplan examined the decline in demand as a factor other than increased imports alleged to be a cause of the threat of serious injury facing the domestic stainless steel wire industry. Chairman Koplan found, however, that the declines in the domestic industry's production and shipments were greater than the total decline in apparent domestic consumption, and the volume of imports increased despite the decline in demand.[1227] Non-NAFTA imports accounted for all of that increase. Therefore, Chairman Koplan was not obliged to discuss this factor further in his analysis of non-NAFTA imports.

916. Thus, Chairman Koplan's analysis of non-NAFTA imports, when read in conjunction with his analysis of all imports, also establishes that he did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in his consideration of non-NAFTA imports Chairman Koplan did not need to conduct a separate non-attribution analysis for NAFTA imports.

917. Commissioner Bragg performed her analysis of non-NAFTA stainless steel wire imports in the context of her like product encompassing stainless steel wire and stainless steel wire rope. Commissioner Bragg found that non-NAFTA imports increased significantly, both in terms of import levels and trends. Commissioner Bragg found that non-NAFTA imports increased by 35.2 percent between 1996 and 2000. She further found that non-NAFTA imports accounted for a larger share of the domestic market in 2000 than in 1996, and that their market share was larger in interim 2001 than in interim 2000. By interim 2001 non-NAFTA imports accounted for 31.1 percent of the U.S. market.[1228]

918. Commissioner Bragg's analysis also demonstrated that there were imports "in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury" by demonstrating the genuine and substantial causal link between non-NAFTA imports and the threat of serious injury facing the domestic stainless steel wire products industry. The nature of that threat was discussed in detail in Commissioner Bragg's analysis of all imports.

[1226] ITC Report, p. 260 n.36.
[1227] ITC Report, p. 259.
[1228] ITC Second Supplemental Report, pp. 22-23..

919. Commissioner Bragg's analysis of all imports also described the causal link between all imports and the threat of serious injury in considerable detail. Commissioner Bragg found that increased imports at declining prices prevented domestic producers from taking advantage of increased consumption and threatened the domestic industry with serious injury.[1229]

920. Commissioner Bragg found that this analysis was applicable for non-NAFTA imports as well. She found that prices for non-NAFTA imports declined between 1996 and 2000, and non-NAFTA imports undersold domestic products in the majority of quarterly comparisons. She also emphasized that non-NAFTA imports took market share away from the domestic industry.[1230]

921. Consequently, Commissioner Bragg's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined.

922. In her analysis of all imports, Commissioner Bragg examined three factors other than increased imports alleged to be causes of the threat of serious injury to the stainless steel wire products domestic industry. Commissioner Bragg examined the general downturn in the economy, raw material costs, and the appreciation of the U.S. dollar.[1231] Commissioner Bragg's findings concerning these factors were based on a combination of overall U.S. marketplace data and domestic industry data, neither of which changed depending on which imports were being examined. Thus, there was no need for her to discuss these factors further in her analysis of non-NAFTA imports.

923. Consequently, Commissioner Bragg's analysis of non-NAFTA imports, when read in conjunction with her analysis of all imports, establishes that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Her analysis also establishes that she did not attribute to non-NAFTA imports any effects due to factors other than imports. As discussed above, in her consideration of non-NAFTA imports Commissioner Bragg did not need to conduct a separate non-attribution analysis for NAFTA imports.

924. The analyses of non-NAFTA imports of both Chairman Koplan and Commissioner Bragg, when read in conjunction with the analysis of all imports, establish that the considerations that establish the existence of a genuine and substantial causal link between the increased imports and the threat of serious injury were the same whether all imports were examined or whether only imports from non-NAFTA sources were examined. Chairman Koplan and Commissioner

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[1229] ITC Report, p. 301-302.
[1230] ITC Second Supplemental Report, p. 23.
[1231] ITC Report, p. 302.

Bragg reached their conclusions on the basis of an objective, fact-based analysis of volume and pricing data specifically pertaining to non-NAFTA imports.

G. The ITC Report and Second Supplemental Response Satisfy the Requirements of Article XIX:1(a) With Regard to Unforeseen Developments

925. Consistent with U.S. obligations under Article XIX, the ITC's findings demonstrate the existence of unforeseen developments. Namely, 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 to the domestic industries producing like products. Contrary to Complainants' views, it does not matter that some of these findings appeared separately from the initial report, or that the ITC did not frame its analysis in the same way that it did the causation analysis. The texts of Article XIX establish requirements with regard to unforeseen developments that are different from the requirements applicable to increased imports, injury, and causation under Articles 2 and 4. The Appellate Body recognized this difference in describing unforeseen developments as a "*circumstance* which must be demonstrated as a matter of fact," as opposed to the "independent *conditions* for the application of a safeguard measure," that is, imports in such quantities and under such conditions as to cause serious injury.[1232]

1. Any Unexpected Event That Results in an Increase in Imports of a Product or a Change in the Conditions Under Which the Product is Imported Can be an "Unforeseen Development" Within the Meaning of Article XIX:1

926. The term "unforeseen developments" covers any change that is unexpected. Under GATT 1947, this was understood to mean that the negotiators of the Contracting Party imposing a safeguard measure did not foresee the development when they undertook obligations or tariff concessions with regard to that product subject to the measure. What was "unforeseen" could be, for example, the development itself, the unexpected magnitude of a development that was foreseen, or the unexpected interaction of multiple developments that were foreseen.

927. In evaluating the first clause of Article XIX:1, the Appellate Body has stated:

> the dictionary definition of "unforeseen", particularly as it related to the word "developments," is synonymous with "unexpected". "Unforeseeable", on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated". Thus it seems to us that the ordinary meaning of the phrase "unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such

[1232] *Argentina – Footwear*, AB Report, para. 92 (emphasis original).

> conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected".[1233]

The *Lamb Meat* panel, in a finding that the Appellate Body did not address, found that "the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* [is] important. In our view, the former term implies a lesser threshold than the latter one. . . . [W]e must consider what was and was not actually 'foreseen', rather than what might or might not have been theoretically 'foreseeable'."[1234]

928. The working party in *Felt Hats* found that the proper focus was on the knowledge of a Contracting Party's negotiators at the time they undertook a particular obligation or tariff concession:

> the term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[1235]

In *Felt Hats*, the Working Party found that a change in fashion was not unforeseen, but that the magnitude of the change and its duration were. In short, "the United States negotiators in 1947 could not reasonably be expected to foresee that this style change in favor of velours would in fact subsequently take place, and would do so on as large a scale and last for as long a period as it in fact did."[1236]

929. This distinction is important to this proceeding. The primary "unforeseen developments" identified by the USITC were the financial crises in Southeast Asia and the former USSR countries, which resulted in increased exports to the United States of a variety of steel products. These economic crises were perhaps "foreseeable" in the general, hypothetical sense that economic crises periodically occur, just as fashion periodically changes. However, the timing, extent, and ongoing effect on global steel trade of the Asian and Russian financial crises were not "foreseen" by the United States (or any other WTO Members, for that matter) until well after the conclusion of the Uruguay Round. Thus, the existence of unforeseen developments, as defined by the GATT 1994 and the Agreement on Safeguards, is met.

2. Article XIX:1 Does Not Require the Establishment of a "Causal Link" Between the Unforeseen Developments and Serious Injury Caused by Increased Imports

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[1233] *Korea – Dairy*, AB Report, para. 84.
[1234] *US – Lamb Meat*, Panel Report, para. 7.22.
[1235] *Felt Hats*, para. 9.
[1236] *Felt Hats*, para. 11.

930. The role of "unforeseen developments" in the establishment of a Member's right to impose a safeguard measure is different from the role of increased imports, injury, and causation. This difference arises from the grammatical structure of the text, and the ordinary meaning of the linkages between the terms used.

931. As the Appellate Body has found,

> The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions . . ." – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that paragraph.[1237]

Following this same reasoning, "in such increased quantities and under such conditions" is linked within that second clause to "serious injury to domestic producers." It is significant that these linkages are different. "Unforeseen developments" is linked to the second clause by "as a result of," while "in such increased quantities and under such conditions" is linked to serious injury by "cause." Thus, the only causation requirement is that increased imports under such conditions *cause* serious injury. The quantities of imports or the conditions must be "a result of" unforeseen developments, but need not be caused by those developments.

932. The EC maintains that a Member must establish a "causal link" between the unforeseen developments and the importation of the product in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers.[1238] The text establishes that this is plainly not the case. As noted above, Article XIX uses "cause" only to refer to the relationship between increased imports and serious injury. Moreover, the term "causal link" is borrowed from Article 4.2(b) of the Safeguards Agreement, which elaborates on the examination of whether increased imports caused serious injury. That provision does not reference unforeseen developments. Indeed, the Safeguards Agreement does not address, much less expand on the concept of "unforeseen developments" in any way, indicating that it imposes no substantive requirements on the demonstration of unforeseen developments in addition to those stated in Article XIX itself.

933. In fact, the Panel Report in *Lamb Meat* explicitly considered and rejected the theory that Article XIX.1(a) requires a "two-step" causation approach, that is, a showing that there exist "(a) unforeseen developments that (b) lead to a surge in imports under such conditions as in turn to (c) cause (a threat of) serious injury."[1239] The Panel stated:

[1237] *Korea – Dairy*, AB Report, para. 85.
[1238] EC first written submission, para. 120.
[1239] *US – Lamb Meat*, Panel Report, para. 7.14.

> We do not find, in the ordinary meaning of GATT Article XIX, a textual basis for what we see as a "two-step causation approach" implied by the complainants' arguments. The phrase concerning "unforeseen developments" in Article XIX:1 is grammatically linked to both "in such increased quantities" and "under such conditions". Rather than implying a two-step causation, we view this structure as meaning that while "unforeseen developments" are distinct from increases in imports per se, it may be sufficient for a showing of the existence of this "factual circumstance" that "unforeseen developments" have caused increased imports to enter "under such conditions" and to such an extent as to cause serious injury or threat thereof.[1240]

Thus, Article XIX, as modified by the Agreement on Safeguards, requires that the unforeseen developments exist, but not that they directly cause the increased imports that in turn cause or threaten injury.

934. The EC claims that a "temporal nexus" must exist between the unforeseen developments and the increase in imports.[1241] However, the EC cites no legal authority for this proposition. In fact, the phrase "as a result of unforeseen developments" does not provide any timeframe relating the unforeseen developments to the increased imports. Article XIX does indicate that there should be a sequential relationship of trade concessions, followed by unforeseen developments and then serious injury. But it does not require that the unforeseen developments be contemporaneous with the imports, or immediately precede the imports.

935. Although the EC's claimed "temporal nexus" is not required, a sequential relationship did exist between the specific unforeseen developments cited by the ITC and the beginning of the import increases that were found to cause serious injury to the domestic industries. The increase in imports began just after the currency depreciations and financial situations discussed in the Second Supplemental Report, and resulted in serious injury.[1242]

3. Unforeseen Developments Can Include Macroeconomic Factors, Such as Regional Economic Crises

936. The Safeguards Agreement and Article XIX of the GATT 1994 do not require that the unforeseen developments identified by the authority must be limited to, or even directly related to, the particular product or products under investigation. The language of Article XIX specifies only that "unforeseen developments" must occur, and that they must be related to the increase in imports.

[1240] *US – Lamb Meat*, Panel Report, para. 7.16.

[1241] EC first written submission, para. 134.

[1242] ITC Report. pp. 50 (CCFRS), 71 (tin mill), 92 (hot-rolled bar), 101 (cold-finished bar), 109 (rebar), 157 (certain welded pipe), 171 (FFTJ), 205 (stainless steel bar), and 214 (stainless steel rod), 234-35 (stainless steel wire).

937. The EC argues that the economic crises in Southeast Asia and the former USSR countries were macroeconomic events, unrelated to steel production and, therefore, cannot be unforeseen developments in the sense of Article XIX:1.[1243] This is wrong. A macroeconomic event, like any other event, can constitute an unforeseen development, and if it has the effect of producing a global import surge that causes or threatens serious injury to a domestic industry, then it can justify imposition of safeguards relief in response.

938. The EC and other Respondents demand separate explanations of unforeseen developments for each product category.[1244] But Article XIX does not require competent authorities to trace each unforeseen development, such as a massive economic crisis, to each specific increase in imports of a product or category. As a factual matter, the unforeseen developments cited by the ITC were broad macroeconomic disturbances that disrupted a wide variety of economic and financial relationships. There was no need to discuss the effects of each disturbance on each individual steel product.

4. Article XIX does not require that the effects of unforeseen developments be limited to a country, and a competent authority is not required to demonstrate the effects of unforeseen developments on other industries or economies

939. The EC complains that the ITC did not explain the effects of those macroeconomic disruptions on the steel sector in countries other than the United States.[1245] The EC cites no requirement for a competent authority to address the effects of unforeseen developments on other economies. Nonetheless, the ITC noted the decline in steel consumption in the most affected areas after the currency depreciations began.[1246] The ITC also noted, during its analyses of the various steel markets, moderate to high degrees of substitutability between imported steel products, indicating that steel products produced in one market could be readily shifted to other markets, a notion the EC embraced as the basis for its own 2002 provisional safeguard measures on steel.[1247]

940. The EC and others also complain that the ITC's analysis relied on data for selected countries,[1248] and gave no data for the relative health of other markets.[1249] Again, there is no *requirement* to address unforeseen developments in other countries, and the EC cites none. This same principle applies equally to the gathering and citation of statistics. Under Article XIX, a Member is free to examine no foreign countries, some foreign countries, or all foreign countries

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[1243] EC first written submission, para. 147.
[1244] EC first written submission, paras. 136-139; China first written submission, paras. 94-95.
[1245] EC first written submission, para 148.
[1246] ITC Second Supplemental Report, pp. 2, 3.
[1247] ITC Report, pp. 58 (CCFRS), 308 (tin mill) 96 (hot-rolled bar), 105 (cold-finished bar), 112 (rebar), 158 (certain welded pipe), 171 (FFTJ), 210 (stainless steel bar), 219 (stainless steel rod).
[1248] EC first written submission, para 136.
[1249] EC first written submission, para. 173.

as it sees fit. To the extent that a comparison among markets was helpful in illustrating the relationship of the unforeseen development to increased imports, the appreciation of the U.S. dollar cited by the ITC in part reflected the strength of the U.S. economy relative to most other markets.[1250]

941. The EC argues that disruptions in the economies of non-WTO members do not satisfy the requirement of Article XIX:1(a) of the GATT 1994. This argument is flawed both legally and factually. As a legal matter, Article XIX:1(a) imposes no requirement that an unforeseen development originate in the economy of a WTO member. Indeed, the first sentence of Article XIX:1(a) makes it clear that "unforeseen developments" are separate from "the effect of obligations incurred...under this Agreement." The EC is unjustified in reading the clause "under this Agreement" as applying to "unforeseen developments."

942. As a factual matter, the ITC's analysis did not focus solely on an increase in imports from Russia or other non-members.[1251] The ITC found that the disruptions in Southeast Asia (which includes many WTO Members) and the former USSR countries caused unusually large volumes of foreign steel to be displaced from local consumption, with a significant portion of that displaced foreign production being directed to the U.S. market.[1252]

943. A table submitted by China, drawn from data compiled for the ITC, supports the ITC's findings. These figures show that, while imports from Southeast Asia and the countries of the former Soviet Union increased rapidly between 1997 and 1998, more than half of the unprecedented increase in imports came from other sources.[1253] That imports increased so sharply, from such a variety of sources, soon after the economic disruptions cited by the ITC is compelling support for the ITC's finding that those financial disturbances destabilized the worldwide market for steel.

944. China complains that the ITC's demonstration of unforeseen developments rests on the instability and increased exports from only a handful of countries, namely, those in Southeast Asia and the former USSR countries.[1254] China misunderstands the ITC's analysis. The ITC found that financial crises led to displaced consumption in those countries experiencing the depreciations firsthand, triggering wider disruption in the world steel market, all of which led to

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[1250] ITC Second Supplemental Report, p. 3.

[1251] The EC notes that the United States was free to restrict the imports of steel products from non-members such as Russia. The United States did in fact reach an agreement limiting steel imports from Russia after the import surges of 1998. This action did not prevent additional quantities of imports from other sources being displaced and entering the U.S. market and injuring domestic industries there, although the agreement did effectively limit imports from Russia after mid-1999. ITC Report, p. 35 n.75; ITC Dataweb Tables (US-49).

[1252] ITC Second Supplemental Report, p. 3.

[1253] China first written submission, para. 103.

[1254] China first written submission, para 103-106.

an increase in imports into the U.S. market.[1255] As data compiled by China itself shows, displaced steel production from Southeast Asia and the former USSR countries flowed into the U.S. market after 1997, but imports from all sources increased in the wake of those initial financial crises.[1256]

5. The Finding of "Unforeseen Developments" Need Not Be Linked to the Effect of Obligations Incurred By a Party Under the WTO Agreement

945. There is no requirement that the finding of "unforeseen developments" must be "coupled with" the effect of the obligations, including tariff concessions, incurred under the GATT 1994, as suggested by several Complainants.[1257] In fact, WTO panels and the Appellate Body have interpreted the "unforeseen developments" portion of Article XIX independently of the "effect of the obligations" provision.

946. In *Lamb Meat*, for example, the Appellate Body reviewed the "unforeseen developments" provision of Article XIX without reference to the "effect of the obligations" provision.[1258] The *Lamb Meat* panel report, which contains an even more detailed analysis regarding "unforeseen developments," mentions the "effect of the obligations" provision but does not require the establishment of a relationship between the obligations or tariff concessions and the unforeseen developments.[1259] In *Line Pipe*, the Appellate Body's discussion of "unforeseen developments" did not reference the "effect of the obligations" provision at all.[1260] Moreover, in *Argentina – Footwear* and *Korea – Dairy* the Appellate Body considered the "effect of obligations" element of Article XIX could be met independent of the existence of unforeseen developments, and concluded:

> With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .", we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions.[1261]

947. Similarly, the requirement that imports result from the effect of the obligations incurred by a contracting party does not specify or limit which "obligations" are relevant. Contrary to the argument of New Zealand, there is no requirement that the most recent round of concessions (in

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[1255] ITC Second Supplemental Report, p.3.
[1256] China first written submission, para. 103.
[1257] EC first written submission, paras. 137-139; New Zealand first written submission, para. 4.22.
[1258] *US – Lamb Meat*, AB Report, paras. 65-76.
[1259] *US – Lamb Meat*, Panel Report, paras. 7.4-7.45.
[1260] *US – Line Pipe*, AB Report, paras. 7.293 – 7.300.
[1261] *Argentina – Footwear*, AB Report, para. 91; *Korea – Dairy*, AB Report, para. 84.

this case, the Uruguay Round) is the only relevant round.[1262] As the plain language of Article XIX indicates, any "obligations incurred by a contracting party under this Agreement" may be relevant to the inquiry. Because the U.S. concessions on steel under the WTO Agreement also include concessions under the GATT 1947 (see for example paragraph 1(b)(i) of the GATT 1994), any and all of these obligations may be considered relevant.

6. The ITC Made The Required Finding of Unforeseen Developments Before the Safeguards Measures Were Imposed

948. The only temporal requirement that Article XIX imposes is that the finding of unforeseen developments precede the application of the safeguard measure. In the steel investigations, the finding of unforeseen developments was made most clearly in the ITC's Second Supplemental Report, issued on 4 February 2002 – well before the President's proclamation of safeguards measures.[1263]

949. As the Appellate Body found in *US – Lamb Meat*, "the text of Article XIX provides no express guidance" on the issue of "when, where, or how" a demonstration of unforeseen developments was to be made.[1264] The Appellate Body has found an implied requirement that a Member's demonstration of unforeseen developments be made "*before* the safeguard measure is applied."[1265] We have shown how this requirement was met.

950. Nonetheless, some Complainants argue that the ITC's findings are *ex post facto* and do not satisfy the requirements of Article 3.[1266] They argue that the ITC Second Supplemental Report was not only published after the ITC Report, but the findings themselves were made after the injury determination, and this timing invalidates the injury determination.

951. This view is wrong as a matter of law. The timing and sequence of the findings required under Article XIX and the Safeguards Agreement is irrelevant as long as those findings are made before a Member applies a safeguard measure. In *US – Line Pipe*, the Appellate Body noted that "we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty."[1267]

[1262] New Zealand first written submission, para. 4.26.

[1263] ITC Second Supplemental Report, pp. 1-4.

[1264] *US – Lamb Meat*, AB Report, para. 72.

[1265] *US – Lamb Meat*, AB Report, para. 72.

[1266] EC, first written submission, paras. 130-131; Norway, first written submission, para. 119; Switzerland, first written submission, para. 118.

[1267] *US – Line Pipe*, AB Report, para. 158.

952. Article 3.1 contains substantive obligations on the content of the report, and the procedural obligation that it be "published," but does not restrict the format. Thus, the choice of whether the components of the report are issued at the same time or over a period of time is left to the discretion of the individual Members. In this case, the ITC Second Supplemental Report is part of the report published in accordance with Article 3.1, pursuant to procedures established in advance. Thus, it meets the requirements of Article 3.1.

953. The Complainants' argument is also wrong as a matter of fact. The ITC and the interested parties knew from the outset of the investigation that an examination of unforeseen developments would occur. In his June 22, 2001, letter to the USITC, the USTR stated:

> Please be advised that if the Commission makes an affirmative determination . . . the President may request additional information from the Commission under section 203(a)(5) of the Trade Act. In particular, . . . [t]he President may also request the Commission to report on the developments that resulted in the relevant steel products 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 and whether those developments were unforeseen."[1268]

954. The ITC Report itself shows that the unforeseen conditions demonstrated in the ITC Second Supplemental Report informed its injury determinations. The ITC specifically sought information on unforeseen developments in the course of its investigation, by including specific questions on its various questionnaires and directly requesting parties to address the issue in written submissions.[1269] The ITC investigated the conditions, and the parties addressed them in briefs and in testimony at the ITC hearings. The ITC Report's Overview section addressed each of the conditions.[1270] The turmoil in financial markets was specifically noted as a condition affecting competition in the domestic market.[1271] Accordingly, the allegation that third parties had no opportunity to present evidence and their views on the issue of unforeseen developments, in violation of Article 3.1 of the Safeguards Agreement, is patently incorrect.[1272]

[1268] Letter from Robert B. Zoellick to The Honorable Stephen Koplan, June 22, 2001.

[1269] Purchasers' Questionnaire at Question I-6 (US-43); Importers' Questionnaire at Question I-6 (US-42); Domestic Producers' Questionnaire at I-7 (US-41). Tr., pp. 326-327 (Chairman Koplan) (US-44); 343 (Commissioner Hillman) (US-45); 1445 (Vice Chairman Okun) (US-46); and 2626 (Vice Chairman Okun) (US-47).

[1270] ITC Report, pp. OVERVIEW-17-18 (Asian financial crisis), OVERVIEW-18-19 (former USSR countries), OVERVIEW-57-60 (exchange rates), OVERVIEW-25-27 (U.S. steel market). Continued demand growth was discussed in individual production sections.

[1271] ITC Report, pp. 56-58. The moderate-to-high degree of substitutability, which facilitated the flow of steel imports from other markets into the U.S. market, was also discussed individual production sections. ITC Report, pp. 58 (CCFRS), 308 (tin mill) 96 (hot-rolled bar), 105 (cold-finished bar), 112 (rebar), 158 (certain welded pipe), 171 (FFTJ), 210 (stainless steel bar), 219 (stainless steel rod).

[1272] EC first written submission, para. 178; New Zealand first written submission, para. 4.30.

955. Thus, the ITC specifically took note of the unforeseen developments, the parties had an opportunity to address the issue, and the existence and effects of those developments informed its injury determination. In the ITC Second Supplemental Report, the ITC identified which of the cited conditions of competition were unforeseen developments. The ITC cited no information that had not already been presented to or provided by the parties in the course of the investigation.[1273]

7. The unforeseen developments cited by the ITC satisfy Article XIX of the GATT 1994

956. The ITC found that, in the years preceding and following the Uruguay round, substantial economic growth had occurred in a number of emerging markets, especially those in Southeast Asian. These high growth rates included substantial growth in exports. As late as the fall of 1997, high growth was still projected for this region. Despite these projections, a financial crisis began in mid-1997, triggered by the depreciation of the Thai baht. The depreciation sparked a wider crisis that affected growth in Asian and other developing markets, slowing growth and reducing local demand for steel.[1274]

957. The ITC found that, although the dissolution of the Soviet Union predated the conclusion of the Uruguay Round, subsequent unanticipated financial difficulties led to a sharp increase in exports of steel from the former countries of the Soviet Union at the same time that other Eastern European countries also became net exporters of steel.[1275]

958. The ITC also found that these financial disruptions occurred at a time when demand in the United States remained strong, with total apparent consumption for most steel products peaking in 2000. The ITC noted that this particularly strong, continued growth occurred at a time when other markets were stagnant if not actually contracting. This disparity caused the dollar to appreciate against most major currencies throughout the period, including most European and Asian currencies. The continued strength of the U.S. dollar made the U.S. market particularly attractive for steel products displaced from other markets.[1276]

[1273] This demonstrates that the ITC Second Supplemental Report is not an *ex post facto* explanation, such as the panel in *Chile – Price Band Systems* rejected. In that dispute, Chile's competent authority discussed a particular condition of competition in its report, but did not identify it as an unforeseen development or explain how it was unforeseen. The first demonstration that it was unforeseen occurred in Chile's written submissions to the panel. The Panel found such an explanation, without support in the Article 3.1 report, to be *ex post facto*. *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, paras. 7.136-7.139. In the steel investigations, the ITC provided its findings on unforeseen developments as part of its investigations, before application of the measure, and included them in its report. Therefore, it met the requirements of Article 3.1 and Article XIX.

[1274] ITC Second Supplemental Response, pp. 2-3.

[1275] ITC Second Supplemental Response, p. 3.

[1276] ITC Second Supplemental Response, p. 3.

959. The ITC noted that imports have historically been in the U.S. market, but found that, after the financial crises in Southeast Asia and the former USSR countries destabilized those markets, unusually large volumes of foreign steel were displaced into the U.S. market. The ITC found that the U.S. market was the destination for a significant portion of that displaced production, and currency devaluations made these displaced exports attractive to U.S. purchasers because of favorable price terms.[1277]

a. The disruption in Southeast Asian markets was an unforeseen development that resulted in increased imports

960. The ITC found that, despite continued forecasts of impressive economic growth, a number of economies in Southeast Asia were hit by unforeseen financial crises which led to currency depreciations, slowed economic growth, and reduced demand for steel in those markets.[1278] These crises diverted steel production into other markets in the form of significantly increased exports.

961. The EC and others argue that the increase in exports from Asia existed before the conclusion of the Uruguay Round.[1279] However, the level of exports from those affected countries changed radically after currency depreciations began in mid-1997.

962. ITC import data strongly support its finding that the financial disruptions in Southeast Asia led to displaced steel production being diverted to the U.S. market. Imports to the U.S. market from five Southeast Asian countries affected by the currency disruptions beginning in mid-1997 jumped by 113.5 percent just between 1997 and 1998.[1280] Nor did the market in those countries return to normal as quickly as the EC and others argue. Imports of all steel products from those five countries in 2000 were 132.8 percent higher than in 1996.[1281]

963. The EC mistakenly asserts that the ITC's analysis was based on a simple assumption that a decline in domestic steel consumption in the Southeast Asian countries would result in an increase in imports to the U.S. market. To the contrary, the ITC based its analysis on import data that firmly supported its finding that the financial crises disturbed the worldwide market for steel. As we have shown imports of steel products from each of the countries most seriously affected by the currency depreciations of 1997 and 1998 surged after the currency crises began and remained at high levels afterward. The data also support the ITC's finding that these currency

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[1277] ITC Second Supplemental Response, pp. 3-4.

[1278] Aside from making general objections regarding the foreseeable nature of currency fluctuations, no party provided any evidence indicating the depreciation of the Thai baht and the subsequent depreciations in other Southeast Asian currencies were in fact foreseen.

[1279] EC first written submission, para 171.

[1280] China first written submission, para 103; ITC Dataweb tables (US-49).

[1281] China first written submission, para 103; ITC Dataweb tables (US-49).

crises displaced steel production elsewhere, as demonstrated by the unprecedented increase in imports from areas outside Southeast Asia.

964. The EC claims that "the fact that consumption of steel products in the Asian countries is now increasing should have led [the ITC] to conclude that the crisis cannot now be an "'unforeseen developments' that is (still) leading to increased imports into the United States."[1282] Both the Working Party in *Felt Hats* and the Appellate Body in *Argentina – Footwear* indicate that the developments must have been unforseen at the time when a Member granted the relevant concession.[1283] Thus, the relevant question is what was foreseen by the Member at the time the concession was granted, not what was foreseen at the time the injury determination was reached.

965. Additionally, as import data show, the crisis had hardly passed, even if steel consumption in those five countries had begun to recover. Imports of steel products from those five Southeast Asian countries remained at high levels in 1999 and 2000. As noted above, imports of steel products from those five countries in 2000 were still 132.8 percent higher than in 1996.

b. The financial disruptions in the former USSR countries were an unforeseen development that resulted in increased imports

966. The ITC found that Russia and the other former USSR countries experienced intense financial disruptions and currency fluctuations between 1996 and 1999.[1284] These financial disruptions diverted steel shipments from those local markets and into the world market, with large volumes of that displaced steel production finding its way to the U.S. market.

967. The EC complains that the breakdown of the Soviet Union occurred in 1989-1991, well before the conclusion of the Uruguay Round. But the ITC did not cite the dissolution of the Soviet Union as an unforeseen development. Rather, the ITC cited the unforeseen difficulties which the former Soviet Union republics encountered after dissolution, most specifically the intense financial disruptions and currency fluctuations which occurred after 1996.

968. The ITC's investigation provided abundant evidence that the financial disruptions in the former USSR countries beginning in 1996 changed export and consumption patterns in the region. Although the cited decrease in apparent domestic consumption of steel products in the former Soviet republics, along with an increase in exports, began soon after the dissolution of the Soviet Union in 1991, the severity of the imbalance between these trends sharpened after 1996. In 1996, the ratio of apparent domestic consumption of steel to exports for those countries was 1.37; for every ton of steel consumed, the countries exported 1.37 tons. By 1998 that ratio rose to 1.57. In 1999 the ratio remained at a relatively high level of 1.54. Within a short period of

[1282] EC first written submission, para. 172.

[1283] *Felt Hats*, para. 9; *Argentina – Footwear*, AB Report, para. 93.

[1284] Aside from making general objections regarding the foreseeable nature of currency fluctuations, no party provided any evidence indicating these currency depreciations were actually foreseen.

time, the region's reliance on exports increased significantly.[1285] The modest increase in consumption cited by the EC did little to mitigate the need for exports for those countries.

969. The assertion that "exports from former USSR countries...were not for the US market" is simply in error.[1286] Imports into the U.S. market of flat-rolled products from Russia increased from 3.2 million short tons in 1997 to 5.1 million short tons in 1998; exports of flat-rolled products from Lithuania jumped from 1,560 short tons in 1997 to 62,930 short tons in 1998; exports of flat-rolled products from Kazakhstan increased from 22,588 short tons in 1997 to 149,265 short tons in 1998; imports of rebar rose from 33,378 short tons in 1997 to 104,400 short tons in 1998 and 309,049 short tons in 1999.[1287]

970. Similar increases occurred in other categories and from other former USSR countries.[1288] Imports into the U.S. market of all steel products from ten of the former USSR countries increased by 67.3 percent between 1997 and 1998 alone.[1289] An agreement limiting steel imports from Russia was reached in mid-1999, curtailing imports from Russia. But imports from other former USSR countries remained high. Imports of all steel products from nine former USSR countries increased by 115.1 percent between 1997 and 1998 alone, and imports from those nine countries in 2000 were 145.4 percent higher than in 1996.[1290] The ITC Report and the associated data tables prepared for the ITC's investigation more than adequately document the surge of imports from Russia and other former USSR countries during the period of investigation. The ITC's conclusion that a significant portion of the displaced production from the former USSR countries was diverted to the U.S. market was well-supported by the record.

c. The continued strength of the U.S. market and the U.S. dollar were unforeseen developments that resulted in increased imports

971. The EC and others complain that the continued strength of the U.S. market could not be cited as an unforeseen development, since all economic policies are conducted with precisely this objective.[1291] As the ITC found, the unforeseen developments consisted not merely of continued growth in demand in the U.S. market for steel products, but rather the continued growth in that market while other markets contracted or stagnated, making the U.S. market an especially attractive one for steel products displaced from other markets.[1292] If consistent economic expansion over a long period of time, despite stagnation or contraction in other, interrelated markets, were so predictable, countries would not need economic policies.

[1285] ITC Report, p. OVERVIEW-19, Tables OVERVIEW-4 and OVERVIEW-5.
[1286] EC first written submission, para 165.
[1287] ITC Dataweb tables (US-49).
[1288] ITC Dataweb tables (US-49).
[1289] China first written submission, para 103; ITC Dataweb tables (US-49); and INV-Y-180 (US-40).
[1290] China first written submission, para 103; ITC Dataweb tables (US-49); and INV-Y-180 (US-40).
[1291] EC first written submission, para 151.
[1292] ITC Second Supplemental Report, p. 3.

972. The EC and others make a similar complaint regarding the appreciation of the U.S. dollar during the period under investigation. The EC and others claim that, given the regularity of currency changes, currency fluctuations cannot be an unforeseen development under Article XIX:1(a). Again, however, Article XIX:1(a) itself has no such limitation. As a factual matter, however, the unforeseen development cited by the ITC was not that the dollar "would not remain stable," as the EC says. Rather, the period under investigation saw persistent and widespread appreciation in the U.S. dollar against virtually all other major currencies.[1293] Between the first quarter of 1996 and the first quarter of 2001, virtually every major currency experienced significant real depreciation against the dollar. The dollar was neither stable nor "fluctuating": throughout the period the dollar generally moved in only one direction against most major currencies. As the ITC found, it was the confluence and unusual persistence of these events, such as continued growth in the U.S. economy while other economies stagnated or contracted, and persistent, widespread currency appreciation, that made these developments unforeseen.

973. The situation is analogous to that in *Felt Hats*. At issue in that investigation was whether a change in fashion could be an unforeseen event. It could be argued that general classes of events, such as changes in fashion, occur and could be foreseen. The Working Party in *Felt Hats* nonetheless found that, while certain events could be generally foreseen, the particular fashion change that did occur, in its particular breadth and persistence, was unforeseen.

974. Currencies do fluctuate and demand for products sometimes increases. However, the ITC's findings make clear that each of the events it cited as unforeseen occurred with a rapidity, a breadth, or a persistence which made the event unusual and unexpected.

975. The EC complains that the ITC report failed to show that the persistent appreciation of the U.S. dollar was caused by the economic crises in Russia or Asia.[1294] The EC does not even suggest why such an explanation would be required. The U.S. dollar appreciated between 1996 and 2000 for a variety of factors, including, but not limited to, the instability in emerging markets. The ITC cited the persistent appreciation of the U.S. dollar as another unforeseen development which interacted with the economic crises in Russia and Asia to produce an injurious surge of imports.

d. The timing of these particular developments was an unforeseen development that resulted in increased imports

976. The ITC report cited a number of unforeseen developments that resulted in the ten steel products being imported into the United States in such increased quantities and under such conditions as to cause serious injury to the domestic industries. Each of those developments was unforeseen in and of itself. However, the confluence of this particular set of events can be described as an unforeseen development. No party has argued that anyone foresaw the particular

[1293] ITC Second Supplemental Report, p. 1; ITC Report, Table OVERVIEW-16.
[1294] EC first written submission, paras. 174-175.

combination of financial crises and currency depreciations occurring in both Southeast Asia and the countries of the former Soviet Union at the same time that the U.S. market was experiencing an extended period of economic expansion and resulting currency appreciation and other economies were stagnant or contracting.

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

977. As we explained in Sections C through F, 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 Commission reached a divided vote and the affirmative votes were designated by the President as the determination of the ITC, neither changes the analysis under Articles 3.1 and 4.2(c) nor necessitate additional explanation by the President.

978. The ITC concluded that tin mill and stainless steel wire were "divided votes" under U.S. law, colloquially referred to as "tie votes." This conclusion reflected the following determinations by the individual Commissioners:

- Three Commissioners concluded that tin mill was a distinct like product, and reached negative determinations. One Commissioner concluded that tin mill was a distinct like product, and reached an affirmative determination. Two Commissioners concluded that tin mill fell within a larger like product along with other flat-rolled steel, and reached affirmative determinations for that product. There is no dispute that there were three affirmative votes with regard to a like product that included tin mill steel.[1295]

- For stainless steel wire, three Commissioners concluded that stainless steel wire was a distinct like product, and reached a negative determination. One Commissioner concluded that stainless steel wire was a distinct like product and issued an affirmative determination. Two Commissioners concluded that stainless steel wire and stainless steel rope together form a single like product, with one of them reaching a determination of threat of serious injury and the other a determination of serious injury. Again, there is no dispute that there were three affirmative votes with regard to a domestic like product that included stainless steel wire.[1296]

There were also divided votes on two other products, tool steel and stainless steel fittings and forgings.

[1295] ITC Report, pp. 17-18.
[1296] *Ibid.*

979. Under section 330(d) of the Tariff Act of 1930, in a proceeding in which the ITC must determine:

> under section 202 of the Trade Act of 1974 whether increased imports of an article are a substantial cause of serious injury or the threat thereof . . . and the commissioners voting are equally divided with respect to such determination, then the determination agreed upon by either group of commissioners may be considered by the President as the determination of the Commission.

Acting under this authority, the President designated the divided votes on tin mill and stainless steel wire as affirmative determinations, and the divided votes on tool steel and stainless steel fittings and forgings as negative determinations.[1297]

1. The ITC Treatment of the Tin Mill Steel and Stainless Steel Wire Votes Is Consistent with U.S. Law and the Agreement on Safeguards

a. The Safeguards Agreement Leaves To The Members Matters Relating To The Decision-Making Process, Including What Constitutes A Decision

980. The Appellate Body in *US – Line Pipe* made it clear that the internal decision making process of a Member is entirely within the discretion of that Member and an exercise of its sovereignty:

> We note also that we are not concerned with how the competent authorities of WTO Members reach their determination in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*.[1298]

Thus, the Agreement leaves the decision-making process to the Members, including the identification of what constitutes a decision under its municipal law, provided that the determination, "however it is decided domestically," meets the requirements of the Agreement.

[1297] Presidential Memorandum, 67 Fed. Reg. 10593, Proclamation 7529.
[1298] *US – Line Pipe*, AB Report, para. 158. Emphasis in original.

981. The implementing legislation enacted by the United States and notified to the Committee on Safeguards sets out the U.S. decision-making process.[1299] It provides for the ITC to conduct investigations and make injury determinations,[1300] and for the President to make the decision on remedy and certain other matters.[1301] It provides that when the ITC is equally divided in its injury determination, the President may consider as the ITC determination either the determination of the Commissioners voting in the affirmative or those voting in the negative.[1302]

b. The ITC Report Shows That Three Commissioners Made Affirmative Determinations on Tin Mill And That Those Determinations Are Supported By the Necessary Findings and Conclusions

982. The determinations of the three ITC Commissioners who made affirmative determinations on tin mill steel are supported by findings and conclusions and a detailed analysis that fully meets the requirements of Articles 3.1 and 4.2(c) of the Safeguards Agreement.[1303]

983. In their written views explaining their determinations, the ITC Commissioners first addressed the question of the domestic industry producing the like or directly competitive product, and then addressed the question of whether increased imports were causing serious injury to that industry.

984. Two Commissioners adopted a relatively broad definition of industry and the like product corresponding to the subject imported merchandise. Commissioner Bragg identified the domestic industry as U.S. producers of carbon and alloy flat products.[1304] Commissioner Devaney identified the domestic industry as U.S. producers of flat-rolled steel products. Tin mill products are a subset of the like product identified by both Commissioners Bragg and Devaney. Both Commissioners found that imports corresponding to the flat-rolled like product that they defined caused serious injury to the domestic industry.[1305]

985. It is clear that both Commissioners Bragg and Devaney specifically considered tin mill in their analysis. Commissioner Bragg found as follows: "I determine that certain steel products are being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industries producing: (1) carbon and alloy flat products (including slab, hot-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products)".[1306]

[1299] In general, *see* 19 U.S.C. §§2251-2254.
[1300] 9 U.S.C. § 2252.
[1301] 19 U.S.C. § 2253.
[1302] 19 U.S.C. § 1330(d)(1).
[1303] *See* Sections C, D, E and F of this submission.
[1304] ITC Report, p. 272.
[1305] ITC Report, pp. 50, 269.
[1306] ITC Report, p. 269.

986. Commissioner Devaney defined the domestic industry "appl[ying] the same basic analysis as the majority. However, he found a single like product consisting of all flat products."[1307] He expressly stated that his finding should be applied to the more narrow categories determined by the majority. "Commissioner Devaney joins in the analysis of the majority, related to injury, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, i.e., the industry is seriously injured."[1308]

987. Thus, both ITC Commissioners made affirmative injury and causation findings with respect to tin mill steel because, in their analyses, these products are included in the larger category of carbon and alloy flat products, which they define as the relevant like product.

988. Four of the Commissioners (Koplan, Okun, Miller, and Hillman) found that the U.S. tin mill producers constitute the industry producing the article like the imported article, tin mill steel. Of these four, Commissioner Miller found that imports of tin mill products caused serious injury to the U.S. tin mill industry.[1309]

989. The ITC combined the affirmative votes of Commissioners Bragg and Devaney on the broader industry with that of Commissioner Miller on tin mill industry and, pursuant to the U.S. statute, reported to the President that it was "equally divided" with respect to tin mill products.[1310] [1311]

c. The ITC Report Shows That Three Commissioners Made Affirmative Determinations on Stainless Steel Wire And That Those Determinations Are Supported By the Necessary Findings and Conclusions

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[1307] ITC Report, p. 36, n. 65.
[1308] ITC Report, p. 50, n. 186.
[1309] ITC Report, p. 307.
[1310] The Commission explained its determination as follows:

> Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman determine that carbon and alloy tin mill products are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury; Commissioners Bragg, Miller, and Devaney make an affirmative determination regarding imports of carbon and alloy tin products.

ITC Report, p. 25.

[1311] 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 steel was consistent with U.S. law. *Corus Group et al. v. George W. Bush et al.*, Slip Op. 02-87 (Aug. 9, 2002). The court specifically held that Commissioners Devaney and Bragg considered tin mill steel in their analysis, and thus made affirmative injury and causation findings with respect to tin mill steel. This same reasoning applies to the divided vote on stainless steel wire products.

990. The determinations of the three ITC Commissioners who made affirmative determinations on stainless steel wire are supported by findings and conclusions and a detailed analysis that fully meets the requirements of Articles 3.1 and 4.2(c) of the Safeguards Agreement.[1312]

991. In their written views explaining their determinations, the ITC Commissioners first addressed the question of the domestic industry producing the like or directly competitive product, and then addressed the question of whether increased imports were causing serious injury to that industry.

992. Two Commissioners, Bragg and Devaney, found stainless steel wire and stainless steel rope to be included in a single like product and defined the domestic industry, accordingly, to include producers of both stainless steel wire and steel rope.[1313] There were only slight differences in their respective definitions of the domestic industry. Commissioner Bragg identified the domestic industry as U.S. producers of stainless steel wire products, including stainless steel wire and wire rope.[1314] Commissioner Devaney identified the domestic industry as U.S. producers of stainless steel wire and rope.[1315] Stainless steel wire is a subset of the like product identified by Commissioners Bragg and Devaney. Commissioner Bragg found that increased imports of the articles corresponding to the domestic like product threatened to cause serious injury to the domestic industry,[1316] and Commissioner Devaney found that increased imports caused serious injury to the domestic industry.[1317]

993. It is clear that both Commissioners Bragg and Devaney considered stainless steel wire in their analysis. Commissioner Bragg found as follows: "I determine that certain steel products are being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industries producing: . . . (8) stainless wire products (including stainless wire and wire rope)".[1318]

994. Commissioner Devaney stated: "I find that stainless steel wire and wire rope ('wire products') are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic stainless steel wire products industry."[1319]

[1312] *See* Sections C, D, E and F of this submission.
[1313] ITC Report, p. 27, n. 14.
[1314] ITC Report, p. 277.
[1315] ITC Report, p. 336.
[1316] ITC Report, p. 289.
[1317] ITC Report, p. 342.
[1318] ITC Report, p. 269.
[1319] ITC Report, p. 342.

995. Thus, both ITC Commissioners made affirmative injury and causation findings with respect to stainless steel wire because, in their analyses, these products are included in the larger category of stainless steel wire products.

996. Four of the Commissioners (Koplan, Okun, Miller, and Hillman) found that the U.S. stainless steel wire producers constitute the industry producing the article like the imported article, stainless steel wire.[1320] Of these four, Commissioner Koplan found that imports of stainless steel wire caused serious injury to the U.S. stainless steel industry.[1321]

997. The ITC combined the affirmative votes of Commissioners Bragg and Devaney on the broader industries with that of Commissioner Koplan on stainless steel wire and, pursuant to the U.S. statute, reported to the President that it was "equally divided" with respect to stainless steel wire.[1322]

d. The Complainants' Claims Find No Support in the Text of the Agreement

998. The essence of the claim that Norway and other parties make about the ITC's tie votes on tin mill and stainless steel wire concerns how the United States reaches the ultimate legal findings in safeguard actions under its domestic law. As indicated above, the Safeguards Agreement leaves such matters to the discretion of Members as the Appellate Body made clear in *US – Line Pipe.*

999. Norway, for example, claims that the ITC erred in how it counted votes. Norway acknowledges that all six ITC Commissioners voted on tin mill, and that three of the six Commissioners voted in the affirmative on tin mill. However, Norway asks the Panel to disregard – in effect, nullify – two of the affirmative votes, because the Commissioners making those votes defined the domestic industry differently from the other four Commissioners. Norway urges the Panel to find that the ITC made a negative determination by a vote of 3-1 on tin mill, and that the President included tin mill in the remedy based on what Norway alleges to

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[1320] ITC Report, p. 201.

[1321] ITC Report, p. 234, n. 1518; p. 256.

[1322] The Commission explained its determination as follows:

> Chairman Koplan and Commissioners Bragg and Devaney determine that . . . stainless steel wire . . . [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. Vice Chairman Okun and Commissioners Miller and Hillman determine that . . . stainless steel wire . . . [is] not 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.

ITC Report, p. 27.

be just one affirmative vote.[1323] Brazil, China, Korea, and Japan make similar arguments with regard to tin mill.[1324]

1000. China makes a similar claim in the case of stainless steel wire. While acknowledging that three ITC Commissioners voted in the affirmative with respect to stainless steel wire, China argues (without offering support) that the President did not consider the determinations of two of the Commissioners since their determinations were based on a broader domestic industry, consisting of producers of stainless steel wire and stainless steel wire rope, and that the President's decision was based on the decision of only one Commissioner.[1325]

1001. None of the parties provide support for their claims, either in the text of the Safeguards Agreement, or in panel or Appellate Body reports, that the ITC's method of counting votes – cumulating the votes of the individual Commissioners – is within the purview of a panel, or explain how it is inconsistent with Articles 2.1 and 4.2 of the Agreement. Nor do they provide support for their underlying claim that the findings of the different decision-makers must be exactly the same on all issues in order to be aggregated.

1002. In their submissions, they fail to address or even acknowledge the recent finding of the Appellate Body in *US -- Line Pipe*, in which the Appellate Body both confirmed that the decision-making process is left to the discretion of the Members and found no inconsistency between the requirements of the Agreement and the manner in which the ITC counts votes, at least in the instance of its present injury and threat of injury determinations.

e. The Appellate Body's Finding In *US – Line Pipe* Supports The ITC's Practice Of Aggregating Mixed Votes Of Individual Commissioners

1003. As part of its review of the U.S. safeguard measure in *US – Line Pipe*, the Appellate Body, in response to a claim made by Korea, analyzed whether a Member is required to make a finding based on either present serious injury or threat of serious injury, *i.e.*, whether a Member may base its ultimate legal determination on the discrete findings of a combination of officials, some finding present injury and others concluding that a threat of injury exists.

1004. In its *Line Pipe* decision, the ITC announced that it had made an affirmative determination by a vote of 5-1, with three Commissioners finding present serious injury, and two finding a threat of serious injury. Korea contested that vote count, and claimed that the Agreement required the United States to make a discrete determination of either serious injury or

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[1323] Norway first written submission, para. 303-308.

[1324] For a similar argument by other parties, see Brazil first written submission, para. 248-253; EC first written submission, para. 477-478, 575-577; Japan first written submission, para. 149, 153-157; Korea first written submission, para. 193-194.

[1325] China first written submission, para. 532-534.

threat of serious injury, as opposed to "serious injury or threat of serious injury." In essence, Korea argued that the ITC could not combine the votes of Commissioners who found present injury with the votes of those who found a threat of injury.

1005. In rejecting Korea's claim, the Appellate Body said that if a Member has taken a safeguard action that satisfies the requirements of the Agreement, the particular manner in which the decision is reached by the competent authorities is of no consequence. Specifically, the Appellate Body in *US – Line Pipe* reached the following conclusion regarding the required finding under Article 2.1:

> Based on this analysis of the most relevant context of the phrase "cause or threaten to cause" in Article 2.1, we do not see that phrase as necessarily meaning *one or the other, but not both.* Rather, that clause could also mean *either one or the other, or both in combination.* Therefore, for the reasons we have set out, we do not see that it matters – for the purpose of determining whether there is a right to apply a safeguard measure under the *Agreement on Safeguards* – whether a domestic authority finds that there is "serious injury", "threat of serious injury", or, as the USITC found here, "serious injury or threat of serious injury". In any of those events, the right to apply a safeguard is, in our view, established.[1326]

Thus, the Appellate Body, in rejecting Korea's complaint, concluded that the requisite findings had been made by the ITC. The same conclusion is appropriate with respect to the votes of Commissioners Bragg and Devaney with respect to stainless steel wire products. The fact that Commissioner Bragg found that increased imports constituted a threat of serious injury while Commissioner Devaney determined that such imports cause serious injury does not in any way diminish the sufficiency of their findings for purposes of Article 2.1.

1006. The Appellate Body's conclusion is also instructive with regard to the affirmative votes made by those Commissioners whose respective starting point for their assessment of serious injury began with a different definition of the relevant like products. By way of example, both Commissioners Bragg and Devaney defined a like product that consisted of a broad grouping of flat-rolled steel products, including tin mill steel. They both analyzed increased imports corresponding to the like product, as they defined it, considered the conditions of competition, and assessed whether the domestic industry was suffering or threatened with serious injury and lastly considered the causal link, if any, between any such injury and the increased imports. As discussed in sections D and E of this submission, their legal findings fulfilled the requirements of Articles 2.1 and 4.2 of the Agreement. Therefore, they satisfied the applicable requirements set forth in the Agreement to be completed by the competent authorities in this regard.[1327]

[1326] *US – Line Pipe*, AB Report, para. 171 (emphasis in original).

[1327] The Appellate Body said in *US - Line Pipe*: "*First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member

(continued...)

1007. At the same time, four other Commissioners defined a like product consisting exclusively of tin mill steel and conducted the same methodical analysis required by Articles 2 and 4 of the Agreement. One of the four Commissioners concluded that increased imports of tin mill steel were causing serious injury to the domestic industry producing tin mill steel as discussed in sections D and E of this submission.

1008. Since each Commissioner's determination fulfilled the requirements of Articles 2 and 4, each provides a valid basis under both U.S. law and the Agreement for determining whether increased imports are a cause of serious injury to a domestic industry. Accordingly, the ITC was warranted in combining all of the affirmative votes and all of the negative votes to determine the collective decision of the agency. In the case of both tin mill steel and stainless steel wire, this process resulted in an evenly divided Commission with each grouping of Commissioners, consisting of three votes.

1009. Thus, as in *Line Pipe*, a multiple number of ITC Commissioners reached the same conclusion that domestic producers of tin mill and domestic producers of stainless steel wire, either by themselves or as part of a larger group of producers, are seriously injured or threatened with serious injury by increased imports. As in *Line Pipe*, they reached the same result, albeit based on different findings on certain discrete subject matter. Each group of three determined, based on the facts in the case, that the right to apply a safeguard measure on imports of tin mill and stainless steel wire had been established.

1010. The essence of what Norway, China, and other parties argue is that the ITC should hold two votes, one on the definition of industry and the other on whether the industry as defined by the majority is seriously injured or threatened with serious injury by increased imports. This is not, of course, how the ITC votes or counts votes or a subject to which the Agreement speaks. Moreover, the vote-counting methodology they appear to advocate could have the unintended consequence, in other cases, of changing the ITC's decision from a negative one to an affirmative one. For example, if a majority of ITC Commissioners (e.g., three of five voting) favor one definition of like product, but the majority of those Commissioners (two of the three) reach a decision regarding increased imports, serious injury and the causal link that is different from that reached by the majority of all Commissioners, the minority decision, under the vote counting methodology advocated by Norway, China, and others, would be the "majority" ITC decision. We doubt that this is the result Norway, China, and the other parties are pursuing.

1011. In conclusion, the ITC reached a divided vote with regard to tin mill and stainless steel wire under U.S. law and their decisions fully complied with the requirements of the Agreement.

[1327] (...continued)
in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry." Report, para. 84.

2. Articles 3.1 and 4.2(c) Did Not Require the President to Issue a Report Explaining the Basis For His Decision to Treat Certain Tie Votes as Affirmative Determinations

1012. Section 330 of the Tariff Act allows the President, when faced with a divided vote, to consider the vote to be either an affirmative or negative determination by the ITC as a whole. He does not conduct his own investigation, or render his own determination. Instead, he chooses whether the negative or affirmative determinations and their supporting views – each side complete and potentially valid under U.S. law – will be the determination of the ITC. In this case, Proclamation 7529 states that he considered "the determinations of the commissioners with regard to tin mill products and stainless steel wire," and refers to no other factors.

1013. Some Complainants argue that the President acted inconsistently with Articles 3.1 and 4.2(c) because "no explanation was provided at all by the President, in his proclamation or elsewhere, as to why he agreed with one or the other side of these tie votes."[1328] However, no such explanation is required. Permitting the President to designate the determination of the ITC in the case of a divided vote is part of the U.S. internal process for deciding what is the determination of the competent authorities. The Safeguards Agreement does not contain an obligation on this process.

1014. As an initial point, these arguments demonstrate a misunderstanding of the role of the President in the process. Japan and Korea state that the President acted impermissibly when he "considered" or "treated" these votes as divided votes.[1329] However, it was the ITC that decided that the votes were equally divided.[1330] Proclamation 7529 indicates that the President recited this characterization by the ITC, and did not make an independent decision as to whether the vote was divided.[1331]

1015. China alleges that in reaching his decision on the divided votes, the President did not consider the determinations of Commissioners Bragg and Devaney concerning "flat steel" (including tin mill) and stainless steel wire products (including stainless steel wire).[1332] Proclamation 7529 states:

> Having considered the determinations of the commissioners with regard to tin mill products and stainless steel wire, I have decided to consider the determinations of

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[1328] Japan first written submission, para. 170.

[1329] Japan first written submission, paras. 149-150; Korea first written submission, para. 166.

[1330] ITC Report, p. 1, n. 1.

[1331] Proclamation 7529, recital 2 ("The ITC commissioners were equally divided with respect to the determination required under section 202(b) regarding whether (i) carbon and alloy tin mill products ('tin mill products') and (j) stainless steel wire.").

[1332] China first written submission, paras. 508 and 534.

> the *groups* of commissioners voting in the affirmative with regard to each of these products to be the determination of the ITC.[1333]

The reference to the "groups" of Commissioners making affirmative determinations shows that the President considered all of the affirmative determinations that covered tin mill and stainless steel wire, including the determinations regarding larger like products that encompassed tin mill and stainless steel wire.

1016. As the Appellate Body has recently stated:

> we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*.[1334]

1017. That is the case for tin mill and stainless steel. The competent authorities (*i.e.*, the ITC) made an affirmative determination with regard to tin mill and stainless steel wire under U.S. law and fully complied with Article 3.1 by publishing "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The report addressed all of the factors necessary for an affirmative determination consistent with Articles 2.1 and 4. Since the views of the Commissioners and data in the ITC Report provided findings and reasoned conclusions in support of the affirmative determinations, Article 3.1 did not require further explanation by the President. This is in keeping with the President's role in the U.S. statutory process – not to make a separate determination, but to decide on which of the determinations already made by the Commissioners to rely as the determination of the ITC as a whole.

I. Consistent With Article 5.1, the United States Applied the Steel Safeguard Measures No More Than the Extent Necessary to Prevent or Remedy Serious Injury And to Facilitate Adjustment

1018. As described by the Appellate Body, the assessment of consistency with the Safeguards Agreement involves two "separate and distinct" inquiries: "first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercised, through the application of

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[1333] Proclamation 7529, recital 4 (emphasis added).
[1334] *US – Line Pipe*, AB Report, para. 158.

such a measure, within the limits set out in the treaty?" In the first inquiry, a panel must evaluate whether the competent authorities have properly determined that increased imports have caused serious injury to a domestic industry. In the second inquiry, the panel must evaluate whether the Member has applied the safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[1335]

1019. We have shown in the preceding sections that the first inquiry should result in the conclusion that the ITC complied fully with the U.S. obligations under the Safeguards Agreement. It properly found that increased imports caused serious injury to ten domestic industries, identified the nature and extent of the injury attributable to increased imports, as distinguished from injury caused by other factors. The ITC also provided the findings necessary to satisfy the parallelism principle enunciated by the Appellate Body.

1020. Based upon these findings, the United States adopted the steel safeguard measures to prevent or remedy serious injury and to facilitate adjustment, as those terms have been explicated by the Appellate Body. An explanation of the measures as established by the President on March 5, 2002, will show that they fully satisfied the obligations under Article 5.1. After this review, if the Panel still entertains any doubt as to the Article 5.l consistency of one or more of the steel safeguard measures, the product exclusions granted by the United States after the establishment of the safeguard measures should eliminate that doubt.

1. A Member May Apply A Safeguard Measure In Any Form And At Any Level That Falls Within The Parameters of Article 5.1

1021. Article 5.1 explicitly states that the role of applying a safeguard measure is 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. Thus, a safeguard remedy is permitted to be applied as long as it in necessary to remedy (or prevent) the serious injury and to facilitate adjustment.

1022. 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.

1023. The Appellate Body explained this analysis in *US – Line Pipe*, observing that

> the words of Article 5.1, first sentence, state that a safeguard measure may be applied "*only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment*". (emphasis added) This phrase sets the maximum

[1335] *US – Line Pipe*, Appellate Body Report, para. 84.

> permissible extent for the application of a safeguard measure under the *Agreement on Safeguards*."[1336]

Thus, the serious injury experienced by the domestic industry and the need to facilitate adjustment define the limit for applying a safeguard measure. Specifically, the Appellate Body has stated that Article 5.1 "must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports"[1337] and that this

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[1336] *US – Line Pipe*, AB Report, para. 245.

[1337] *US – Line Pipe*, Appellate Body Report, para. 260. The United States has previously noted its concerns with the Appellate Body's reasoning in *Line Pipe*. Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/121, para. 35 (3 April 2002). These concerns apply with particular force to the Appellate Body's interpretation of Article 5.1.

First, in reaching its conclusion that Article 5.1 allows application of a safeguard measure only to the extent necessary to remedy the injury attributable to imports, the Appellate Body disregarded that Article 5.1 addresses "serious injury." Article 4.1 defines this term as the "significant overall impairment of a domestic industry," without limitation regarding attribution to increased imports. Article 4.2(b) supports this conclusion, as it uses "serious injury" to refer to the overall condition of the industry, and "injury" to refer to the effect of increased imports taken alone. The absence from Article 5.1 of the term "injury" by itself indicates that the injury caused by imports is not a factor in the Article 5.1 analysis. There also appears no recognition of the other purpose under Article 5.1, which is facilitating adjustment. Those words may not just be read out of the agreement.

Second, the Appellate Body based its conclusion, in part, on the belief that the Safeguards Agreement covers fair trade, and that relief "disproportionate" to the injury caused by increased imports made no sense in comparison to the "less trade-restrictive" antidumping or countervailing duty remedies available for unfair trade. However, Articles 9.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and Article 19.2 of the *Agreement on Subsidies and Countervailing Measures*, however, clearly envisage situations in which an antidumping or countervailing duty would be applied *more* than the extent of the injury caused by imports. If that were not the case, the "lesser duty" provisions of those Articles would be unnecessary. Thus, the Appellate Body's observations about antidumping and countervailing duties are simply inapposite.

Third, the Appellate Body erred when it found that references to "imports" in Article XIX and the *Agreement on Safeguards* suggest that the measures taken under those rules must address only the effects of imports. Rather, such references reflect that the measures – regardless of their level – fall *on* imports.

Fourth, the Appellate Body incorrectly relied for support on the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts in reaching its conclusion on the permissible extent of application of a safeguard measure. The Draft Articles are not international law, let alone a principle of interpretation of public international law. They apply only to responses to wrongful acts. As the Appellate Body itself made clear, a safeguard measure is <u>*not*</u> a response to an unlawful act. In addition, the Draft Articles specifically provide that they do not apply in the event that legal consequences for an internationally wrongful act are determined by special rules of international law, under the principle of *lex specialis* (Article 55). Thus, there was no basis for referring to the Draft Articles or for importing a supposed proportionality principle into the Safeguards Agreement. Further, the United States and other Members did not sign an agreement imposing an overarching proportionality requirement. Panels and the Appellate Body are specifically prohibited from adding to or diminishing a Member's rights and obligations under a covered agreement.

In addition, the Appellate Body's utilization of the proportionality principle is inconsistent with WTO jurisprudence. Article 3.2 of the DSU establishes the customary rules of interpretation of public international law as the basis for interpreting the covered Agreements. As the Appellate Body recognized, those rules provide that a treaty is interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of

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injury serves as "a benchmark against which the permissible extent of the measure should be determined."[1338]

1024. The grammatical structure of Article 5.1 establishes that the "extent" of the application of the measure is the degree to which it prevents or remedies the injury attributed to increased imports and facilitates adjustment, since the phrase "necessary to prevent or remedy serious injury and to facilitate adjustment" modifies "extent." The Appellate Body reached a similar conclusion in finding that a safeguard measure must be "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."[1339]

1025. The ordinary meaning of the words in Article 5.1 indicates what effect a safeguard measure may have. "Prevent" means "to forestall or thwart by previous or precautionary measures;" "provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening."[1340] "Remedy" means "put right, reform, (a state of things); rectify, make good."[1341] Thus, a safeguard measure is permissible if it rectifies existing injury attributed to increased imports or forestalls such injury in the future. "Facilitate adjustment" means to promote the adaptation to changed circumstances.[1342]

1026. Practice under GATT 1947 indicates that the comparison between the remedial effect of a measure and the injury caused by increased imports is not a matter of scientific precision. The working group that reviewed the U.S. Article XIX measure on felt hats and hat bodies recognized this point:

> the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the

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[1337] (...continued)
the object and purpose of the treaty. "Proportionality" is not a customary rule of *interpretation* of international law, and does not appear in the texts of the covered agreements. Accordingly, it has no place in WTO jurisprudence. We would finally note that the Appellate Body, in stating that the United States had previously supported its views on proportionality, cited those views wholly out of context. Most notably, the United States stated specifically that the Draft Articles did not fully capture customary international law to the effect that the purpose of countermeasures is to bring about compliance. Because of disagreement among countries on this and many other issues, the Draft Articles, not having been adopted, endorsed or approved in any sense by the General Assembly, cannot be regarded as customary international law.

[1338] *US – Line Pipe*, Appellate Body Report, para. 236.

[1339] *Korea – Dairy*, AB Report, para. 96.

[1340] New Shorter Oxford English Dictionary, p. 2348.

[1341] New Shorter Oxford English Dictionary, p. 2540.

[1342] New Shorter Oxford English Dictionary, pp. 27 and 903.

> position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties . . . .[1343]

1027. New Zealand argues that under Article 5.1, "the least trade restrictive measure must be chosen,"[1344] which would mean that a Member taking a safeguard measure has no discretion in choosing the form or level of the measure. New Zealand ascribes this standard to the obligation to apply a safeguard measure only to the extent necessary to remedy serious injury caused by imports and facilitate adjustment. It claims that "the Appellate Body stated that this [obligation] required safeguard measures to be no more restrictive than necessary to remedy the serious injury caused by imports, as 'separated' and 'distinguished' under Article 4.2(b)."[1345]

1028. There are several flaws with New Zealand's reasoning. The most glaring of them is that the Appellate Body did not state that Article 5.1 requires that safeguard measures be "no more restrictive than necessary." Its actual statement in the paragraph cited by New Zealand was that safeguard measures "may be applied only to the extent necessary" – a direct quote from Article 5.1[1346]

1029. This distinction is significant. New Zealand's interpretation conflicts with the ordinary meaning of Article 5.1 and the object and purpose of the Safeguards Agreement. As noted above, the term "necessary" in Article 5.1 is linked to "to prevent or remedy serious injury and to facilitate adjustment." Thus, "necessary" relates to the preventive, remedial, and facilitative effect of the measure, and not to its trade restrictive effect. In short, the need for relief and adjustment defines what is "necessary."

1030. We note also that the final sentence of Article 5.1 advises that "Members should choose measures most suitable for the achievement of these objectives." This admonition shows that many potential measures might satisfy the requirements of the first sentence of Article 5.1, and that Members have discretion in choosing which among them best meets the objectives of preventing or remedying serious injury and facilitating adjustment.

1031. New Zealand also asserts that the panels in *US – Reformulated Gasoline* and *Canada – Periodicals* found that to be "necessary" a measure must be "capable of achieving its objectives."[1347] Again, the cited paragraphs of these reports simply do not contain the statements

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[1343] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951, para. 35. The Appellate Body cited this report as part of the GATT 1947 *acquis*. *US – Line Pipe*, AB Report, para. 174.

[1344] New Zealand first written submission, para. 4.196.

[1345] New Zealand first written submission, para. 4.195. The EC and Brazil make a similar point. EC first written submission, para. 319; Brazil first written submission, para. 236.

[1346] *US – Line Pipe*, AB Report, para. 260.

[1347] New Zealand first written submission, para. 4.196, citing *United States – Standards for Reformulated and Conventional Gasoline*, Panel Report, WT/DS2/R, adopted 20 May 1996 as modified by the Appellate Body

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that New Zealand ascribes to them. They provide only that to qualify for the exception under Article XX(d) of GATT 1994, a measure must secure compliance with laws and regulations not inconsistent with GATT 1994 and be necessary to secure such compliance. The cited passages did not equate necessity with the capability to achieve objectives. Even if "necessary" had been given the meaning attributed to it by New Zealand, the following establishes that the safeguard measures applied by the United States are capable of preventing or remedying serious injury and facilitating the adjustment of the relevant domestic industries.

2. 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

1032. The Safeguards Agreement does not require the quantification of injury attributable to increased imports, either in the determination of serious injury or in the decision as to what extent to apply a safeguard measure. The text makes this point patently clear. Nothing in the interpretations of the Safeguards Agreement by panels and the Appellate Body suggests otherwise.

1033. Nonetheless, Japan has faulted the ITC because it "made no attempt to quantify the serious injury caused by imports (as opposed to these other factors) so that it could craft a remedy carefully tailored to such injury caused by imports."[1348] Similarly, Brazil observes with regard to the ITC's recommendation of a 20 percent tariff on certain carbon flat-rolled steel that "[n]o attempt to quantify the serious injury caused by imports (as opposed to these other factors) was made. Under the circumstances, the ITC could not possibly craft a remedy carefully tailored to the injury caused by imports."[1349]

1034. The text provides no support for the notion that "injury" as such must be quantified. Article 4.1 defines serious injury as "a significant overall impairment in the position of a domestic industry." Article 4.2(a) specifies that, in determining whether injury exists, the competent authorities must evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." Thus, the text itself treats the two concepts differently. The factors considered by the competent authorities are characterized as "quantifiable," but "serious injury" itself is not. This omission is significant because where the covered agreements require quantification or valuation of something, they generally state so clearly, and often provide detailed guidelines.[1350]

[1347] (...continued)
Report, WT/DS2/AB/R, para. 6.31; and *Canada – Certain Measures Concerning Periodicals*, Panel Report, WT/DS31/R, adopted 30 July 1997 as modified by the Appellate Body Report, WT/DS31/AB/R.

[1348] Japan first written submission, para. 323.

[1349] Brazil first submission, para. 240.

[1350] *E.g.*, Anti-Dumping Agreement, Article 2; SCM Agreement, Article 14. These detailed requirements for calculation of the dumping margin and amount of the subsidy, respectively, contrast with the treatment of injury
(continued...)

1035. The analytical framework contained in Article 4.2(a) provides further support for this conclusion. It lists a number of specific factors that the competent authorities are required to consider: the rate and amount of the increase in imports in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. The Appellate Body has emphasized that this obligation "requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors concerned."[1351] It added that "it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry."[1352]

1036. Within this analytical framework, it is not possible to "quantify" injury for many reasons. The most obvious is that the different factors in Article 4.2(a) are measured in different units – market share and capacity utilization in percentages, level of sales and production in units, profits and losses in currency (or percentages), and employment in number of workers or hours worked. The competent authorities can no more aggregate these required attributes of injury into a single quantification of "injury" than a doctor could quantify "sickness" in a person simply by adding temperature, blood pressure, and white cell count. Thus, the Safeguards Agreement requires an analysis that itself prevents quantification.

1037. Similarly, the Safeguards Agreement does not require a Member to quantify the serious injury caused by imports when it evaluates the extent to which it will apply a safeguard measure. Articles 5 and 7, which address the extent and duration of a safeguard measure, do not require the valuation of either serious injury or the extent of application of a safeguard measure. Nor do they eliminate the practical impossibility of such an exercise. In this regard, the finding of the working party in *Felt Hats* remains instructive:

> the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market . . . .[1353]

1038. Another problem with quantification of "serious injury" is that the factors most illustrative of the condition of an industry may differ depending on the industry. For example, in an industry that requires highly trained workers to produce a product, reductions in employment may be particularly indicative of injury. Once such workers are dismissed, the industry could have difficulty training replacement workers to permit it to restore production to previous levels.

[1350] (...continued)
in both agreements, which do not require calculation of the amount of the injury.

[1351] *Argentina – Footwear*, AB Report, para. 136.

[1352] *Argentina – Footwear*, AB Report, para. 139 (emphasis in original).

[1353] *Felt Hats*, para. 35.

By contrast, in an industry that produces a product incorporating technology that changes frequently, reductions in research and development expenditures may be particularly indicative of injury. Without such expenditures, the industry will be unable to make further developments in its product needed to remain competitive in the marketplace. Any formulaic mathematical "quantification" would not allow for these informed judgments about the relative importance of the factors required to be considered.[1354]

1039. Finally, we note that Japan and Brazil posit only one way to "quantify" injury – through the use of economic modeling.[1355] In effect, they would replace the complex and nuanced analysis anticipated by Article 5.1 with a rigid and formulaic mathematical test. Modeling is widely used in theoretical economics, and may play a role in the evaluation of a safeguard measure. However, modeling has important limitations that prevent it from quantifying "injury" within the meaning of the Safeguards Agreement, or from measuring with any precision the effect of increased imports or of a safeguard measure on the individual factors demonstrating injury. These limitations are discussed more fully in Section E.

3. Article 3.1 Does Not Require an Explanation Regarding How the Safeguard Measure Conforms to Article 5.1

1040. The Appellate Body found in *Korea – Dairy* and reaffirmed in *US – Line Pipe* 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. Nothing in Article 3.1 affects this conclusion.

1041. In its findings on this issue, the Appellate Body focused on the difference between the first and second sentences of Article 5.1. The second sentence requires a "clear justification" for any safeguard measure in the form of a quantitative restriction that reduces the quantity of imports below the average of imports during a recent, representative three-year period.[1356] In *Korea – Dairy*, the Appellate Body explained:

> . . . we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is *not* obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three years for which statistics are available.[1357]

[1354] This issue is discussed further in Section E.
[1355] Japan first written submission, para. 324, Brazil first written submission, para. 212-214.
[1356] This provision is not at issue here, because none of the safeguard measures are quantitative restrictions.
[1357] *Korea – Dairy*, AB Report, para. 99, *quoted in US – Line Pipe*, AB report, para. 233.

In *US – Line Pipe*, the Appellate Body reiterated that "[i]t is clear, therefore, that apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[1358]

1042. Several Complainants now contend that Articles 3.1 and 4.2(c) create just the obligation to explain that the Appellate Body has twice found does not arise from Article 5.1.[1359] They argue that a safeguard measure's consistency with Article 5.1 is clearly a "pertinent issue of fact or law" and, therefore, the report of the competent authorities under Article 3.1 must contain findings or reasoned conclusions on that issue.[1360]

1043. The text of Article 3.1 is completely at odds with this interpretation. The relevant provision is the third sentence of that paragraph, which provides that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of law and fact." Article 4.2(c) further provides that "[t]he competent authorities shall publish promptly . . . a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

1044. These texts make clear that Article 3.1, third sentence, and Article 4.2(c) are related to the investigation of the competent authorities. Article 4.2(c) references the investigation explicitly, while the title of Article 3 is "Investigation." Article 4.2(a) specifies the purpose of this investigation – "to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry." In other words, an investigation is conducted to determine whether conditions (as set forth at Article 2.1) are such that safeguard measures may legally be applied.

1045. The texts also make clear that Articles 3.1 and 4.2(c) are obligations of the "competent authorities." The only functions assigned to the competent authorities under the Safeguards Agreement are to investigate and make determinations of serious injury. The competent authorities are mentioned only in Articles 3, 4, and 7.2, and always in those contexts. In contrast, Articles 5 and 7.1, which address the extent and duration of a safeguard measure, make no mention of the competent authorities or their investigation. These obligations are addressed to the Member itself, which is not required to provide a report under Article 3.1.

[1358] *US – Line Pipe*, AB Report, para. 233.

[1359] EC first written submission, para. 632; Japan first written submission, paras. 325-328; Korea first written submission, paras. 203-213; Norway first written submission, para. 357; New Zealand first written submission, paras. 4.203-4.204; Brazil first written submission, para. 246.

[1360] Korea first written submission, para. 167.

1046. By the terms of Article 3.1, Members may not apply safeguard measures until the "investigation" is complete.[1361] Once the competent authorities determine that safeguard measures may be applied, the Agreement makes clear that it is the "Member," not the "competent authorities" of that Member, who decides what, if any, safeguard measures shall be applied.[1362] Although Article 3.1 provides that the "*competent authorities* shall publish a report setting forth *their* findings and reasoned conclusions," there is no similar requirement that Members publish their findings regarding how the measures should be applied. In particular, other than the requirement to justify certain quantitative restrictions, which is not applicable to this dispute, there is no provision requiring Members to publish findings regarding why the particular safeguard measures selected conform with Article 5.1.

1047. The "pertinent issues of fact and law" that must appear in the report are, therefore, those issues that relate to the "investigation" by the "competent authorities" regarding whether the conditions for applying safeguard measures have been satisfied.[1363] They do not include issues related to the Members' selection and application of a measure consistent with Article 5.1.

1048. The Appellate Body recognized this distinction between the process for determining serious injury and the process for selecting and applying a safeguard measure when it stated in *US – Line Pipe* that there are "two basic inquiries" for interpreting the Safeguards Agreement:

> *First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. *Second*, if this first inquiry leads to the conclusion that there *is* a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment", as required by Article 5.1, first sentence, of the *Agreement on Safeguards*.[1364]

The Appellate Body stated that these inquiries are "separate and distinct," and that "[o]ne necessarily precedes and leads to the other." It is noteworthy that the Appellate Body only

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[1361] Note that Article 3.1 states that "[a] Member may apply a safeguard measure *only following an investigation* by the competent authorities of that Member." (Emphasis added.)

[1362] Article 3.1 states that "[a] *Member* may apply a safeguard measure only following an investigation by the competent authorities of that Member;" (emphasis added) and Article 5.1 states that "[a] *Member* shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."

[1363] *US – Wheat Gluten*, AB Report, para. 52 ("The scope of the obligation to evaluate 'all relevant factors' is, therefore, related to the scope of the obligation of competent authorities to conduct an investigation").

[1364] *US – Line Pipe*, AB Report, para. 84.

described Article 3 as applicable to the inquiry regarding the determination of serious injury under Articles 2 and 4, and not in conjunction with the consideration whether the measure is consistent with Article 5.1, first sentence.

1049. In another section of the *US – Line Pipe* report, the Appellate Body explained that the absence of a requirement to demonstrate compliance with Article 5.1 "does not imply that the measure may be devoid of justification."[1365] The Appellate Body pointed out that,

> By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the *Agreement on Safeguards* should have the incidental effect of providing sufficient "justification" for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined.[1366]

1050. Korea and Norway read this passage as placing an affirmative procedural duty on Members to explain in a published report the "sufficient motivation" or "justification" for the measures selected.[1367] This interpretation is devoid of merit.[1368]

1051. The reasoning in the *US – Line Pipe* report makes clear that the competent authority's "compliance with Articles 3.1, 4.2(b) and 4.2(c)" in its investigation (*i.e.*, by "separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports" in a detailed report) "*should* have the *incidental* effect of providing sufficient 'justification'" for the safeguard measure applied.[1369] This passage indicates the Appellate Body's understanding that the competent authorities will *not* explain how a safeguard measure complies with Article 5.1 – if they did, the justification would be intentional, and not an "incidental effect." In other words, although Members need not *explicitly* state the reasons for selecting safeguard measures, the need for the measures should be *implicit* from the findings of

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[1365] *US – Line Pipe*, AB Report, para. 236.

[1366] *Ibid.*

[1367] Korea first written submission, paras. 203-207; Norway first written submission, paras. 348-350.

[1368] Korea alleges that "USTR conducted its own separate investigation including comments from interested parties on the proposed remedy." Korea first written submission, para. 205. Japan and Norway make similar allegations. Japan first written submission, para. 327, Norway first written submission, para. 355. This is incorrect. USTR merely recognized that in the event of an affirmative determination by the ITC, the U.S. executive would need to decide whether and to what extent to apply a safeguard measure, and that interested persons would want to present the executive departments with information regarding that decision. It formally requested public commentary to provide a framework for interested persons to provide such information, both in writing and in person.

[1369] *US – Line Pipe*, AB Report, para. 236 (emphasis added).

the competent authorities. The Appellate Body will use the competent authority's report as the "benchmark" to determine, on a substantive basis, whether the measures selected did, in fact, comply with Article 5.1. However, the report itself need not address this issue.

4. The Member Applying a Safeguard Measure May Provide The Explanation For the Measure During Dispute Settlement, In Rebuttal to a Claim That the Measure Is Inconsistent With the Safeguards Agreement

1052. The Appellate Body has emphasized that "Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[1370] As we have shown above in Section H, nothing in Article 3.1 requires that either the competent authorities or the Member itself provide such a justification concurrent with the application of a safeguard measure. Thus, a Member remains free to explain its compliance with Article 5.1 during the dispute settlement process.

1053. In *US – Line Pipe*, the Appellate Body stated:

> [B]y establishing that the United States violated Article 4.2(b) of the *Agreement on Safeguards*, Korea has made a *prima facie* case that the application of the line pipe measure was not limited to the extent permissible under Article 5.1. . . . Therefore, we reverse the Panel's finding in paragraph 7.111 of its Report that Korea failed to make a *prima facie* case . . . .
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> * * * * *
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> We note that, had the Panel found differently, the United States might have attempted to rebut the presumption raised by Korea in successfully establishing a violation of Article 4.2(b) of the *Agreement on Safeguards*, that the United States had also violated Article 5.1. For even if the USITC failed to separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors, it is still possible that the safeguard measure may have been applied in such a manner that it addressed only a portion of the identified injurious effects, namely, the portion equal to or less than the injurious effects of increased imports.[1371]

[1370] *US – Line Pipe*, AB Report, para. 233; *Korea – Dairy*, AB Report, para. 233. The Appellate Body recognized one exception to this rule, concerning safeguard measures in the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years. That exception does not apply in this dispute, as the safeguard measures are all in the form of tariffs or a tariff-rate quota.

[1371] *US – Line Pipe*, AB Report, paras. 261-262.

1054. This passage demonstrates that even if the competent authorities' report did not satisfy the non-attribution requirement, the United States could establish the consistency of the resulting safeguard measure with Article 5.1 during dispute settlement.

5. The United States Applied the Steel Safeguard Measures No More Than the Extent Necessary to Prevent or Remedy Serious Injury and to Facilitate Adjustment

1055. An analysis of the ten safeguard measures applied by the United States demonstrates that they are consistent with the standard set out in Article 5.1, as interpreted by the Appellate Body. The ITC Report establishes that the United States has the right to apply a safeguard measure with regard to each of the ten steel products at issue. They demonstrate that as a result of unforeseen developments, imports of each product increased in such quantities and under such conditions as to cause or threaten to cause serious injury. The report further demonstrates that in reaching this determination, the ITC separated and distinguished the injury caused by increased imports from the injury caused by other factors. No Complainant has established a *prima facie* case of inconsistency with these obligations. To the extent that any Complainant could be considered to have made a *prima facie* case on any of these issues, the discussion in the preceding sections has fully rebutted that case.

1056. For the most part, Complainants' claims of a breach of Article 5.1 rest entirely on their assertion that they have presented a *prima facie* case that the ITC's causation analysis was inconsistent with Article 4.2(b) and that, under the Appellate Body's reasoning in *US – Line Pipe*, this demonstration also constitutes a *prima facie* case of breach of Article 5.1. Therefore, our defense above of the ITC's determinations also rebuts the claimed inconsistency with Article 5.1.

1057. However, should the Panel find any merit with Complainants' claims under Article 4.2(b), subsection 6 explains how each of the safeguard measures is consistent with Article 5.1. We have based the explanations on the determinations of serious injury in the ITC Report. Where appropriate, we have made additional observations on the nature and extent of the injury attributable to increased imports that, while not relevant in the ITC's causation analysis, are helpful in explaining how a particular safeguard measure satisfied the obligations under Article 5.1.

1058. Japan asserts that "[b]ecause the President's measure is more strict than the ITC's recommendation, the ITC's report cannot, as a matter of logic, support it."[1372] To the contrary, one could accept the truth of the facts produced in the ITC investigation and contained in the ITC

[1372] Japan first written submission, para. 326.

reports without adopting the remedy recommendations of the ITC.[1373] (In fact, in several instances, the Commissioners themselves made different remedy recommendations based on these facts.) One could also accept the ITC findings of serious injury, yet arrive at an entirely different view as to what form and level of measure was necessary to prevent or remedy the injury and facilitate the adjustment of the domestic industry.[1374]

1059. For all of the reasons given above and throughout this brief, the Safeguards Agreement does not require a quantitative analysis demonstrating mathematically that a safeguard remedy is consistent with Article 5.1, nor is such a numerical demonstration possible given the analytical framework under the Agreement.

1060. Any numerical analysis is, at best, an approximation that might assist a Member (or a panel) in evaluating whether a measure is commensurate with the injury caused by increased imports and the need for adjustment. Here, it is evident, through both a qualitative and a quantitative assessment of the effects of imports on the relevant domestic industries and of the measure taken, that the relief provided was only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

1061. The injury suffered by the domestic industries at issue in this case was extraordinary by any measure. The nature and extent of this injury is documented throughout the findings of the ITC and is discussed extensively in this brief. This injury involved significant financial losses, numerous bankruptcies, tens of thousands of job losses, as well as lost sales, decreased production, reduced capacity utilization, lost investment opportunities and many other indicators of serious injury. The ITC's findings also document the extraordinary steps required for domestic producers to facilitate adjustment to import competition. The enormity of the injury documented here plainly necessitated the type and extent of the measures taken by the United States if the industries at issue were to be given any chance to recover from serious injury and adjust going forward.

1062. While numerical estimates are necessarily limited in their ability to precisely quantify and isolate the full effect of imports and the appropriateness of remedial measures, they do fully support the decisions made by the President regarding the appropriate safeguard measures to apply in response to the ITC's *Steel* determinations. Numerical estimates may be useful to test whether a measure is set at an order of magnitude consistent with Article 5.1. We discuss and set forth below two different methodologies for illustrating the appropriateness of the remedies chosen for each industry – one based upon a simplified numerical analysis and the other based

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[1373] That, in fact, is the basis for this dispute. With a few exceptions, the Complainants do not contest the accuracy of the facts found by ITC, merely whether those facts support the findings of the ITC.

[1374] In any event, for FFTJ, stainless steel bar, stainless steel wire, and stainless steel rod, the President imposed safeguard measures at a level equal to or lower than recommended by the ITC. In these cases, the ITC's explanation of its recommended safeguard measures would certainly apply equally to the safeguard measure actually applied by the United States.

upon a simplified economic modeling approach described below. These approaches are certainly not exhaustive of those that could be used to demonstrate the appropriateness of the remedies chosen (or indeed their conservative nature) under the standard set out in Agreement based on the extensive findings and data before the ITC and the President. These approaches do, however, provide clear support in showing that the relief implemented by the President was fully in accordance with Article 5.1.

1063. It must also be recognized that any numerical approach focusing merely on remedying the lost profits suffered by a domestic industry during a period of investigation and returning it to a normal level of profitability cannot adequately capture the full breadth of the need to "facilitate adjustment" to import competition pursuant to Article 5.1. To facilitate adjustment, the relief in question must, among other things, allow firms to make necessary new capital investments, consider restructuring and consolidation measures, improve their ability to raise capital, and often take extraordinary steps to make up for lost ground during the period of injury caused by imports. To this extent, such numerical estimates are of necessity inadequate to fully account for both the injury suffered by a domestic industry and the remedial measures necessary to facilitate adjustment.

1064. The appropriateness of the remedies chosen by the President is abundantly clear, given a consideration of the findings of the ITC, the information before the competent authority and the President, and insight that can be gleaned from numerical analysis. To the extent that the complaining parties have suggested that some further analysis is required to precisely and scientifically quantify the exact measure of injury and effect of the measures taken, such a standard would clearly be unworkable and inconsistent with the Agreement. It would create a standard that no Party could meet in taking a safeguard measure and would thus effectively nullify the Agreement.

a. Consistency With Article 5.1

1065. One potential numerical approach begins with the ordinary meanings of the terms of Article 5.1. A safeguard measure to "remedy" injury caused by increased imports would, in the ordinary meaning of the term, need to "put right, reform, (a state of things); rectify, make good." To "prevent" serious injury would be "to forestall or thwart by previous or precautionary measures." To "facilitate" adjustment would be to promote the adaptation to changed circumstances, namely, competition from increased imports.

1066. Each aspect of Article 5.1 – the "injury" being prevented or remedied and the "adjustment" being facilitated – depends on the facts of the case, most particularly the condition of the industry and the injurious effects of imports. Most of the steel determinations noted that the low prices of increased imports were forcing domestic producers to lower their own prices, thus reducing profitability. In these cases, the United States considers that a remedy in the sense of Article 5.1 would both stop the ongoing negative effects of imports and allow the domestic industry to recoup the losses caused by increased imports during the investigation period. Such a

remedy would also advance the goal of facilitating adjustment, since producers could devote increased profits to projects that would make them more competitive with imports when the safeguard measures are removed.

1067. In some of the steel determinations, the analysis of the ITC noted that the domestic industry's loss of market share played a prominent role. In these cases, the United States considers that a remedy in the sense of Article 5.1 would allow the domestic producers to recover market share. The associated improvements in revenue and profits would also, to some extent, allow them to undertake projects that would make them more competitive with imports when the safeguard measures are removed.

1068. In both sets of cases, simply counteracting the current negative effects of imports or promoting a temporary return to the industry's historical condition before imports began to increase would not be sufficient. First, the industries' condition before increased imports manifestly did not permit them to adjust to increased imports – that is why they reached a state of serious injury. Second, the very concept of "remedy" suggests an alleviation of the injury identified during the investigation period, as well as cessation of future injury. An industry cannot adjust successfully if past losses left it in a financially perilous position that a measure could remedy only in the future. Thus, we consider that the extent of application of a safeguard measure includes both counteracting current negative effects of imports and alleviating past negative effects to permit the industry's adjustment.

1069. The simple numerical analysis described below focuses on conditions during a year in the investigation period to estimate the change in revenue or import volume necessary to remove the current negative effects of imports and to recoup past negative effects. As a surrogate for the "uninjured" condition of the industry, we used a year either before the increase in imports or before the condition of the industry began to decline. This is a conservative approach because the ITC did not identify any time during the investigation period as one in which there was no injury. Indeed, in several cases, the ITC specifically found that imports had negative effects throughout the period. Thus, any part of the period would potentially reflect a level of operating income or revenue already reduced by the effects of increased imports.

1070. The selection of a comparison year, estimated operating margin, or estimated import volume are not intended to suggest that imports did not have negative effects on the domestic industry and its operating income levels at that time. It does not imply either that there was serious injury in that year, or that there was not serious injury, as the ITC did not make a determination in that regard. The comparison year merely provides a starting point to evaluate the negative effects that imports in subsequent years may have had on the industry's performance.

1071. This numerical analysis then estimates the extent to which non-NAFTA import prices would have to increase, or volumes decrease, to attain the desired condition.

1072. Accordingly, to perform this numerical analysis for the industries in which the price effects of imports played a prominent role, we performed a four-step analysis to estimate the extent to which domestic producers' prices and revenues would have to rise to eliminate the negative effects of increased imports on the industry's operating income. We then estimated the degree that import prices would have to increase for the domestic industry to achieve this level of profitability, and the additional tariff that would achieve that price increase.[1375]

1073. The first step of this approach estimates the amount of revenue domestic producers would have needed in each year to raise operating income to its level at a point (the "base year") in the investigation period before the industry's performance began to decline. The approach estimates the degree to which the industry's operating income declined in each year after the base period. In cases in which the ITC found that factors other than imports were also injuring the industry, the approach uses a comparison year in which the ITC observed that one or more non-import factors were affecting the industry. (For example, if the ITC found that increased capacity had injurious effects, we would attempt to choose a year in which capacity had already risen to its level during the period of serious injury.) The approach then estimates the amount that revenue would have had to increase to produce that estimated operating margin in each year in which the ITC identified the industry's performance as deteriorating due to increased imports. In situations in which there is no comparison year that reflected the injurious effect of non-import factors, this analysis either omits the years in which other factors had an effect, or subtracts the amount of profit shortfall we estimated would be attributable to that factor.

1074. In the second step, this analysis estimates the degree to which domestic producers' prices would have to increase during the pendency of a safeguard measure. Any price increase would have to return domestic prices at least to a level that would provide operating income equal to a level that does not reflect the price effect of increased imports and then increase prices by a further amount to counteract the negative effects of imports from 1998 to 2000 and to facilitate adjustment. This estimate calculates the further amount of increase by dividing the revenue shortfall estimate in the first step by total revenue during the period of the shortfall, and adding that percentage to the operating income margin for the comparison year.

1075. As a third step, this approach estimates the degree to which import producers' prices would have to increase for domestic producers to achieve the operating income margin described above. The average unit values or ITC pricing comparisons, as appropriate, involved domestic prices from years when the industry did not achieve this level of profitability. To estimate a price that would achieve the target operating income level calculated in the second step, this approach

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[1375] For the most part, we based the calculations on unit values, as these captured all of the products under investigation. For some products, the findings of the ITC or data in the ITC report indicated that the difference in unit values between imports and domestic products reflected different product mixes, as well as the injurious effects of price underselling by non-FTA imports. In those cases, we based our calculations on the item-specific pricing comparisons conducted by the ITC.

decreases domestic producers' annual unit value or price[1376] by the unit operating income,[1377] and then increase the resulting figure to a point where it would produce an operating income margin equal to the target operating income margin. This approach compares this price in each year to the annual unit value or price of imports to calculate how much import prices would have to increase for the domestic industry to achieve the target operating income.

1076. As a fourth step, this approach estimates the additional duty that would achieve the price increase calculated in the third step. As part of its investigation, the ITC performed economic modeling on the U.S. industries. These models indicated that there would not be full "pass-through" of any increases in tariff rates. That is, an increase of tariffs of X percent would result in a less-than-X increase in the prices importers charged in the U.S. market. Based on these models, we estimated a range of tariff increases that would produce the target increase in import prices for the product in question. These estimates of pass-through were in line with those predicted by industry participants.

1077. This approach uses a somewhat different process for the finding of threat of serious injury with regard to certain welded pipe. For that industry, the concepts of "preventing" and "remedying" serious injury overlap to a significant degree. To "prevent" injury attributable to imports, which the ITC found would imminently result from the negative effects of increased imports during the investigation period, a safeguard measure would have to counteract those current negative effects. Since the determination reflected negative performance that developed late in the period, the revenue shortfall calculation in the first step reflected a shorter period than for the industries subject to determinations of serious injury.

1078. Finally, for industries in which the market share effects of imports were prominent, this approach analyzes compliance with Article 5.1 in terms of import volumes. This approach is described more fully in the segments on tin mill and stainless steel wire.

1079. While we find this numerical analysis to be instructive, we recognize, as did the Working Group in *Felt Hats*, that this is not a science. These estimates are intended to show that the steel safeguard measures were applied no more than the extent necessary to prevent or remedy serious injury. They are conservative estimates, in that the ITC identified a number of negative effects that imports had on the domestic industry – reduced volume, prices, revenue, production, capacity utilization, employment, capital formation and investment – but these estimates have not attempted to address the negative effects of imports on other indicators of injury, such as employment, production, and capacity utilization. These estimates also do not attempt to add to the estimated tariff levels to attain operating income levels that would fully facilitate the adjustment of the industry to increased imports.

[1376] Since the ITC performed pricing comparisons on a quarterly basis, we weight average pricing data to produce an annual figure that we could then compare to profitability, which was expressed on an annual basis.

[1377] We do this by multiplying the unit value annualized price by the one minus the reported profit margin.

1080. The Safeguard Measures Worksheets for each product show the results of these calculations. In preparing this estimate, we reiterate that the decision on the nature and level of a safeguard measure, or the defense against a claimed inconsistency with Article 5.1, is a not strictly numerical exercise. Just as "serious injury" as described in the Safeguards Agreement is not quantifiable, the overall effect of a safeguard measure in preventing or remedying serious injury and facilitating adjustment is not quantifiable, either. As discussed above, there are important limitations in the analytical tools that are available to estimate the effect of a remedy. Thus, any numerical analysis is, at best, an approximation that might assist a panel in evaluating whether a measure is commensurate with the injury caused by increased imports and the need for adjustment. The numerical analysis will not delineate with any precision the extent of the injury, or the extent of application of the measure that would remedy only that injury. In short, these estimates are not in any manner a quantification of injury, excluding as they do a consideration of most of the factors required to determine serious injury under Article 4.2(a).

b. Economic Modeling of the Effect of the Safeguard Measures

1081. Economic modeling of the price, volume, and revenue effects of increased imports and of the safeguard measures established by the President on March 5, 2002 also suggests that these measures were in accord with Article 5.1. During its remedy phase, the ITC prepared an economic model, similar to ones it has used over a long period and in a variety of proceedings, to model the theoretical effect of various measures on the relevant U.S. industries. It is a comparative statics model, which estimates how price, quantity, and total revenue associated with sales by domestic producers and various imports sources during a particular period would have been different if there were a change in market conditions. It is important to recognize that the model does not *predict* future performance and, does not measure injury as such. What it does do is estimate how certain indicators of *past* performance might have changed if market parameters had changed.

1082. We have used this model, inputting variables to model how the quantity, price, and revenue of sales by the domestic industry and various import sources would have changed in 2000 if the safeguard measure established by the President on March 5, 2002, had been in effect during that period. The results appear in column 2 of the Modeling Results Worksheet for each product.

1083. We then modeled how the quantity, price, and revenue of sales by the domestic industry would have changed if imports in 2000 had been at the same quantity in a year prior to the increase in imports. The results appear in column 1 of each Modeling Results Worksheet. This exercise only models the effect of the *change* in imports on the price, quantity, and revenue associated with sales of the domestic like product. It does not capture the injury that imports may have been causing at lower levels, before any increase. Subject to all of the limitations inherent with modeling, this model provides a rough estimate of certain effects of the increase in imports, *i.e.*, on the quantity, price, and revenue of sales by the domestic industry.

1084. A comparison between the figures in columns 1 and 2 of each worksheet explains how the remedy applied was no more than the effect of the increase in imports on indicators of injury covered by the model – the price, volume, and revenue associated with sales by the domestic industry.

6. Product-By-Product Evaluation of Consistency With Article 5.1

a. The tariff on certain carbon flat-rolled steel and tariff-rate quota on slabs

Injury caused by increased imports

1085. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic certain carbon flat-rolled steel industry. The ITC identified six factors other than increased imports that potentially caused injury: declining demand, increased capacity, legacy costs, intra-industry competition, management decisions, and purchaser consolidation. It found that legacy costs, management decisions, and purchaser consolidation did not cause injury to the domestic industry during the investigation period.

1086. The ITC did not identify declining demand prior to the first half of 2001 as a cause of injury. Demand *increased* from 1996 through the third quarter of 2000, and demand for all certain carbon flat-rolled products in full year 2000 was higher than in 1996 or 1999. However, the ITC found that declining demand contributed to serious injury at the end of the investigation period.[1378]

1087. The ITC noted that capacity increases outstripped growth in apparent domestic consumption, and that production increased at a lower rate, causing capacity utilization rates to fall, which would affect producers' pricing behavior. However, it did not attribute this effect to imports. It noted that imports consistently undersold the domestic industry – including those producers that added capacity – and continued to lead prices down in 1999 and 2000. From this, the ITC concluded that imports, not increased capacity, were the primary cause of decreasing prices.[1379]

1088. The ITC found that competition from minimills had some effect on domestic pricing. The Commissioners concluded that although minimills had lower costs than integrated producers, it was imports that were price leaders and led prices down, underselling the minimills throughout the investigation period. Accordingly, the ITC found that minimills were not primarily responsible for declines in domestic prices.[1380] In this regard, we note that the volume

[1378] ITC Report, p. 63.
[1379] ITC Report, pp. 63-64.
[1380] ITC Report, p. 65.

of imports far exceeded the volume of minimill sales in the commercial market, by an order of two-to-one.[1381]

1089. The ITC found that the only factors other than increased imports that caused injury to the domestic industry were increased capacity, competition from minimills, and a decline in demand after 2000. This is not to suggest that imports in 1996 and 1997 had no negative effects. However, since the analysis of the ITC focused on changes in industry performance after 1997, and as a conservative estimate of the injury attributable to imports, the numerical analysis for certain carbon flat-rolled steel was based on the changes from 1998 through the first half of 2001 only, as compared with 1997.

1090. The injury attributable to imports from 1998 to 2000 continued into the first half of 2001. Non-FTA unit values fell in the first half of 2001, as compared with the same period in 2000. Beginning in the fourth quarter of 2000, domestic prices collapsed. Import prices fell to a lesser extent, resulting in a reduction, or elimination of the margins of underselling.

Application of the safeguard measures no more than the extent necessary

1091. The numerical analysis followed the general approach outlined in subsection 5.a to evaluate the safeguard measure on certain carbon flat-rolled products, with appropriate modifications to reflect the greater variation among the categories of steel covered by the like product. The estimate in the analysis is based on the unit values, which appear to be broadly reflective of the products available from domestic producers and the import sources. This is a conservative approach since, for most of the period, differences between domestic and non-FTA import unit values were less than the margin of underselling.

1092. The analysis also considers the effect of antidumping and countervailing duty orders on the domestic industry. Most of the orders predate the ITC investigation period. The exceptions are the 1997 and 2000 orders on plate, and the 1999 and 2001 antidumping orders on hot-rolled steel. The ITC found that import surges in many of the products occurred after antidumping and countervailing duty orders were in place, an observation that applies equally to pre-investigation-period orders and the 1997 plate orders. In addition, the ITC data for the surge and post-surge periods reflect any effect on the industry that these orders may have had. Since we base our estimate of the measure on that data, we do not need to perform any additional analysis to account for these orders. The 1999 and 2001 antidumping duty orders and suspension agreements on hot-rolled steel applied to several countries. However, in light of the fact that the 1999 orders did not prevent the continuation of imports at high and injurious levels, and would not have prevented injury by fairly traded imports, the analysis did not adjust the estimate to account for these orders. With regard to the 2000 antidumping orders on plate, it is significant that the offset of dumping under the 1997 dumping orders and suspension agreements affected

[1381] From 1996 to 2000, imports ranged from 18.3 to 25.3 million tons annually, while minimill shipments never exceeded 8.49 million annually.

the volume of imports, but did not prevent a reduction in unit values and continued underselling.[1382] Accordingly, the analysis does not adjust the estimate to reflect the offset of dumping and subsidization under the 2000 orders.

1093. The numerical analysis also attempts to avoid attributing to increased imports the negative price effects of increased capacity and minimill competition, the two other factors that the ITC found to be causing injury during the 1998-2000 period. These two factors are related because, during the investigation period, almost all new capacity for certain carbon flat-rolled products was minimill capacity. The greatest increase in minimill capacity occurred in 1997, which is the comparison year.[1383] Thus, the comparison year already reflects much of the capacity expansion that the ITC found was having an effect on U.S. prices. In 1998, the year with the second highest level of increase in minimill capacity during the investigation period, capacity increases were in line with increases in demand, so the analysis makes no adjustment to account for capacity and minimill competition in those years.[1384] Capacity increases in 1999 and 2000 were much smaller than in previous years, and demand stayed at roughly the same level. Imports remained in the market at high levels, and at lower prices than in previous years. Minimill shipments into the commercial market were at higher levels than at the beginning of the investigation period, but still reflected unit values higher than those for imports. To compete with imports, domestic producers cut prices. Accordingly, we made no adjustment for these factors.

1094. We also made an adjustment to the estimate to reflect the ITC's finding that the decrease in demand in the first half of 2001 "contributed to the industry's continued deterioration at the end of the period." For purposes of the Article 5.1 analysis, and as a conservative assumption, we noted that apparent domestic consumption of hot-rolled steel, cold-rolled steel, and coated steel was at levels comparable to those in 1996 in the first half of 2001. Accordingly, for this period, we reflected the decreased level of demand by using 1996 as the base period profit.

1095. The ITC's findings with regard to imports from Canada and Mexico required no adjustment to the estimate.

1096. In the first step of the Article 5.1 evaluation, we used a base year of 1997 for all categories. As a conservative estimate, the estimate reduces the base year operating income

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[1382] ITC Report, pp. FLAT-64 & FLAT-C-3

[1383] ITC Memorandum INV-Y-215, Tables G04-1, G02-1, G03-1, and G06-1. Minimill capacity to produce plate and hot-rolled steel increased as much in 1997 as in all other years of the investigation period, combined.

[1384] For plate, cold rolled steel, and coated steel the increase in demand in 1998 was either greater than or roughly equal to the increase in capacity in 1998. The ITC indicated that capacity increases in line with demand were not themselves injurious. For hot-rolled steel, capacity increased by more than demand in 1998. However, imports of hot-rolled steel increased by 68 percent in 1998, while production decreased, indicating that the domestic producers were not engaged in competitive price reductions to gain market share and fill capacity, which the ITC identified as the way that extra minimill capacity would affect prices. ITC Report, pp. 63-65.

margin by half for the first half of 2001, to reflect that the ITC found that declining demand was a factor in causing injury during this period, but was no more important than increased imports.

1097. In the second step, the analysis estimates the level to which domestic producers' prices would have to increase during the pendency of a safeguard measure to eliminate the price effects of increased imports and to counteract the negative effects of imports from 1998 to 2000. This involved estimating the unit value needed to raise operating margins by the amounts we have described, and then adding an additional increase that would recoup the shortfall in operating income.

1098. In the third step, the process described in subsection 5 produced an estimate for each category of the degree to which import producers' prices would have to increase for domestic producers to achieve the operating income margin described above. The results appear in Safeguard Worksheet A. We then weight averaged these amounts by net commercial sales revenues.

1099. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. During the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. market for certain carbon flat-rolled steel. The ITC staff adjusted the standard model to reflect linkages among the different categories of flat steel, and ran several permutations. This linked model indicated that a 30 percent increase in duties on all certain flat-rolled steel (including slab and Mexico) would result in an increase of between 20.8 and 28.0 percent in the sale price of imported certain carbon flat-rolled products (excluding Canada) in the United States.[1385] This suggests that the 30 percent tariff on certain carbon flat-rolled steel products is set at a magnitude that satisfies the requirements of Article 5.1.

Economic modeling also supports this conclusion

1100. Based on the ITC's analysis, we considered that our estimate of the extent of application of the certain carbon flat-rolled steel measure necessitated modifications to the approach outlined in subsection 5.b. The ITC found that [t]he impact of the 1998 surge in imports on the domestic industry is undeniable." Operating income fell in spite of an increase in demand.[1386] The ITC found further that "[t]he import surge in 1998 altered the competitive strategy of domestic producers" in subsequent years, leading to "repeated price cuts" that "while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry's

[1385] Memorandum EC-Y-050 (US-65). The public materials do not contain model results covering the safeguard measure established by the President. We note that the exclusion of slab and Mexico in the model of the President's remedy (US-57) shows a substantially lower effect on import prices.

[1386] ITC Report, p. 60.

condition."[1387] Consequently, in 2001, "[t]he domestic industry entered a period of falling demand already in a weakened condition and deteriorated even further."[1388]

1101. Accordingly, we performed the modeling exercise described in subsection 5.b, but based on data for 1998, rather than just 2000. More specifically, we looked at the following scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1996 levels in 1998. The results of this exercise appear in Modeling Worksheet A. The price, volume, and revenue results for scenario (1) are in the same range as the price, volume, and revenue results for scenario (2) in 1998.

b. The tariff on hot-rolled bar

Injury caused by increased imports

1102. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic hot-rolled bar industry. The ITC identified four factors other than increased imports that potentially caused injury: competition among domestic producers, inefficient domestic producers, changes in demand prior to 2001, and changes in input costs. The ITC found that none of these was a factor causing injury to the domestic industry.

1103. The ITC did not attribute any injury to competition among domestic producers. It found that this cause might explain changes in the relative market shares of domestic producers, but not their loss of 2.4 percentage points of market share to imports. The ITC also found Nucor – the source of competition among domestic producers – was not a primary source of pricing declines.

1104. Thus, increased imports were the only factor causing injury to the domestic industry in 2000. The ITC made no findings with regard to declining demand in 1998 and 1999. For purposes of the estimate, we would note that demand increased in 1998. Based on the ITC's finding of serious injury, for purposes of our estimate, we treat the injury attributable to imports from 1997 to 2000 as continuing into the first half of 2001. Non-FTA imports undersold domestic products at levels comparable to preceding years,[1389] and retained a market share well above 1996 and 1997 levels. The ITC found that the decline in hot-rolled bar consumption in this period led to "further deterioration."

Application of the safeguard measures no more than the extent necessary

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[1387] ITC Report, p. 61.

[1388] ITC Report, p. 63.

[1389] The unit value of imports increased in 2001 as compared to 2000. Since comparisons of comparable items continued to show underselling, this development indicates that the mix of imported products changed.

1105. We base our analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the ITC noted:

> for a product such as hot-rolled bar which covers a broad range of product types and values, pricing data for a more specific product can provide more probative information than average unit sales values.[1390]

1106. In the first step, we choose 1997, the year before the year when the condition of the domestic industry began to deteriorate, as the appropriate comparison year, keeping in mind that imports may still have may had some negative effect on the industry. We estimated that the revenue shortfall in 1998 and 2000, years in which demand did not decline, was attributable to increased imports. As a conservative estimate, we treated half of the decline in revenue in 1999 as attributable to increased imports, and for the first half of 2001, treated the decline in revenue attributable to imports as equal to the level in 2000. In the second step, we calculated the amount by which the 1997 operating income margin would have to rise to recoup the shortfall in operating income described in the preceding paragraph.[1391] In the third step, we based the pricing analysis on the ITC pricing comparisons on page LONG-87. The results of these calculations appear in Remedy Worksheet B.

1107. We noted the ITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary.

1108. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of its investigation, the ITC prepared economic models on the U.S. hot-rolled bar market. These models indicated that a 30 percent increase in duties would result in an increase of between 19.6 and 24.2 percent in the sale price of imported hot-rolled bar in the United States.[1392] This suggests that the 30 percent tariff on hot-rolled bar is set at a magnitude that satisfies the requirements of Article 5.1.

Economic modeling also supports this explanation

1109. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet B, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

[1390] ITC Report, p. 93, note 554.

[1391] We do this by calculating the revenue shortfall in each year in which the ITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[1392] Memorandum EC-046, p. LONG-29 (US-64).

c. The tariff on cold-finished bar

Injury caused by increased imports

1110. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic cold-finished bar industry. The ITC identified two factors other than increased imports that potentially caused injury: declining domestic demand for cold-finished bar and the effect of a purportedly inefficient domestic producer. The ITC found that the inefficiency of RTI did not cause injury to the domestic industry.

1111. The ITC carefully considered the effect of declining demand on the domestic industry. It noted the domestic producers' observation that prices for cold-finished bar historically track demand, and observed that this appeared to be the case in 1999. Accordingly, it found the decline in the domestic industry's financial performance in 1999 to be "to a large extent attributable to declines in demand during that year."[1393] The ITC noted that demand increased in 2000, but that the domestic producers' prices decreased. Accordingly the ITC found that changes in demand did not explain the serious injury to the domestic cold-finished bar industry. These findings indicate that changes in demand were having a *positive* effect in 2000; therefore, no injury should be attributed to this potential cause in 2000. The ITC noted that demand declined in the first half of 2001, and that the domestic industry's performance further deteriorated.[1394] This finding indicates that some of the injury in the first half of 2001 is attributable to declining demand.

1112. These findings demonstrate that the entirety of the reduction in domestic producers' production, shipments, market share, employment, revenue, and operating income in 2000 is properly attributed to increased imports. The ITC's findings further indicate that both increased imports and decreases in demand had an injurious effect in 1999 and the first half of 2001. This is not to suggest that imports in 1996 through 1998 had no negative effects. Since the analysis of the ITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, we will base our analysis for cold-finished bar on the changes from 1999 through the first half of 2001 only.

1113. As a conservative estimate, we treat non-import factors as responsible for half of the decline in the domestic industry's operating income in 1999. We will assume that decreased demand was responsible for any change in performance in the first half of 2001 as compared with the full year 2000. Accordingly, we estimated that increased imports had the same negative effect in the first half of 2001 that we estimated for 2000.

Application of the safeguard measures no more than the extent necessary

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[1393] ITC Report, p. 107.
[1394] ITC Report, p. 107.

1114. We based our analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the ITC noted:

> for a product such as hot-rolled bar which covers a broad range of product types and values, pricing data for a more specific product can provide more probative information than average unit sales values.[1395]

1115. In the first step, as a conservative estimate we choose 1998, a year in which demand was equivalent to its level in 2000, as the appropriate base year, keeping in mind that imports increased in that year and, thus, may have had some negative effect on the industry. To reflect the impact of non-import factors on 1999, we halved the base operating income margin. We estimated the revenue shortfall in 1999 through the first half of 2001, periods in which the ITC indicated that imports caused some of the decline in the industry's performance. In the second step, we estimated the amount by which the 1998 operating income margin would have to rise to recoup the shortfall in operating income.[1396] In the third step, we based the pricing analysis on the ITC pricing comparisons on page LONG-92.[1397] The results of these calculations appear in Remedy Worksheet C.

1116. We noted the ITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary.

1117. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. cold-finished bar market. These models indicated that a 30 percent increase in duties would result in an increase of between 19.6 and 24.2 percent in the sale price of imported cold-finished bar (excluding bar from Canada) in the United States.[1398] This suggests that the 30 percent tariff on cold-finished bar is set at a magnitude that satisfies the requirements of Article 5.1.

1118. We note that the target increase is lower than the tariff level of the safeguard measures established by the President. As the Working Party in *Felt Hats* noted, "it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market."[1399]

[1395] ITC Report, p. 103, n. 614.

[1396] We do this by calculating the revenue shortfall in each year in which the ITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[1397] This table contains confidential information. Accordingly, we have reproduced the results of this step, but not the inputs.

[1398] Memorandum EC-046, p. LONG-29 (US-64).

[1399] *Felt Hats*, para. 35. In the case of cold-finished bar, we noted that it was relatively simple and inexpensive to convert a hot-rolled bar into a cold-finished bar. If the tariff level for these two products were

(continued...)

Economic modeling also supports this explanation

1119. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet C, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

d. The tariff on rebar

Injury caused by increased imports

1120. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic rebar industry. The ITC identified four factors other than increased imports that potentially caused injury: demand changes, changes in input costs, capacity increases, and competition between domestic producers. The ITC found that none of these caused injury to the domestic industry.

1121. These findings demonstrate that the entirety of the reduction in domestic producers' performance from 1999 through 2001 was attributable to increased imports. This is not to suggest that imports in 1996 through 1998 had no negative effects. Since the ITC's analysis focused on changes in industry performance, and that performance began to decline in 1999, we based our estimate for rebar bar on the changes from 1999 through the first half of 2001 only.

Application of the safeguard measures no more than the extent necessary

1122. In our estimate with regard to consistency with Article 5.1, we considered the ITC's observation that the United States imposed antidumping duties on Turkey in 1996 and on Belarus, China, Indonesia, Korea Latvia, Moldova, Poland, and Ukraine in 2001. The ITC noted in its remedy recommendation that, although the antidumping duties reduced imports from these sources, imports from other sources took their place to a significant degree.[1400] In fact, even though the antidumping duty orders took effect in January, 2001, non-FTA imports for the first

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[1399] (...continued)
different, it would create an incentive for foreign producers to circumvent the safeguard measure by shifting their hot-rolled bar customers to cold-finished bar. This would undermine the remedial effect of the measures on both hot-rolled and cold-finished bar. Accordingly, the United States did not go beyond the extent necessary by applying a 30 percent tariff to imports of cold-finished bar.

[1400] ITC report, p. 375, n. 112.

half of 2001 were only slightly lower than in the first half of 2000. Non-FTA unit values, while slightly higher than in the first half of 2000, remained far below domestic unit values.[1401]

1123. We based our analysis of the permissible remedy on the aggregate value data, rather than the underselling data, because the ITC did not find, as it did for hot-rolled bar and cold-finished bar, that rebar encompassed a wide spectrum of products.

1124. In the first step, we choose 1998, the year before the industry's profitability began to decline, as the appropriate base year, keeping in mind that imports increased in that year and, thus, may have had some negative effect on the prices and profitability of the domestic industry. In the second and third steps, we used data pertaining to 1999 through the first half of 2001 to estimate how much prices would have to increase to recoup the shortfall in revenue attributable to increased imports.

1125. As a conservative estimate of the effect of the 2001 antidumping duty orders, we assume that they are responsible for all of the 6.8 percent increase in average unit values in the first half of 2001 as compared with the first half of 2000. We deducted this amount from the estimated increase in import prices calculated in the first through third steps.

1126. The results of these calculations appear in Remedy Worksheet D. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. rebar bar market. These models indicated that a 15 percent increase in duties would result in an increase of between 8.2 and 10.9 percent in the sale price of imported rebar (excluding rebar from Mexico and Canada) in the United States.[1402] This suggests that the 15 percent tariff on rebar is set at a magnitude that satisfies the requirements of Article 5.1.

Economic modeling also supports this explanation

1127. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet D, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

e. The tariff on certain welded pipe

Injury caused by increased imports

[1401] ITC Report, p. LONG-C-5.
[1402] Memorandum EC-046, p. LONG-27 (US-64).

1128. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused the threat of serious injury to the domestic certain welded pipe industry. The ITC identified two factors other than increased imports that potentially caused the industry's weakened condition: increased capacity on an overall basis and cost increases at one significant producer ("Producer X") that were unrelated to increased imports.

1129. The ITC found that the increase in capacity did not contribute in more than a minor way to the condition of the industry in 2000 or the first half of 2001. It found that the 1.5 million ton increase was only "modestly higher" than the increase in apparent domestic consumption and, therefore, not "excessive."[1403]

1130. The ITC found that the main reason for Producer X's declining performance was a drop in the unit value of sales beginning in 1999, and that the drop was largely a result of increased imports.[1404] In other words, this development was not an alternative "cause" of injury, but a symptom of the injury caused by increased imports. Thus, any injury to the industry as a result of Producer X's performance was properly attributed to increased imports.

1131. These findings of the ITC demonstrate that most of the reduction in domestic producers' production, capacity utilization, shipments, number of workers, and profitability in 2000 is properly attributed to increased imports. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. The ITC specifically found that "imports have had a negative effect on the domestic industry over the period we have examined."[1405]

1132. As we noted above, the ITC did find that the increase in capacity had a negative effect on the industry in 2000, albeit a "minor" amount. The data suggest that the amount is quite minor. Total domestic capacity grew by approximately 350,000 tons from 1999 to 2000, an increase of only 4.4 percent. The industry experienced an even higher increase in capacity, of approximately 488,000 tons, from 1998 to 1999 (an increase of 6.5 percent). During that period, profits fell by only 0.2 percentage points.[1406] As an extremely conservative estimate, while recognizing the imports were causing injury to the domestic industry in 1998, 1999, 2000, and 2001, we will treat the *decrease* in the industry's performance from 1999 to 2000 as attributable to increases in capacity.

Application of the safeguard measures no more than the extent necessary

1133. We based our estimate of the permissible extent of application on the aggregate unit value data. The ITC did not determine, as it did for hot-rolled bar and cold-finished bar, that a

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[1403] ITC Report, p. 165.
[1404] ITC Report, p. 165.
[1405] ITC Report, p. 163.
[1406] ITC Report, p. TUBULAR-C-4.

difference in product mix between domestic producers and importers might affect the unit value data. Moreover, the unit value data is public, and the pricing data confidential.

1134. In our estimate regarding consistency with Article 5.1, we also consider two issues addressed by the ITC: existing antidumping duty orders and a likely increase in demand for large diameter line pipe. The ITC found that existing antidumping duty orders covered a limited number of products and countries. Although the orders had been in place since at least 1989, they did not prevent the overall increase in imports, or even prevent increases in imports from the covered countries.[1407] Moreover, the data gathered by the ITC reflects any effect on the industry that the orders may have had. Since we based our estimate regarding the measure on that data, we did not need to adjust the estimate to account for the effect of the antidumping duty orders.

1135. As for the likely increase in demand for large diameter line pipe, the ITC found as a general matter that "rising demand tends to ameliorate the effect of a given volume of imports." However, the Commissioners also found that decreasing demand for standard pipe was offsetting the increase in demand for large diameter line pipe.[1408] These findings by the ITC indicate that there was no overall increase in demand for certain welded pipe and, therefore, no basis to conclude that increased demand would lessen the future effect of increased imports. Therefore, we did not attempt to incorporate this factor into our analysis.

1136. For the first step, in light of our conservative estimate that the decrease in the domestic industry's financial performance in 2000 was attributable to increased capacity, we did not attempt to determine a domestic price that would increase operating income margins above their 2000 levels. In the second and third steps, we based our estimate on data for 1998 through the first half of 2001, the period when imports were increasing. The result of this calculation appears in Safeguard Measure Worksheet E.

1137. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. certain welded pipe market. These models indicated that a 15 percent increase in duties would result in an increase of between 9.3 and 11.5 percent in the sale price of imported certain welded pipe (excluding pipe from Canada) in the United States.[1409] This suggests that the 15 percent tariff on certain welded pipe is set at a magnitude that satisfies the requirements of Article 5.1.

Economic modeling also supports this explanation

1138. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the

[1407] ITC Report, p. 166.
[1408] ITC Report, p. 166.
[1409] Memorandum EC-046, p. TUBULAR-21 (US-64).

President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet E, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

f. The tariff on FFTJ

Injury caused by increased imports

1139. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic FFTJ industry. The ITC identified five factors other than increased imports that potentially caused injury: the business cycle for the oil and gas industry, increases in capacity and intra-industry competition, the inefficiency of domestic producers' outdated facilities, shortage of qualified workers, and purchaser consolidation. The ITC found that the business cycle in the oil and gas industry in 2000 and the first half of 2001; capacity and intra-industry competition; and inefficiencies in domestic producers' facilities or shortages of workers were not factors causing serious injury.

1140. The ITC found that purchaser consolidation would put "some" pressure on domestic producers' prices, but would not explain the reduction in domestic production, shipments, employment and other non-price indicators that occurred.[1410] Thus, the ITC did not attribute any of the decrease in non-price factors to purchaser consolidation, and only "some" of the decrease in domestic prices.

1141. The findings of the ITC indicate that most of the reduction in domestic producers' production, capacity utilization, shipments, market share, number of workers, wages, and profitability from 1999 through the first half of 2001 is properly attributed to increased non-FTA imports. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. Since the analysis of the ITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, we will base our analysis for FFTJ bar on the changes from 1999 through the first half of 2001 only.

1142. The ITC did not attribute any injury to four of the five other potential causes of injury. It attributed some of the decrease in FFTJ prices, but none of the other decreases in industry performance, to purchaser consolidation. The ITC attributed domestic producers' loss of market share, decreased prices, and decreased profitability to increased imports, and to no other cause.

Application of the safeguard measures no more than the extent necessary

[1410] ITC Report, p. 178.

1143. We based our analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the ITC noted that "[w]e are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix."[1411]

1144. In the first step, as a conservative estimate we chose 1998, the year following the first significant increase in imports, as the appropriate base year, keeping in mind that imports increased somewhat in that year, and thus may have had some negative effect on the industry. The ITC found that purchaser consolidation had negative effects on the industry. As a conservative estimate, we treated one-half of the reduction in operating income in each year as attributable to purchaser consolidation. We estimated the revenue shortfall in 1999 through the first half of 2001, periods in which the ITC indicated that imports caused some of the decline in the industry's performance. In the second step, we estimated the amount by which the 1998 operating income margin would have to rise to recoup the shortfall in operating income estimated in step 2.[1412] In the third step, we based the pricing analysis on the ITC pricing comparisons on page TUBULAR-59 of the ITC Report. The results of these calculations appear in Remedy Worksheet F.

1145. We noted the ITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary.

1146. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. FFTJ market. These models indicated that a 15 percent increase in duties would result in an increase of between 10.5 and 12.5 percent in the sale price of imported FFTJ in the United States.[1413] This suggests that the 13 percent tariff on FFTJ is set at a magnitude that satisfies the requirements of Article 5.1.

Economic modeling also supports this explanation

1147. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet F, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

g. The tariff on stainless steel bar

[1411] ITC Report, p. 176, n. 1087.

[1412] We do this by estimating the revenue shortfall in each year in which the ITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[1413] Memorandum EC-046, p. TUBULAR-23 (US-64).

Injury caused by increased imports

1148. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic stainless steel bar industry.

1149. The financial data on the stainless steel bar industry were confidential in the ITC Report. However, there were publicly available data in the prehearing report.[1414] We have used these public data in making our estimate regarding compliance with Article 5.1, since no other public data are available. We note that these data are generally reflective of the trends in indicators in the industry. For convenience, we present this data in the following table:

	1998	1999	2000	1st half 2000	1st half 2001
Production	175,171	164,376	179,090	94,890	81,750
Capacity utilization	57.8%	52.1%	55.8%	59.5%	49.6%
Shipments	169,515	158,861	173,582	92,878	84,186
Market share	60.5%	59.8%	53.5%	52.7%	54.9%
Employment	2,125	1,854	1,941	1,901	1,793
Op. income	20,885*	4,580*	2,266*	8,746*	(1,389)*
Margin	3.7%*	0.9%*	0.4%*	2.8%*	(0.5%)*
Capital exp.	81,120*	55,581*	25,250*	23,169*	12,794*
Inventory	21,130	21,302	19,392	19,435	14,894

Source: ITC Report, p. STAINLESS-C-4 & ITC prehearing report, p. STAINLESS-C-4 (US-61). Production, shipments, and inventory in short tons; employment in number of workers, operating income and capital expenditure in $1 million.
* Indicates data made public in the ITC prehearing report.

1150. The ITC identified two factors other than increased imports that potentially caused injury: a downturn in demand for stainless steel bar and increase in energy costs in late 2000 and the first half of 2001 and poor operations by domestic producers AL Tech/Empire and Republic. The

[1414] The ITC made data on the financial performance of the stainless steel bar industry publicly available in its prehearing report. Subsequent to issuance of that report, an additional small producer submitted data. Thus, public revelation of aggregate data available at the time of the ITC Report would allow anyone to calculate that producer's proprietary data by subtracting out the data from the preliminary report. Accordingly, the ITC redacted all financial data on this industry from the final public version of the ITC Report.

ITC found that poor operations by domestic producers AL Tech/Empire and Republic, and downturn in demand for stainless steel bar and increased energy costs prior to late 2000 were not factors that caused injury to the domestic industry.

1151. These findings indicate that the injury to the domestic industry in 1999, as reflected in the reduction in domestic producers' production, shipments, market share, employment, revenue, and operating income in 1999, is properly attributed to increased imports. This is not to suggest that imports before 1999 had no negative effects. Since the analysis of the ITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, we will base our analysis for stainless steel bar only on the changes in 1999 and after.

1152. The ITC found that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001, albeit one less important than the injury caused by increased imports. The ITC further indicated that the domestic industry could have increased prices to cover increased costs in the absence of increased imports. As a conservative estimate, we treated half of the decline in the industry's performance in 2000 and the first half of 2001 as attributable to increased imports.

1153. Non-FTA imports continued in the first half 2001 at unit values far below those of the domestic producers. Although their volume and market share declined, non-FTA imports maintained a market share two percentage points higher than at any time prior to 2000 and five times higher than FTA imports.

Application of the safeguard measures no more than the extent necessary

1154. In our estimate regarding consistency with Article 5.1, we also considered existing antidumping duty orders. The ITC considered two groups of antidumping duty orders – orders imposed on imports of stainless steel bars from Brazil, India, Japan, and Spain in 1995 and orders imposed on stainless steel angles from Japan, Korea, and Spain in May 2001. The ITC found that the 1995 orders did not limit subject countries from exporting substantial, and even increased, quantities to the United States. Moreover, the data gathered by the ITC reflects any effect on the industry that the orders may have had. Since we based our estimate on that data, we do not need to adjust the estimate to account for the effect of the 1995 orders.

1155. The ITC found that it was too early to assess the effect of the 2001 orders. We note, however, that these covered angles alone, which represented at most between 8 and 18 percent of the non-FTA imports covered by the stainless steel bar safeguard measure, and a small number of countries.[1415] As a conservative estimate for purposes of this calculation, we diluted the amount

[1415] Public ITC data on total imports of stainless steel angles (from all sources, both fairly and unfairly traded) in the 1998-2000 investigation period show the following figures, which are compared in the following table to total non-FTA imports of stainless steel bar from the ITC Report:

(continued...)

of increase necessary to remedy serious injury to reflect that a trade remedy whose effects may not currently be felt already applies to these products.

1156. In our estimate regarding consistency with Article 5.1, we followed the basic steps outlined in subsection 5.a, with adaptations appropriate to the facts of this domestic industry. We based the estimate on the unit values, as there is no suggestion in the ITC report that differences in the unit values reflect different product mixes. Drawing on the ITC's analysis, we have used 1998 as the comparison year. We have treated the full difference in operating profits in 1999 versus 1998 and one-half of the difference in operating profits in 2000 and the first half of 2001 as compared with 1998, as attributable to increased imports. In the second and third steps, we used data for the period of 1999 through the first half of 2001.

1157. We noted the ITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary.

1158. The results of these calculations appear in Remedy Worksheet G. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. stainless steel bar market. These models indicated that a 20 percent increase in duties would result in an increase of between 10.2 and 14.7 percent in the sale price of imported stainless steel bar (excluding Mexican products) in the United States.[1416] This suggests that the 20 percent tariff on stainless steel bar is set at a magnitude that satisfies the requirements of Article 5.1.

Economic modeling also supports this explanation

1159. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet B,

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[1415] (...continued)

	1998		1999		2000	
	Volume	Value	Volume	Value	Volume	Value
Angles imports	9,802	20,931	16,399	27,163	17,148	32,152
Bar imports	97,552	248,724	92,341	204,223	131,184	302,546
Angles share	10.0%	8.4%	17.8%	13.3%	13.1%	10.6%

Source: ITC Report; Stainless Steel Angles From Japan, Korea, and Spain, Inv. No. 731-TA-888-890 (Final) USITC Pub. 3421, p. IV-2 (May 2001) (US-62).

[1416] Memorandum EC-046, p. STAINLESS-42 (US-64).

and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

h. The tariff on stainless steel rod

Injury caused by increased imports

1160. As we have shown in previous sections, the ITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic stainless steel rod industry. Most of the data are confidential, since the industry had a small number of producers. For purposes of explaining our estimate relating to compliance with Article 5.1, we have obtained ranged data for producers representing a large portion of the domestic industry. These data are within a range either 10 percent greater or less than the actual data. For convenience, we present this data in the following table:

	1996	1997	1998	1999	2000	1st half 2000	1st half 2001
Production	120,000	120,000	113,000	107,000	96,000	55,000	39,000
Shipments	118,000	119,000	111,000	107,000	96,000	54,000	40,000
Employment	1,000	1,000	900	900	800	800	700
Wages	50,000	52,000	46,000	44,000	43,000	23,000	18,000
Op. income	5,100	4,400	5,100	(1,300)	(4,800)	1,800	(5,200)
Margin	5.0%	4.0%	6.0%	-0.2%	-7.0%	4.0%	-18.0%
Inventory	1,600	1,000	2,300	400	900	1,900	-

Source: Stainless Steel Rod (US-63). Production, shipments, and inventory in short tons; employment in number of workers; wages, and operating income in $1 million; productivity in tons/1000 hours.

1161. The ITC identified two factors other than increased imports that potentially caused injury: downturn in demand and increased energy costs in late 2000 and the first half of 2001 and poor operations by domestic producer AL Tech/Empire. The ITC found that the poor operations by AL Tech/Empire was not a factor that caused injury to the domestic industry.

1162. The ITC found that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001, albeit one less important than the injury caused by increased imports. The ITC further indicated that the domestic industry could have increased prices to cover increased costs in the absence of increased imports.

1163. The findings of the ITC indicate that the much of the poor industry performance is attributable to increased imports. It also indicated that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001.

Application of the safeguard measures no more than the extent necessary

1164. We base our analysis of the permissible remedy on aggregate unit value data because the pricing series data for domestic industry is confidential.

1165. In our estimate regarding consistency with Article 5.1, we considered existing antidumping duty orders. The ITC noted that antidumping and countervailing duty orders were imposed in 1993, 1994, and 1998 against imports of stainless steel rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan.[1417] The ITC found that the orders appeared not to have limited the ability of foreign producers in these countries to increase exports to the United States in 1999 and 2000.

1166. We followed the basic steps outlined in subsection 5.a, with adaptations appropriate to the facts of this domestic industry. To estimate the extent of the permissible remedy, we began with the fact that in 1996 the condition of the domestic industry had not yet begun to deteriorate. Therefore, 1996 would be an appropriate comparison year, keeping in mind that imports may still have been having some negative effect on the industry. As noted above, the ITC report indicates that the injury, as reflected in the decrease in the domestic industry's performance from 1997 to 1999, was due to increased imports. Therefore, it is reasonable to treat any amount by which operating income in each of these years is below operating profits in 1996 has having been caused by increased imports. As a conservative estimate, we treated half of the decline in the industry's performance in 2000 and the first half of 2001 as attributable to this factor. In the second and third steps, we used public data for 1997 through the first half of 2001, using publicly available unit values from page STAINLESS-12 of the ITC Report. The results of these calculations appear in Remedy Worksheet H.

1167. We noted the ITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary.

1168. As a fourth step, we estimated the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the ITC staff prepared economic models on the U.S. stainless steel rod market. These models suggest that the 15 percent tariff on stainless steel rod (excluding rod from Canada and Mexico) is set at a magnitude that satisfies the requirements of Article 5.1.[1418]

[1417] ITC Report, p. 219.

[1418] Memorandum EC-046, p. STAINLESS-41 (US-64) (the results of the modelling exercise are confidential).

Economic modeling also supports this explanation

1169. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet H, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

i. The tariff on tin mill products

Injury caused by increased imports

1170. For tin mill, three Commissioners found serious injury. They issued separate views, but agreed on certain key aspects of the injurious condition faced by the domestic industry. Commissioner Miller found serious injury based on a decline in capacity utilization, U.S. shipments and sales, operating margins, average unit values, capital expenditures and employment during the period of the investigation.[1419] Commissioner Bragg treated tin mill as a component part of a single flat rolled like product, and found serious injury based on decreasing revenues, operating margins, capacity utilization, wages and employment, and the lack of ability to finance modernization in the last two and half years of the period of investigation.[1420] Commissioner Devaney also treated tin mill as part of a single flat rolled like product, and found serious injury based on declines in capacity utilization, operating margins, average unit values, and downward trends in employment and capital expenditures in the later portion of the period of investigation.[1421]

1171. For the reasons discussed above, each of these determinations reflects a permissible analysis of the effect of imports on the domestic industry. Under U.S. law, multiple affirmative determinations by individual Commissioners as to differently defined like products constitute an affirmative determination of the ITC with regard to the largest product group that is subject to enough affirmative determinations to form a majority sufficient to support a determination of the ITC. It is the injury experienced by the producers of tin mill – the product within the intersection of the determinations of Commissioners Miller, Bragg, and Devaney – that forms the basis for deciding the extent of application of the safeguard measure. The performance of these producers is evaluated in light of the findings made by Commissioners Bragg and Devaney as to the larger industry comprising producers of tin mill and flat rolled products.

[1419] ITC Report, pp. 72-74 and pp. 307-308.
[1420] ITC Report, pp. 283-282.
[1421] ITC Report, p. 345.

1172. The Commissioners rendering affirmative determinations focused on the following indicators of injury. For tin mill, these were:

	1998	1999	2000	1st half 2000	1st half 2001
Revenues	2,120	2,033	1,974	1,008	880
Shipments	3,287	3,239	3,163	1,597	1,436
Market share	87.2%	82.3%	84.5%	84.4%	84.5%
Employment	6,322	6,075	5,733	5,884	5,584
Op. income	(78)	(141)	(119)	(25)	(65)
Margin	(3.9)%	(6.9)%	(6.1)%	(2.5)%	(7.4)%
Capital Expenditures	120	146	97	29	15

Source: ITC Report, p. FLAT-C-8. Shipments in 1000 short tons; employment in number of workers; revenue, operating income, and capital expenditures in $1million.

1173. Commissioner Miller found that although the industry was unprofitable before and throughout the period, it suffered a serious downturn in 1999 as imports surged. Despite the increase in demand in 1999, the domestic industry "realized no gain, and in fact a serious loss, in profitability. Imports also showed their greatest increase in U.S. market share over this period . . . "[1422] Commissioner Bragg stated in her opinion that although the volume of imports of carbon and alloy flat products declined towards the end of the period of the investigation, "they still remained at relatively high levels and continued to negatively impact prices for the domestic product throughout the period. By forcing domestic prices lower, imports deprived domestic producers of revenue. It should be recognized that given the worsening condition of the domestic industry over the period of investigation, the amount(level) of imports sufficient to cause serious [injury] declined correspondingly."[1423]

1174. Commissioner Miller analyzed three additional potential causes of the serious injury: declining demand, purchaser consolidation, and overcapacity. Commissioner Bragg identified several potential causes of serious injury other than imports, but determined that for all flat products, "any injury sustained by the domestic industry stems solely from increased imports."[1424] Commissioner Devaney found that declining demand, increased capacity, and competition from

[1422] ITC Report, p. 308.
[1423] ITC Report, p. 294.
[1424] ITC Report, p. 295.

minimills contributed to the deterioration of the industry encompassing all flat steel products. He found that declining demand had effect only at the end of the investigation period.[1425]

1175. Commissioner Miller found that declining overall demand was not causing injury. She noted that this condition began long before the investigation period, and might account for the industry's weak state in 1996, but that demand actually increased in 1999 with no improvement in the condition of the domestic industry.[1426]

1176. Commissioner Miller found that purchaser consolidation existed throughout the investigation period, and signaled the "intense price competition that exists for tin mill products, both domestic and imported.[1427] Since this factor existed throughout the investigation period, it may have had negative effects throughout, but it would not be responsible for *changes* in the industry's condition.

1177. Commissioner Miller found that there was overcapacity during the investigation period, but noted that the decrease in capacity utilization coincided with the import surge. She also noted that the industry's overall capacity decreased during the investigation period, and that the tin mill industry had taken steps to rationalize capacity.[1428] Although this factor may have had negative effects on the industry during the investigation period, the decline in capacity indicates that it was not responsible for any worsening in the condition of tin mill producers during the investigation period.

1178. The ITC Report detail the relationship between increased imports from non-FTA sources and injury to the domestic industry. Commissioners Bragg, Devaney, and Miller found that imports caused serious injury because when an upswing in demand occurred in 1999, the domestic industry was unable to make any gain as imports surged. Non-NAFTA imports surged 51.5 percent between 1998 and 1999 resulting in the lowest profit margin (-6.9 percent) for any full year of the period of investigation. Domestic prices and average unit values were also at their lowest in 1999. Although non-NAFTA imports declined in 2000, they still were at higher levels than the 1996-1998 period. Commissioner Bragg in her analysis found that the "impact of opportunities lost during an upswing in the given cycle would not only have an immediate impact on the domestic industry by virtue of suppressed and depressed prices, lost sales, and resulting lost revenues, but would also be expected to have lingering carryover effects on the domestic industry as the cycle turned lower."[1429]

[1425] ITC Report, p. 63. In footnote 224 of the ITC Report, p. 55, Commissioner Devaney joins the analysis of the majority for the causation of injury in flat products, stating that the result is the same when the analysis is performed over the entire industry as he has defined it, that is that imports are a substantial cause of serious injury.

[1426] ITC Report, pp. 308-309.

[1427] ITC Report, p. 309.

[1428] ITC Report, p. 309.

[1429] ITC Report, p. 293.

1179. Commissioner Miller found that her analysis of tin mill would not change if she had excluded Canada and Mexico.[1430] Commissioner Bragg found that her analysis that the domestic flat rolled industry suffered serious injury from imports would not change with the exclusion of NAFTA imports.[1431]

1180. As a conservative approach, we consider that if one of the Commissioners identified a factor as causing injury, that factor caused injury regardless of the views of the other Commissioners. Accordingly, for purposes of evaluating whether the tin mill safeguard measure complied with Article 5.1, we conclude that non-NAFTA imports were responsible for some of the reduction in domestic producers' sales and market share, production, profits, wages, and employment beginning in 1999. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years.

1181. Accordingly, for purposes of the evaluation of consistency with Article 5.1, we will treat increased capacity, competition with minimills, and decline in demand in the latter part of the period of investigation as factors causing injury to the domestic tin mill industry.

Application of the safeguard measures no more than the extent necessary

1182. In evaluating the safeguard measure, we also considered Commissioner Miller's observation that the United States imposed antidumping duties on tin mill from Japan in the first half of 2000. She noted that, even so, imports continued to have a significant presence in the United States.[1432] Accordingly, we did not adjust our estimate to reflect these antidumping duty orders.

1183. For purposes of the estimate of consistency with Article 5.1, we have followed a volume-based approach. Commissioner Miller noted the significant volume of imports and the market share increase, both in 1999 and over the entirety of the investigation period.[1433]

1184. Accordingly, we analyzed this safeguard measure based on import volumes. We noted that imports increased substantially between 1998 and 2000. As a first step in the analysis, we estimated what non-NAFTA import volume would have been if non-NAFTA imports had stayed at their 1998 market share in 1999 through 2001. We then compared the estimated import volumes with the actual import volumes for those periods, and found that non-NAFTA imports would have been, on average, approximately 23 percent lower. This reduction represents a reduction in import volume roughly equivalent to the ITC modeling associated with a 30 percent

[1430] ITC Report, p. 310, nn. 28 & 29.
[1431] Second Supplemental Response, p. 14.
[1432] ITC Report, p. 308.
[1433] ITC Report, p. 308.

tariff, suggesting that the 30 percent tariff on tin mill is set at a magnitude that satisfies the requirements of Article 5.1.[1434]

1185. Since this approach was based on the volume of non-NAFTA imports alone, we concluded that no adjustment to the estimate was necessary. In order to calculate target import levels, we used non-NAFTA market share for 1998, the year immediately preceding the 1999 surge in imports, and then applied it to actual apparent consumption for years 1999-2001. We then compared calculated target import levels to the actual import levels for each year. The results of these calculations appear in Remedy Worksheet I.

Economic modeling also supports this explanation

1186. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet I, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

j. The tariff on stainless steel wire

Injury caused by increased imports

1187. For stainless steel wire, two Commissioners found a threat of serious injury and one Commissioner serious injury. They issued separate views, but agreed on certain key aspects of the injurious condition faced by the domestic industry. Chairman Koplan found a threat of serious injury based on a decline in sales and market share, increasing inventories, and a downward trend in production, profits, wages, productivity, and employment, indicating that the domestic producers could not generate adequate capital for modernization. Commissioner Bragg treated stainless steel wire as part of a single like product with stainless steel wire rope (terming the combination "stainless steel wire products"), and found a threat of serious injury based on decreasing domestic sales and market share in the first half of 2001, increases in inventories throughout period of investigation, and lower trends in production, profits, wages, productivity, and employment in the first half of 2001.[1435] Public data indicate that the volume of stainless steel wire rope imported into the United States was much smaller than the volume of stainless steel wire, suggesting that the inclusion of stainless steel rope would not substantially change the data.[1436]

[1434] ITC Memorandum EC-Y-046, p. FLAT-26
[1435] ITC Report, pp. 288-289.
[1436] ITC Report, pp. STAINLESS-14 & STAINLESS-16.

1188. Commissioner Devaney also treated stainless steel wire as part of a single like product with stainless steel wire rope, but found serious injury based on falling operating income levels and a decline in most indicators in the first half of 2001.[1437]

1189. For the reasons discussed above, each of these determinations reflects a permissible analysis of the effect of imports on the domestic industry. Under U.S. law, multiple affirmative determinations by individual Commissioners as to differently defined like products constitute an affirmative determination of the ITC with regard to the largest product group that is subject to enough affirmative determinations to form a majority of the ITC. It is the injury experienced by the producers of stainless steel wire – the product within the intersection of the determinations of Commissioners Koplan, Bragg, and Devaney – that forms the basis for deciding the extent of application of the safeguard measure. The performance of these producers is evaluated in light of the findings made by Commissioners Bragg and Devaney as to the larger industry comprising producers of stainless steel wire and stainless steel rope.

1190. For similar reasons, the overall determination of the ITC is treated as a threat of material injury. As the Appellate Body explained in *US – Line Pipe*,

> since a "threat" of "serious injury" is defined as "serious injury" that is "clearly imminent", it logically follows, to us that "serious injury" is a condition that is above that *lower threshold* of a "threat". A "serious injury" is *beyond* a "threat", and, therefore, is *above* the threshold of a "threat' that is required to establish a right to apply a safeguard measure.[1438]

In the terms adopted by the Appellate Body, treating the affirmative determination of the ITC as threat of serious injury recognizes that all three Commissioners found the industry had at least passed the lower threshold of a threat. It is the degree of injury that is common to all three determinations.

1191. The Commissioners rendering affirmative determinations focused on the same indicators of injury. For stainless steel wire, these were:

[1437] ITC Report, p. 345.
[1438] *US – Line Pipe*, AB Report, para. 169.

	1999	2000	1st half 2000	1st half 2001
Production	103,484	106,547	56,698	43,347
Shipments	102,211	104,752	55,966	43,933
Market share	80.5%	77.0%	77.7%	72.7%
Employment	1,022	1,017	1,021	935
Wages	31	31	16	14
Productivity	48	50	51	46
Op. income*	7,401	5,854	7,808	(4,428)
Margin*	2.0%	2.3%	5.5%	(4.0)%
Inventory	66,688	71,313	50,589	46,271

Source: ITC Report, p. STAINLESS-C-7 & ITC Prehearing Report, p. STAINLESS-C-7. Production, shipments, and inventory in short tons; employment in number of workers; wages, and operating income in $1 million; productivity in tons/1000 hours.

* Indicates data made public in the ITC prehearing report.

1192. The ITC found that "increased imports at underselling prices have played a key role in bringing about this negative trend," ending "at a point near serious injury."[1439]

1193. One or more of the Commissioners identified three other potential causes of the threat of serious injury: declining demand, raw material costs, and appreciation of the dollar..

1194. Chairman Koplan and Commissioner Bragg found that some portion of the industry's declining performance in the first half of 2001 is attributable to the decline in demand for stainless steel wire. Chairman Koplan found that the decline in demand alone did not explain the injury experienced by the domestic producers, whose production and shipments declined more than apparent domestic consumption in the first half of 2001. Commissioner Bragg found that the imminent impact of imports outweighed these other factors.[1440]

[1439] ITC Report, p. 164.

[1440] ITC Report, pp. 259 and 302. Commissioner Bragg treated this factor under the rubric of the "general downturn in the economy."

1195. Commissioners Koplan and Bragg found that the industry's raw material costs had and would continue to have an impact on the domestic industry, but one outweighed by increased imports.[1441]

1196. Commissioner Bragg found that the appreciation of the dollar had and would continue to have an impact of the domestic industry, but one outweighed by increased imports.[1442]

1197. The ITC Report details the relationship between increased imports from non-FTA sources and injury to the domestic industry. Commissioners Koplan and Bragg found that imports caused the threat of serious injury because when domestic consumption fell in the first half of 2001, after four years of steady increases, imports *increased*, resulting in a sharp decrease in sales and market share.[1443] As a result, domestic producers could not raise prices to cover increased costs, and their operating income plummeted.[1444] Commissioners Koplan, Bragg, and Devaney all found that underselling by imported products played a role in causing serious injury.[1445]

1198. As a conservative approach, we consider that if one of the Commissioners identified a other factor as causing injury, that factor caused injury regardless of the views of the other Commissioners. Accordingly, for purposes of demonstrating that the safeguard measures complied with Article 5.1, we interpret the findings of the Commissioners as demonstrating that non-FTA imports were responsible for some of the reduction in domestic producers' sales and market share, increasing inventories, production, profits, wages, productivity, and employment in the first half of 2001. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. As Chairman Koplan found, "between 1996 and 2000, even though domestic consumption increased, the domestic industry kept prices of the domestic product in line with costs and earned only low profits because of the presence of substitutable stainless steel wire imports."[1446] Commissioner Bragg found that increased imports prevented domestic producers taking advantage of an upswing in the business cycle during the 1996 to 2000 period.[1447]

1199. We also assume the injury to some extent attributable to the decline in demand, increasing raw material costs, and currency appreciation, but that none of the injury is attributable to NAFTA imports. As a conservative estimate, we consider that the entirety of the decrease in the industry's financial performance was due to these factors.

Application of the safeguard measures no more than the extent necessary

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[1441] ITC Report, pp. 259 and 302.
[1442] ITC Report, p. 302.
[1443] ITC Report, pp. 259 and 302.
[1444] ITC Report, p. 259.
[1445] ITC Report, pp. 259, 294, and 346.
[1446] ITC Report, p. 259.
[1447] ITC Report, p. 302.

1200. We performed a different analysis for stainless steel wire because the Commissioners' causation analyses focused on the volume of imports and their market share. In addition, the underselling data cited by Commissioner Koplan was confidential, and the average unit value data did not show similar patterns, making it unusable as a surrogate.

1201. Accordingly, we analyzed this safeguard measure based on import volumes. We noted that imports increased substantially between 1999 and 2000. As a first step in the analysis, we calculated what non-NAFTA import volume would have been if non-NAFTA imports had stayed at their 1999 market share in 2000 and 2001. We then compared the calculated import volumes with the actual import volumes for those periods, and found that non-NAFTA imports would have been, on average, approximately 20 percent lower. This reduction represents a reduction in import volume lower than the ITC modeling associated with a 10 percent tariff, indicating that the safeguard measure was applied less than the extent necessary.[1448]

1202. Since this approach was based on the volume of non-NAFTA imports alone, we concluded that no adjustment to the estimate was necessary. In a similar vein, no adjustment was necessary to reflect our conservative estimate that the decrease in the domestic industry's financial performance in 2000 was attributable to the decline in demand or increasing raw material costs. In addition, since our calculation does not make use of import prices, no adjustment was necessary to reflect our conservative estimate that currency appreciation was a cause of injury to the domestic industry. The results of these calculations appear in Remedy Worksheet J.

Economic modeling also supports this explanation

1203. As described in subsection 5.b, we modeled two scenarios: (1) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on March 5, 2002, had been in effect in 2000; and (2) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The results of this exercise appear in Modeling Worksheet J, and suggest that the United States applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

k. The effect of exclusions

1204. We note that the preceding analysis of the extent of application of the safeguard measures does not take into account the product exclusions granted at the time the President established the safeguard measures and afterward. Should the Panel have any doubt that the safeguard measures the type and level of each measure were applied less than the extent necessary, the granting of product exclusions should remove that doubt.

[1448] ITC Memorandum EC-Y-046, p. STAINLESS-40.

7. The Safeguard Measure on Certain Welded Pipe is Consistent With the Findings of the ITC

1205. The United States applied the safeguard measure on line pipe to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. It properly took guidance from the role of imports in causing a threat of serious injury, and not whether the industry's *current* condition rose to the level of serious injury.

1206. Korea, China, and Switzerland argue that the safeguard measure on certain welded pipe goes beyond the extent necessary, based on the following passage from the ITC's recommendation on remedy:

> Given that we have found threat of serious injury, the intent of our recommended remedy is to prevent imports from rising to a level that would cause serious injury. A straight tariff would affect all imports, even those at levels we have found did not cause serious injury. In light of the diversity of welded pipe imports, we seek to avoid creating supply shortfalls during the period of relief. Moreover, in order to discourage product shifting, the above-quota tariff-rate we recommend on welded pipe mirrors the tariff level we recommend be imposed for flat-rolled carbon steel products.[1449]

They consider that, in light of this statement, a "straight tariff . . . goes necessarily beyond the extent necessary to prevent or remedy serious injury."[1450]

1207. Contrary to Complainants' interpretation, this passage merely states the intent *of the ITC* to prevent imports from rising above current levels that the ITC felt were not causing *serious* injury. It does not contain a finding relevant to the question of the permissible extent of a safeguard measure.

1208. Most importantly, the ITC focused on whether imports at a particular level were causing serious injury. The Appellate Body has stressed that imports need not be responsible for an injury that by itself reaches the level of serious injury.[1451] Moreover, once there is a finding of serious injury or threat of serious injury, the role of imports in bringing that state about guides the extent of application of a safeguard measure. As the Appellate Body concluded in *US – Lamb Meat*,

> [T]he extent of the remedy permitted by Article 5.1, first sentence, is not determined by the characterization in the determination of the situation of the

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[1449] ITC Report, p. 383, quoted in Korea first written submission, para.208; China first written submission, para 553; and Switzerland first written submission, para. 320.

[1450] Switzerland first written submission, para. 320; China first written submission, para. 555.

[1451] *US – Line Pipe*, AB Report, para. 209.

> industry as "serious injury" or "threat of serious injury," but by the extent to which that "serious injury" or "threat of serious injury" has been caused by increased imports.[1452]

The observation that imports at 2000 levels did not cause *serious* injury is irrelevant to the inquiry as to their contribution to the *threat* of serious injury that the United States was permitted, under Article 5.1, to prevent or remedy.

1209. In this regard, Complainants disregard the relevant part of the determination – the ITC's express finding that "imports have had a negative effect on the domestic industry over the period we have examined."[1453] Thus, the ITC did not find that only the amount of the increase above 2000 levels threatened to cause serious injury. These imports had negative effects that had left the industry in a "weak" condition, and "approaching a state of serious injury."[1454]

1210. Finally, the passage indicates that the ITC chose a TRQ at 2000 levels in part to avoid creating supply shortages for domestic steel users. This consideration also is irrelevant to the inquiry under the Safeguards Agreement – whether a safeguard measure prevents or remedies serious injury to the domestic industry producing (not consuming) certain welded pipe.

1211. Accordingly, Article 5.1, as interpreted by the Appellate Body, permitted the United States to apply a safeguard measure to the extent necessary to prevent or remedy that injury attributable to increased imports.

8. An Inconsistency With Article 5.1 Does Not Automatically Result In an Inconsistency With Article 7.1

1212. An inconsistency with Article 5.1 does not automatically result in an inconsistency with Article 7.1 because the two provisions cover different aspects of a safeguard measure. Article 5.1 requires that the safeguard measure not be applied beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment. As the panel in *US – Line Pipe* explained, in examining which of two measures is applied to a greater extent, the analysis should "compare[] the application of the measures as a whole" and not "compare[] the application of the separate constituent parts of the measure in isolation."[1455] In performing this analysis, the panel considered the type of measure (TRQ vs. quantitative restriction), level of restriction (amount subject to lower duty rate vs. quota) and duration.[1456]

[1452] *US – Line Pipe*, AB Report, para. 176.
[1453] ITC Report, p. 163.
[1454] ITC Report, pp. 159 and 162.
[1455] *US – Line Pipe*, Panel Report, para. 7.97.
[1456] *Ibid*., para. 7.96.

1213. In contrast, Article 7.1 addresses only one constituent part of the measure, the duration, which may be "only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment." A measure might be found inconsistent with Article 5.1 because its level was too high even though the chosen duration was permissible. Therefore, an inconsistency with Article 5.1 does not automatically create an inconsistency with Article 7.1.

1214. Norway argues that its claim that the safeguard measure was applied beyond the extent necessary to remedy injury caused by imports "automatically entails a violation of the requirement in Article 7.1 . . . ."[1457] As we have observed, a panel could conclude that a measure was necessary for a given period, but the Member involved applied it at too high a level. Therefore, Norway's arguments regarding Article 5.1, even if accepted by the Panel, do not meet its burden of proof to establish an inconsistency with Article 7.1.

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

1215. In setting the TRQ on slab, the United States based the quantity free of safeguard duties on import levels in 2000, which happened to be the year with the highest import levels of slab during the ITC's investigation period. The United States considered the one-year period of 2001 to be a recent representative period for shares of imports. Therefore, we based the identification of substantial suppliers and allotments of the duty-free quantity among substantial suppliers on shares of total imports in 2001. In so doing, the United States complied fully with the obligation under Article XIII:2(d) to provide allotments to substantial supplying Members "based upon the proportions, supplied by such Members during a previous representative period."

1216. Specifically, the United States based the total quota amount of 5.4 million tons on imports of slab during 2000, exclusive of FTA imports that were not subject to the safeguard measures.[1458] To determine the countries with a substantial interest in supplying the product within the meaning of Article XIII:2(d) ("substantial suppliers"), we examined the share of total imports for the top ten suppliers, as follows:

Supplier	2001 share
Brazil	39.20%
Mexico	23.52%
Russia	18.83%

[1457] Norway first written submission, para. 371.
[1458] ITC Report, p. FLAT-C-2.

Ukraine	2.09%
Australia	5.47%
EC	2.31%
Japan	2.73%
Canada	0.86%
Venezuela	0.00%
China	0.65%

Source: ITC Dataweb

The United States decided that in light of the size of the U.S. market for slab and the large quantity of imports, two percent of total imports was an appropriate threshold in this case. Consistent with these considerations, we treated as substantial suppliers all countries that exceeded 2 percent of total imports in 2001.

1217. With the exception of Brazil and Mexico, the share of total imports held by each source fluctuates to a large degree from year to year. The use of 2001 import share data had the additional benefit of treating as substantial suppliers only countries that had consistently supplied more than two percent of imports. Thus, the identification of substantial suppliers was not based on temporary fluctuations in import shares.

1218. We allotted shares of the 5.4 million ton duty-free quantity to substantial suppliers based on their share of imports in 2001, as shown in the following table:

Supplier	**2001 imports**	**Share of non-NAFTA imports**	**TRQ allotment**
Brazil	2,224,262	51.84%	2,799,392
Russia	1,068,337	24.90%	1,344,578
Ukraine	118,708	2.77%	149,402
Australia	310,620	7.24%	390,937
EC	130,904	3.05%	164,752
Japan	154,833	3.61%	194,868
Other non-NAFTA	282,916	6.59%	356,070

Total non-NAFTA imports	4,290,580

Source: ITC Dataweb

These are the allotments provided to substantial suppliers for the slab TRQ within the certain carbon flat-rolled steel safeguard measure. The basic calculations were described to Complainants during consultations.

1219. China argues that this system is inconsistent with Article 5.2 and Article XIII because it provided allotments to some Members that were not substantial suppliers while failing to provide allotments to other Members, including China, that were not substantial suppliers.

1220. However, Article 5.2 does not apply to safeguard measures that take the form of a TRQ. The Panel in *US – Line Pipe* provided the following reasons for this conclusion:[1459]

> We do not consider that tariff quotas are "quantitative restriction[s]" within the meaning of Article 5. We note that the second sentence of Article 5.1 refers to quantitative restrictions in the sense of measures that "reduce the quantity of imports below [a certain] level". Tariff quotas do not necessarily reduce the volume of imports below any predetermined level, since they do not impose any limit on the total amount of permitted imports (whether globally or from a specific country). Tariff quotas merely provide that imports in excess of a certain level shall be subject to a higher rate of duty. Thus, it would appear that tariff quotas are not the sort of measure envisaged by the reference in the second sentence of Article 5.1 to "quantitative restriction[s] [that] reduce the quantity of imports below [a certain] level".
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> * * * * *
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> Since we have already found that a tariff quota is not a "quantitative restriction" (a broader category including quota) within the meaning of Article 5.1, it cannot constitute a "quota" (a narrower category of quantitative restriction) within the meaning of Article 5.2(a). [citation omitted]
>
> For these reasons, we find that the line pipe measure, as a tariff quota, is not subject to the Article 5 disciplines on quantitative restrictions (Article 5.1, second sentence) or quotas (Article 5.2(a)).[65]

[1459] *US – Line Pipe*, Panel Report, paras. 7.69, and 7.73-7.74. Additional reasoning of the Panel in support of this conclusion appears in paragraphs 7.70-7.73.

[65] We are fully aware that our finding would mean that Article 5.2(b) "quota modulation" is not available for tariff quotas. We do not consider that this result is contrary to the principle of effective treaty interpretation, as Article 5.2(b) remains fully applicable, and therefore effective, in respect of safeguard measures falling within the scope of Article 5.2(a).

1221. China asserts that the panel in *US – Line Pipe* decided that Article 5 and Article XIII could apply simultaneously to analyze a safeguard measure.[1460] As this quotation shows, the panel reached the opposite conclusion with regard to safeguard measures in the form of a TRQ.

1222. China notes that the Appellate Body found in *EC – Bananas* that "a member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest."[1461] China then goes on to ascribe to the panel in *EC – Bananas* an "approach" under which a Member with at least 10 percent of total imports is automatically a substantial supplier, a Member with less than 5 percent of total imports is automatically not a substantial supplier, and a case-by-case analysis is applied to Members with between 5 and 10 percent of total imports.[1462] It derives this test from the panel's supposed finding that Costa Rica and Colombia (each with more than 10 percent of total imports) were substantial suppliers while St. Lucia (with 4.5 percent) was not.[1463]

1223. In deriving a numerical test from the *EC – Bananas* panel report, China does exactly what the panel stated it would not do:

> We do not find it necessary to set a precise import share for determination of whether a Member has a substantial interest in supplying a product. A determination of substantial interest might well vary somewhat based on the structure of the market.[1464]

Moreover, the panel made this statement in response to the complaining parties' argument that the 10 percent threshold for a Member to possess a "substantial interest" under Article XXVIII be adopted by analogy for Article XIII. Thus, the panel not only rejected precise numerical thresholds in general, but specifically rejected the ten percent threshold proposed by the complaining parties.[1465]

[1460] China first written submission, para. 621.

[1461] China first written submission, para. 622, *quoting European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB, adopted 25 September 1997, para. 161.

[1462] China first written submission, para. 635.

[1463] China first written submission, para. 624.

[1464] *EC – Bananas*, Panel Report, WT/DS27/R/ECU, adopted 9 September 1997, as modified by the Appellate Body, WT/DS27/AB/R, para. 7.84.

[1465] *Ibid*., para. 7.83.

1224. Moreover, the panel's actual finding does not support China's view that St. Lucia's 4.5 percent share of imports automatically precluded treatment as a substantial supplier. The panel stated that

> *[g]iven the particular circumstances of this case*, we find that it was not unreasonable for the EC to conclude . . . that Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d).[1466]

1225. This tightly circumscribed finding that the EC conclusion was "not unreasonable," conditioned on the "particular circumstances" of the case, cannot be read to create a set of presumptions as to what share of imports gives a supplier a "substantial interest in supplying the product" in the meaning of Article XIII:2(d). Accordingly, the U.S. approach of setting a two-percent threshold for treatment as a substantial supplier in light of the conditions of the slab market, rather than using numerical thresholds based on the market for a different product, was consistent with Article XIII:2(d).

1226. China also argues that the 5.4 million ton TRQ "was fixed at a very low level in light of former trade."[1467] In fact, as we have shown, the TRQ was based on the very highest level of imports during the ITC investigation period.

1227. Thus, China has not met its burden of proof, as it has provided no basis for the Panel to conclude that the slab TRQ was inconsistent with Article 5.2 or 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)

1. Article I and Article 2.2 Do Not Prohibit A Member From Excluding Its Free Trade Agreement Partners From Safeguard Measures

1228. 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.[1468] 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 measures – between them. Footnote 1 of the Safeguards Agreement establishes that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX

[1466] *EC – Bananas*, Panel Report, para. 7.85 (emphasis added).

[1467] China first written submission, para. 629.

[1468] The title of Korea's argument with regard to the exclusion of FTA partners from safeguard measures refers to Article XIII. However, the text does not mention that Article, which should lead the Panel to conclude that Korea has failed to meet its burden of proof with regard to the claimed inconsistency with Article XIII.

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.

1229. The text of GATT 1994 is clear on this point. Article XXIV:4 recognizes "the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration" among Members, consistent with the objective of facilitating trade while not raising barriers to trade with other Members. To this end, Article XXIV:5 provides that "the provisions of this Agreement shall not prevent" the formation of a free-trade area, provided that certain conditions are met.

1230. Article XXIV:8(b) defines a free trade area as:

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

It is noteworthy that the list of measures that Article XXIV:8 specifically authorizes FTA parties to maintain against each other does not include safeguards measures applied under Article XIX. By implication then, safeguard measures may be made part of the general elimination of "restrictive regulations of commerce" under any FTA.

1231. To the extent that Articles I or XIX can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception. This is because under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Article XIX, can be read to prevent participants in an FTA from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures.

1232. The United States' free trade agreements with Canada, Mexico, Israel, and Jordan clearly meet the requirements of Article XXIV.

1233. NAFTA qualifies for this exception. NAFTA provided for the elimination within ten years of all duties on 97 percent of the Parties' tariff lines, representing more than 99 percent of the trade among them in terms of volume. With regard to eliminating other restrictive regulations of commerce, NAFTA applies the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties. The NAFTA Parties also eliminated the application of global safeguard measures among themselves under certain conditions. NAFTA did not raise barriers to third countries, since none of the NAFTA Parties increased tariffs on trade with non-NAFTA Members. The NAFTA Parties also did not place

other restrictive regulations of commerce on other WTO Members upon formation of the free-trade area.[1469]

1234. The Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel ("Israel FTA") and the Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area ("Jordan FTA") also satisfy the requirements of Article XXIV. The Israel FTA entered into force 17 years ago, on September 1, 1985. Phase-in of tariff reductions ended seven years ago. Currently, 98.61 percent of U.S. imports from Israel are free of duty. The Report of the Working Party on the Israel FTA discusses that agreement in more detail.[1470]

1235. The Jordan FTA entered into force on December 17, 2001. The FTA will eliminate tariffs on virtually all trade between the United States and Jordan within ten years. The tariff reductions are in four stages: Current tariffs of less than 5 percent will be phased out in two years; those that are now between and 5 and 10 percent will be eliminated in four years, those between 10 and 20 percent will be gone in five years, and those that are now more than 20 percent will be eliminated in ten years. Two rounds of tariff reductions have already occurred, and the planned phase-out is scheduled to end by January 1, 2010. The Jordan FTA was notified to the WTO, as was the text of the agreement.[1471]

1236. With regard to other restrictive regulations of commerce, the Israel and Jordan FTAs apply the principles of national treatment, transparency, and a variety of other market access rules to trade between the Parties. Neither agreement raises barriers to third countries, since the United States, Israel, and Jordan did not increase tariffs on trade with third countries as part of the FTAs. The United States, Israel, and Jordan also did not place other restrictive regulations of commerce on other WTO Members upon formation of the free-trade areas.

1237. Based on the statistics discussed above, we consider that, wherever may be the threshold under Article XXIV:8 for elimination of duties on substantially all trade, NAFTA, the Israel FTA, and the Jordan FTA exceed that threshold.

1238. The agreements take somewhat different approaches to safeguard measures. NAFTA requires the parties to exclude each other's goods from Article XIX safeguard measures unless imports from a NAFTA partner, taken individually, account for a substantial share of total

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[1469] Further explanation of the US views on NAFTA and its compliance with Article XXIV appear in the following documents: L/7176, WT/REG4/1 & Corr.1-2, WT/REG4/1/Add.1 & Corr.1, WT/REG4/5, and WT/REG4/6/Add.1. Since these are voluminous materials, we will not append them, but incorporate them into this submission by reference.

[1470] Free Trade Agreement Between Israel and the United States, Report of the Working Party, adopted on 14 May 1987, BISD 35S/58.

[1471] WT/REG134/1 (7 March 2002).

imports and contribute importantly to serious injury.[1472] The safeguard exclusion was part of NAFTA at the time of its entry into force. Prior to that time, a similar provision applied solely between the United States and Canada pursuant to the United States - Canada Free-Trade Agreement.[1473]

1239. The Israel and Jordan FTAs permit the exclusion of those countries from a safeguard measure if imports from the relevant country are not, by themselves, a substantial cause of serious injury.[1474] As with NAFTA and the U.S.-Canada Free Trade Agreement, these exclusions were part of the Israel and Jordan FTAs from the time of their entry into force.

1240. No Complainant has disputed that the safeguard exclusion is an integral component of the elimination of trade restrictive measures incorporated in NAFTA, the Israel FTA, and the Jordan FTA, or that the United States acted in compliance with these agreements in excluding FTA partners' goods from the steel safeguard measures. Therefore, the exclusion of the products of each of these countries from the steel safeguard measures is part of the general elimination of duties and restrictive regulations of trade in those agreements, and falls within the purview of Article XXIV. By virtue of Article XXIV:5, this application by the United States of the safeguards exclusion is not foreclosed either by the requirements of Articles I or XIX.

1241. Article 2.2 also creates a nondiscrimination requirement. However, this requirement does not supersede the Article XXIV authorization for Members to exclude free trade agreement partners from safeguard measures. The last sentence of footnote 1 of the Safeguards Agreement deals with the relationship between Article XXIV and the Safeguards Agreement. It specifies that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." Thus, issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles.

1242. Application of the customary rules of treaty interpretation supports this conclusion. According to these rules, the words in footnote 1 of the Safeguards Agreement must be interpreted in good faith in accordance with their ordinary meaning in their context and in the light of the object and purpose of the Safeguards Agreement. The ordinary meaning of the first four words of the footnote, "nothing in this Agreement," is to place a limitation on the entire agreement by indicating something that it does not do. The end of the sentence indicates what is being limited – "the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

1243. As noted above, Article XIX authorizes the imposition of safeguard measures subject to certain conditions. Article XXIV:8(b) defines a free trade agreement in terms of the duties and

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[1472] North American Free Trade Agreement, Article 802 (US-50).
[1473] U.S.-Canada Free Trade Agreement, Art. 1102 (US-51). The Agreement entered into force in 1988.
[1474] Israel FTA, Article 5.3 (US-52); Jordan FTA, Article 10.8 (US-53).

other restrictive regulations on trade that it must eliminate, and those that it may retain.[1475] Therefore, the "relationship" between Articles XIX and XXIV:8 addresses the application of safeguard measures in the context of an FTA that may prohibit or limit safeguard measures as one way to eliminate duties and other restrictive regulation of commerce.

1244. The verb, "prejudge," establishes the nature of the limitation. The ordinary meaning of the word is to "[a]ffect adversely or unjustly; prejudice, harm, injure," and to "[p]ass judgment or pronounce sentence on before trial without proper inquiry."[1476]

1245. These separate elements of footnote 1, last sentence, combine to establish that nothing in the Safeguards Agreement shall affect the interpretation of the extent to which the Members of an FTA may exclude trade among themselves from the application of Article XIX safeguard measures. In other words, the footnote means that the provisions of the Safeguards Agreement are not intended to disturb the relationship between the GATT 1994 rules addressing safeguard measures on the one hand and the rights and obligations of the participants in an FTA on the other.

1246. The footnote signals that the drafters of the Safeguards Agreement intended to avoid disturbing the *status quo ante* with regard to these issues, leaving them to be resolved exclusively under the GATT 1994 provisions as they stood prior to 1995. As we have shown above, those provisions permit the exclusion of free trade agreement partners from safeguard measures.

1247. We note that the panel in *US – Line Pipe* addressed this question and concluded that the information presented by the United States established a *prima facie* case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b).[1477] It found further that "the United States is entitled to rely on an Article XXIV defence against Korea's claims under Articles I, XIII and XIX regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe [safeguard] measure."[1478] The panel also found, based on footnote 1 of the Safeguards Agreement, that "Article XXIV can provide a defence against claims of discrimination brought under Article 2.2."[1479]

1248. The Appellate Body declared these findings "moot."[1480] Accordingly, the DSB did not adopt these findings when it adopted the panel report, as modified by the Appellate Body Report. However, the Appellate Body at no point criticized the panel's reasoning, which we find persuasive on these issues. Therefore, we draw the Panel's attention to paragraphs 7.135 through 7.163 of the panel report in *US – Line Pipe*. As provided by the Appellate Body in *Japan –*

[1475] Article XXIV:8(a) defines a customs union and, therefore, is not relevant to this inquiry.
[1476] The New Shorter Oxford English Dictionary, pp. 2332-2333.
[1477] *US – Line Pipe*, Panel Report, para. 7.144.
[1478] *Ibid*., para. 7.146.
[1479] *Ibid*., para. 7.158.
[1480] *US – Line Pipe*, AB Report, para. 199.

Alcohol, the Panel may "find useful guidance in the reasoning of an unadopted panel report."[1481] We consider that the provisions of the panel report that we have cited set out a compelling case against the claims raised by Japan and Korea.

2. Articles 3.1 and 4.2(c) Do Not Apply to the President's Determination Whether Imports from Canada and Mexico Met the NAFTA "Substantial Share" and "Contribute Importantly" Criteria for Exclusion from a Safeguard Measure

1249. The determination whether imports from Canada and Mexico qualify for exclusion from a safeguard measure is a question of interpreting and applying Article 802 of the NAFTA. As such, that determination 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).

1250. Article 802 of the NAFTA requires a Party to exclude goods originating in another Party from a WTO safeguard measure unless such goods "account for a substantial share of imports" and "contribute importantly to the serious injury . . . caused by imports." Article 802 does not specify the method a Party may use in determining whether imports meet these standards.

1251. Under section 312 of the U.S. NAFTA Implementation Act, the President makes the "determination" as to whether imports from Canada or Mexico meet the "substantial share" and "contribute importantly" standards. He is required to exclude such imports if they do not meet both criteria.[1482] Before he makes this determination, the ITC is required to "*find* (and report to the President at the time such injury determination is submitted to the President)" whether NAFTA imports meet the "substantial share" and "contribute importantly" standards. However, the President is not required to adopt the conclusions of the ITC, or explain the reasons for reaching a determination different from those conclusions. Thus, for NAFTA purposes, the President's determination is the determination of the United States.

1252. In the *Steel* cases, after the ITC made its serious injury determinations under Section 201, it proceeded to make the findings required under Section 311. The ITC found that imported Mexican certain carbon flat-rolled steel and FFTJ had a substantial share of imports and contributed importantly to serious injury. It reached similar findings with regard to imported Canadian hot-rolled bar, cold-finished bar, certain welded pipe, FFTJ, and stainless steel bar. The ITC was evenly divided with regard to Canadian certain welded pipe.[1483] The President "after considering the report and supplemental report of the ITC" determined that for all ten of

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[1481] *Japan – Taxes on Alcoholic Beverages*, AB Report, WT/DS8/AB/R, adopted on 1 November 1996, p. 15.

[1482] Sections 311 and 312 of the NAFTA Implementation Act are codified as 19 U.S.C. §§ 3371 and 3372, which are duplicated in Exhibit CC-47.

[1483] ITC Report, p. 1 and n. 1.

the steel products, imports from Canada and Mexico either did not account for a substantial share of total imports or did not contribute importantly to serious injury.[1484]

1253. Korea argues that the United States acted inconsistently with Articles 3 and 4.2(c) of the Safeguards Agreement because "the United States failed to provide any explanation of how [the President] reached this directly contrary conclusion on this important and pertinent issue of fact and law."[1485] This assertion is the only argument provided by Korea in support its claim that Articles 3 and 4.2(c) required the President to publish an explanation of why NAFTA imports did not account for a substantial share of total imports and contributed importantly to serious injury. This argument does not meet Korea's burden of proof.

1254. The relevant obligations are that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law," along with "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." These obligations appear in Articles 3 and 4, entitled "Investigation" and "Determination of Serious Injury or Threat Thereof," respectively. This context establishes that the "pertinent issues of fact and law" are those necessary to satisfy Articles 3 and 4, and that the "case under investigation" is the examination necessary under Article 4, as conducted in accordance with the investigatory procedures set out in Article 3.[1486]

1255. Whether imports from Canada or Mexico account for a substantial share of total imports and contribute importantly to serious injury is not a matter of WTO law. These standards appear in the NAFTA and in U.S. law, but not in GATT 1994 or the Safeguards Agreement. Thus, a conclusion as to whether imports meet the NAFTA standards is irrelevant to establishing consistency with the Safeguards Agreement. As the Appellate Body found in *US – Wheat Gluten*, after reviewing the ITC's "substantial share" and "contribute importantly" findings, "the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States."[1487] Or, to phrase this conclusion in the terms of Articles 3 and 4, such a finding is not a "pertinent issue of fact or law," or part of the "case under investigation" in accordance with the Safeguards Agreement.

1256. This conclusion finds confirmation in the objectives of the Safeguards Agreement – "to improve and strengthen the international trading system based on *GATT 1994*" and "to clarify and reinforce the disciplines of *GATT 1994*, and specifically those of its *Article XIX*." Thus, the drafters of the Safeguards Agreement stated specifically that they sought to address GATT 1994 and Article XIX, and not other agreements between or among Members. To the extent that they considered free trade agreements, as we noted above, footnote 1 of the Safeguards Agreement

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[1484] Proclamation 7529, recital 8.
[1485] Korea first written submission, para. 180.
[1486] Sections H and I.3 of this submission discusses this issue more fully.
[1487] *US – Wheat Gluten*, AB Report, para. 99.

indicates that issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles. Thus, Articles 3.1 and 4.2(c) would not apply.

1257. We do not mean to suggest that the competent authorities may disregard imports from Canada and Mexico. A consideration of such imports may, in fact, be pertinent to deciding whether increased imports from non-FTA sources alone meet the requirements of Articles 2.1 and 4. The ITC did just that when it factored information related to NAFTA imports into its conclusions that non-NAFTA imports alone were a substantial cause of serious injury. However, whether exclusion of Canada and Mexico is appropriate under the NAFTA is not relevant to establishing compliance with Articles 2.1 and 4. Therefore, neither Article 3.1 nor Article 4.2(c) obligated the ITC or the President to include such a legal conclusion in a published report.

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

1258. For each of the ten safeguard measures, the United States complied with Article 9.1 by not applying the measure to products originating in developing country Members, as long as imports from those Members accounted for less than three percent of total imports.[1488] The United States identified developing country Members in keeping with its list of countries eligible for the Generalized System of Preferences ("GSP"), a program of benefits for developing countries. The United States determined whether particular developing countries exceeded the three percent threshold based on import data for 1996-1997, the most recent period prior to the surge.

1. Article 9.1 Charges the Member Applying a Safeguard Measure With Identifying the Developing Country Members With Imports Below the Three Percent Threshold

1259. Under Article 9.1, it is the Member applying a safeguard measure that has the obligation to identify the developing country Members not subject to application of the measure. This conclusion derives from the ordinary meaning of Article 9.1 and its context within the Safeguards Agreement and WTO Agreement.

1260. The text of Article 9.1 states: "[s]afeguard measures shall not be *applied* against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 percent. . . ."(emphasis added). Since the obligation falls upon the application of the measure, it is the Member applying the measure that

[1488] If imports from all of the developing countries that fall below the three percent threshold together account for more than nine percent of total imports, Article 9.1 permits application of a safeguard measure to those sources. No party has alleged that this situation exists with regard to any of the steel safeguard measures, so we will not include this aspect of Article 9.1 in our analysis.

must determine how to comply. Article 9.1 assigns no obligation concerning, or role in, this identification process to exporting Members, developing country or otherwise.

1261. Since the Member applying the measure is responsible for compliance with Article 9.1, it must identify which Members are developing countries for the purposes of the Safeguard Agreement, and whether imports from those sources are below the three percent threshold. The WTO Agreement does not define the term "developing country" or create a procedure for determining when a Member qualifies for that status. China argues that "the long-standing practice under the GATT and the WTO has been that the determination of a Member's development status is by self-selection."[1489] However, China provides no evidence of such a practice in defining or interpreting the rights and obligations of Members. Instead, China has offered in support a statement representing the views of two Members. China fails to establish the legal relevance of such a practice even if it existed, since that "practice" would not contribute to the *definition* of a developing country Member but only indicate individual Members who considered that they met the definition. The statements referred to by China are not an authoritative, or even indicative, statement of the practice of the Members. In fact, the WTO does not even have an established procedure for Members to register their *claim* to be a developing country Member.[1490] Under China's reasoning any and all WTO Members could claim benefits intended for developing countries which would effectively read out of Article 9.1 the term "developing."

1262. In the absence of a different procedure in the WTO Agreement on how to identify a developing country Member for purposes of Article 9.1, it falls to the Member imposing the safeguard measure to identify developing countries. This will seldom create difficulties because, in most cases, Members have not disagreed as to the treatment they will afford each other.[1491]

1263. The Safeguards Agreement does not specify any particular method for the Member applying a safeguard to identify developing country Members for purposes of Article 9.1. The Appellate Body confirmed this in *US-Line Pipe*, when it stated, "[w]e agree with the United States that Article 9.1 does not indicate how a Member must comply with this obligation."[1492]

1264. The conclusion that the Member applying a safeguard measure identifies the developing country Members eligible for nonapplication is confirmed by the requirement in footnote 2 to Article 9.1 that "[a] Member shall immediately notify an action taken under paragraph 1 of

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[1489] China first written submission, para. 660.

[1490] In only one instance, that of Mexico's accession to the GATT, has a country been formally recognized as a developing country at the time it acceded to the GATT or the WTO. *See Protocol for the Accession of Mexico to the General Agreement on Tariffs and Trade*, GATT Doc. L/6036 (signed by Mexico July 25, 1986), 33S BISD 3 (1987).

[1491] *E.g.*, *Brazil – Export Financing Programme for Aircraft*, Panel Report, WT/DS46/R, adopted 20 August 1999, para. 7.39; *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, adopted 23 July 1998, para. 14-157.

[1492] *US – Line Pipe*, Panel Report, para. 127.

Article 9 to the Committee on Safeguards." Neither the footnote nor the Article 12 rules for making notifications provides any role in this process for exporting Members, indicating that the importing Member alone has the obligation to identify which Members are developing country Members and which of those to exclude. The structure of Article 12 supports this conclusion. Under that article, the Member that makes a decision or takes an action with respect to a safeguard measure is the party that provides notification of such decision or action.[1493] Therefore, the Article 9.1 requirement that the Member taking a safeguard measure notify any exclusion of developing country Members demonstrates that it is the Member taking the measure that has the obligation to decide which countries qualify for exclusion.

1265. It is the text of each provision that must inform the rights and obligations of Members under that provision. Other provisions of the covered agreements could operate differently.

2. China and Norway Bear The Burden of Proof, And Have Failed to Establish any Inconsistency With Article 9.1 in the U.S. Treatment of China or Choice of Period for Calculating the Import Percentages

1266. It is well established that under the WTO Agreement, "the burden of proof rests upon the party . . . who asserts the affirmative of a particular claim or defense."[1494] In this instance, China and Norway are asserting that the United States failed to comply with Article 9.1. Thus, they bear the burden of proof, which would require a showing that the United States has applied the measure to a developing country Member that accounts for less than three percent of total imports. Neither China nor Norway has met that burden.

a. China Has Not Established That It Is a Developing Country Member.

1267. China's sole argument in support of its claim to be a developing country Member is the assertion that it is, and has always claimed to be, a developing country Member, especially when it acceded to the WTO.[1495] Although China may consider itself a developing country Member, its protocol of accession to the WTO clearly indicates that Members took a different view of China's situation.[1496] Members indicated that because of significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach needed to be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO members. "Each agreement and China's

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[1493] For example, notifications must be provided by the Member that initiates a safeguard investigation (Article 12.1(a)), that makes a finding of serious injury or threat thereof caused by increased imports (Article 12.1(b)), that takes a decision to apply or extend a safeguard measure (Article 12.1(c)), that intends to take a provisional safeguard measure (Article 12.4), and that proposes to suspend concessions and other obligations (Article 12.5).

[1494] *US – Wool Shirts*, AB Report, p. 17.

[1495] China first written submission, para. 667.

[1496] *Accession of the People's Republic of China*, WT/L/432 (23 November 2001); *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001), paras. 8 and 9.

situation should be carefully considered and specifically addressed."[1497] This is precisely the approach taken throughout China's accession documents.

1268. In particular instances, under certain WTO agreements, China has explicitly abandoned any claims to treatment as a developing country. For example, with respect to the Agreement on Agriculture, developing countries are permitted to exempt investment subsidies and agricultural input subsidies from domestic support reduction commitments and these subsidies are not included in the calculation of the Member's Total Aggregate Measurement of Support (AMS).[1498] In addition, Members are permitted to exempt *de minimis* subsidies (both product-specific and non-product-specific) from their Total AMS. The *de minimis* level for developing countries is 10 percent.[1499] In both instances (Articles 6.2 and 6.4), Members confirmed that China was not entitled to developing country Member rights:

> In implementing Article 6.2 and 6.4 of the Agreement on Agriculture, the representative of China confirmed that while China could provide support through government measures of the types described in Article 6.2, the amount of such support would be included in China's calculation of its Aggregate Measurement of Support ("AMS"). ... The representative of China further confirmed that China would have recourse to a de minimis exemption for product-specific support equivalent to 8.5 per cent of the total value of production of a basic agricultural product during the relevant year. The representative of China confirmed that China would have recourse to a de minimis exemption for non-product-specific support of 8.5 per cent of the value of China's total agricultural production during the relevant year. Accordingly, these percentages would constitute China's de minimis exemption under Article 6.4 of the Agreement on Agriculture. The Working Party took note of these commitments.[1500]

1269. These commitments demonstrate that China is not invariably treated as a developing country Member for purposes of the covered agreements. Thus, it cannot rely on a pattern of developing country treatment to support a claim for that status. Since it has provided no other basis for asserting developing country status, China has not met its burden of proof to establish that the U.S. was required under the Safeguards Agreement to exclude exports from China from the U.S. safeguard measures.

[1497] *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001), para 9.

[1498] Agreement on Agriculture, Article 6.2.

[1499] Agreement on Agriculture, Article 6.4.

[1500] *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001), para. 235. *See also* paragraph 171 relating to recourse to special and differential treatment for developing countries under the Agreement on Subsidies and Countervailing Measures (China will not seek to invoke Articles 27:8, 27.9 and 27:13.).

b. China Has Not Established That the U.S. Identification of Developing Country Members in Keeping with the GSP List Is Inconsistent with the Safeguards Agreement

1270. The United States applied Article 9.1 in keeping with the list of developing countries that are eligible for special and differential treatment under the U.S. GSP.[1501] There is nothing about the U.S. GSP list that establishes an inconsistency with Article 9.1.

1271. China argues that the U.S. GSP list of countries is "arbitrary" and "irrelevant."[1502] Neither of these characterizations, even if accurate, would meet China's burden of proof that it is a developing country Member for purposes of Article 9.1. And these characterizations are not accurate. The U.S. GSP list is a transparent and predictable program of long standing designed to benefit developing countries. The United States updates the list each year, and publishes it in General Note 4 to the Harmonized Tariff Schedules of the United States.

1272. China notes that, in Safeguard Committee meetings, other Members have objected to the U.S. use of the GSP list for determining eligibility for preferential treatment under Article 9.1.[1503] That other Members may have objected to this U.S. practice, however, does not establish that China is a developing country Member for purposes of Article 9.1. As explained above, the Member applying a safeguard measure has the obligation to identify which countries are to be considered developing country Members for purposes of Article 9.1.

c. The Relevant Documents Do Not Support China's Claim that the United States Failed to Exclude Members that the United States Considered to be Developing Country Members

1273. The Presidential Memorandum and the relevant portions of the Annex to Proclamation 7529 show that the President considered that the published list of countries to which the steel safeguard measures would not apply included all eligible developing country Members. However, China asserts that these documents indicate instead that the United States applied the measures to WTO Members that it considered to be developing country Members.[1504] It has misinterpreted the documents.

1274. The relevant portion of the Presidential Memorandum states:

[1501] G/SG/N/10/USA/1, G/SG/N/11/USA/1, Annex (6 December 1996) (safeguard measure on broom corn brooms not applied to "Designated Beneficiary Developing Countries for Purposes of the Generalized System of Preferences (GSP)"; G/SG/N/10/USA/2, G/SG/N/11/USA/2, Annex (8 June 1998) (safeguard measure on wheat gluten not applied to GSP countries); G/SG/N/10/USA/3, G/SG/N/11/USA/3, Annex (12 July 1999) (safeguard measure on lamb meat not applied to GSP countries).

[1502] China first written submission, at J.c.(I).

[1503] China first written submission, paras. 658-660.

[1504] China first written submission, paras. 661-665.

> The safeguard measures also will not apply to imports ... that are the product of *a developing country that is a member of the World Trade Organization (WTO) ....* * * * For purposes of the safeguard measures established under the Proclamation, I determine that the beneficiary countries under the Generalized System of Preferences are developing countries. Subdivision (d)(i) of U.S. Note 11 to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (Note 11) in the Annex to the Proclamation identifies those developing countries that are WTO members, and subdivision (d)(ii) identifies the products of such countries to which the safeguard measures shall not apply.[1505]

1275. China notes that the introductory text to subdivision (d)(i) states that "the following developing countries that are members of the World Trade Organization shall not be subject to the rates of duty and tariff-rate quotas provided therein." China considers that the use of "the following" in this statement indicates that the list does not contain all developing country WTO Members. This is incorrect. The statement merely reflects that the subsequent list represents a subset of the group of all developing countries, namely, those developing countries that are also WTO Members. Indeed, not all beneficiary countries under the U.S. GSP program are WTO members.

1276. The Memorandum confirms that this is the case. It states clearly that imported products of a developing country that is a Member of the WTO are excluded from the steel safeguard measures. It then specifies that GSP beneficiaries are developing country Members, and that the list in subdivision (d)(i) contains "those developing countries that are WTO members." This statement shows clearly that the President determined that the GSP list of countries encompasses all the countries eligible for treatment as developing country Members under Article 9.1, and that the list in subdivision (d)(i) contains all developing countries that are also WTO Members.

d. Norway Has Not Established That U.S. Use of 1996-97 as the Period for Calculating the Three Percent Threshold for Nonapplication Was Inconsistent with Article 9.1

1277. In assessing whether the safeguard measures should apply to any developing country Members accounting for less than three percent of total imports, the United States relied upon import statistics for the period 1996-97. As a result, the United States determined that certain developing countries met the criteria for application of safeguard measures with respect to certain products.[1506]

[1505] Presidential Memorandum, 67 Fed. Reg. 10593, 10595.

[1506] Proclamation 7529, Annex at Note 11(d)(ii). Safeguard measures on rebar applied to Moldova, Turkey, and Venezuela. Safeguard measures on carbon flanges applied to India, Romania, and Thailand. Safeguard measures on slabs and flat products applied to Brazil. Safeguard measures on welded pipe applied to Thailand.

1278. Norway asserts that the United States' use of the 1996-97 period for purposes of calculating the volume of developing country imports and the Article 9.1 ratios was inconsistent with Article 9.1.[1507] Citing the Appellate Body report in *US – Line Pipe*, Norway claims that Article 9.1 requires use of "the latest data available at the time the measure takes effect."[1508]

1279. Norway misreads both Article 9.1 and the Appellate Body report. Article 9.1 provides that safeguard measures shall not apply to a developing country Member

> as long as its shares of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.

This text does not specify any particular period for calculating whether developing country Members' imports meet the 3 percent and 9 percent thresholds.

1280. The 1996-1997 period was consistent with these requirements. Since that period predates the increase in imports, it allows an evaluation of import levels undistorted by the increased imports or the serious injury they caused to the domestic industries. By using such a period, the United States could accurately evaluate whether particular developing country Members qualified for non-application.

1281. Norway misreads the *US-Line Pipe* report when it states that the Appellate Body "made reference to the fact that the United States should have looked at 'the latest data available.'"[1509] The Appellate Body was not making a normative statement about what data a Member *should* consider, but responding to the Panel's citation to particular data.[1510] Moreover, it considered that data primarily to evaluate whether the U.S. mechanism for excluding developing countries would work "automatically," a question that has not been raised in this dispute.

3. Article 3.1 Does Not Require the Inclusion in the Report of the Competent Authorities of "Findings and Conclusions" on the Identification of Developing Countries Subject to Non-Application of a Safeguard Measure

1282. As we discussed in Section I, Article 3.1 applies to the investigation and determination of serious injury by the competent authorities, and not to the selection of the type and level of a

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[1507] Norway first written submission, para. 401.
[1508] *Ibid.*
[1509] *US – Line Pipe*, AB Report, para. 130.
[1510] *US – Line Pipe*, AB Report, para. 130 ("But, according to the latest data available at the time the line pipe measure took effect – data found in the Panel record and not disputed by the United States – the 9,000 short-ton exemption from the over-quota duty imposed by the line pipe measure did *not* represent three percent of total imports").

safeguard measure by the Member itself. Thus, a Member is not required to include an explanation of how the measure complies with Article 5.1 in the report of the competent authorities.

1283. China asserts that Article 9.1 must be read in conjunction with Article 3.1. In China's view, whether a Member is a developing country accounting for less than three percent of total imports is a pertinent issue in the application of Article 9.1 and, therefore, must be subject to "findings and reasoned conclusions" published in accordance with Article 3.1.

1284. China is mistaken. As we noted in Section I, the "pertinent issues of fact and law" under Article 3.1 are those related to the investigation and determination of serious injury by the competent authorities. Issues related to the application of the safeguard measure under Article 5.1 – an inquiry that the Appellate Body has found to be "separate and distinct" from the finding of serious injury – are not subject to Article 3.1.[1511]

1285. Compliance with Article 9.1 is not part of the investigation or determination of serious injury. The obligation is phrased in terms of the *application* of the safeguard measure to developing country Members. It does not reference the competent authorities or serious injury. Moreover, measuring a particular developing country's share of total imports indicates nothing about serious injury or causation, making the Article 9.1 calculations irrelevant to the determination under Articles 2.1 and 4.2(b) whether imports have caused serious injury. Thus, China is mistaken in its view that "the existence of a 'developing country' . . . and the fact that the *de minimis* test is met" are "pertinent issues of fact" to be addressed under Article 3.1.[1512] These matters may be pertinent to a non-application determination under Article 9.1, but they are not issues pertinent to the conduct of an investigation under Article 3.1.

1286. Moreover, nothing in the reasoning of the Appellate Body reports cited by China[1513] supports China's conclusion that the reports indicate an obligation to explain an Article 9.1 determination as part of an Article 3.1 report. Indeed, in each of the three citations noted by China, the Appellate Body is addressing the requirement of Article 3.1 that competent authorities publish a report containing the findings and conclusions reached in an investigation. The Appellate Body findings do not indicate that the competent authorities must address whether the application of a measure is consistent with Article 5.1, or whether non-application of the measure is required under Article 9.1. Thus, these findings of the Appellate Body do not support China's views.

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

[1511] *US – Line Pipe*, AB Report, para. 84.
[1512] China first written submission, para. 670.
[1513] China first written submission, paras. 643-645.

1. Article X:3 Does Not Apply to the Substantive Content of Laws, Regulations, Judicial Decisions and Administrative Rulings of General Application

1287. Several Complainants argue that some of the decisions by the ITC or the President under Section 201 or Section 312 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 ignores 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 the a particular outcome is inconsistent with a provision of a covered agreement, they have the burden of proof in establishing that breach, and that would not be a claim under Article X:3(a).

1288. Article X:3(a) states:

> Each contracting party shall *administer* in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.[1514]

Panels and the Appellate Body have considered that the use of the word "administer" limits the scope of Article X:3(a). In *EC – Poultry*, the Appellate Body found that:

> to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.[1515]

1289. The panel in *Argentina - Bovine Hides* found that in evaluating the applicability of Article X:3, "[t]he relevant question is whether the substance of such a measure is administrative in

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[1514] Emphasis added. Article X:1 provides that these are:

> laws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use. . . .

[1515] *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, para. 115.

nature or instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994."[1516] That panel explained further that an administrative measure would not, for example, provide the rules on classification requirements or export refunds, or impose export duties.[1517] An administrative measure would instead provide for a certain manner of *applying* those types of substantive rules.[1518]

1290. This reasoning reflects the limited nature of the Article X obligations. Article X:1 covers only certain "laws, regulations, judicial decisions and administrative rulings of general application," generally those pertaining to international trade. With regard to these measures, the only obligations are that a Member publish them promptly and, for certain of them, not enforce the measure until after its official publication. Article X:3(a) applies not to the measures described in Article X:1 themselves, but to their administration, which must be "uniform, impartial and reasonable." The Appellate Body in *US – Shrimp* described Article X:3 as "establish[ing] certain minimum standards for transparency and procedural fairness in the administration of trade regulations . . . ."[1519] As such, Article X:3 does not require substantive decisions to be uniform. Indeed, a uniform, impartial, and reasonable administration of laws will often *require* different outcomes because of different facts or other circumstances.

1291. Japan argues for a broader interpretation of Article X:3. In its view, that provision "represents in one sense the notion of good faith and in another sense the 'fundamental requirements of due process.'"[1520] Japan cites the Appellate Body report in *US – Shrimp* as support for this conclusion. It then argues that "[t]he Article X:3(a) due process rights may be viewed as a specific incorporation of the fundamental international legal principle of *abus de droit*."[1521]

1292. Japan's analysis omits a key aspect of the reasoning in *US – Shrimp*. The Appellate Body cited Article X:3 not in response to a claimed inconsistency with that Article, but as context for the interpretation of Article XX(g). It stated:

> It is clear to us that Article X:3 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials . . . throughout the certification processes under Section 609, as well as the fact that

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[1516] *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, WT/DS155/R, adopted 16 February 2001, para. 11.70 ("*Argentina - Bovine Hides*").

[1517] *Argentina - Bovine Hides*, Panel Report, para. 11.72.

[1518] *Argentina - Bovine Hides*, Panel Report, para. 11.72; *see also United States - Continued Dumping and Subsidy Offset Act of 2000*, Panel Report, WT/DS217/R, para. 7.140 (16 September 2002).

[1519] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 6 November 1998, para. 183 ("*United States - Shrimp*").

[1520] Japan first written submission, para. 128.

[1521] *Ibid*., para. 19.

> countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994."[1522]

Thus, the Appellate Body appears to have distinguished between "certain minimum standards" that Article X:3 actually "establishes" and other due process ideals that are part of the "spirit, if not the letter" of that Article. It did not have to clarify this distinction, as consistency with Article X was not subject to the appeal.

1293. In line with the Appellate Body's repeated cautions against reading into the Agreement words that are not there,[1523] a panel cannot add new terms or change the meaning of existing terms. Accordingly, we read the Appellate Body's guidance in *US – Shrimp* as a recognition that Article X provides only "certain minimum standards of transparency and procedural fairness" – namely, those expressly provided by its terms. We do not read the Appellate Body's reference to the "spirit" of Article X -- a "spirit" not found in the "letter" (i.e., the text) -- as justifying the importation into Article X of alleged due process concepts that are not expressly provided.

1294. In particular, we see no reason in the text (or even in the "spirit") of Article X to support Japan's conclusion that "impartial" and "reasonable" administration of measures listed in Article X:1 requires the publication of "principled reasons" for reaching a decision.[1524] Article X explicitly requires publication only in paragraph 1, which is limited to regulations, rulings, judicial decisions and administrative rulings of general application. Even this explicit obligation only requires publication "in such a manner as to enable governments and traders to become acquainted with" the measures. In other words, as long as the measure explains what it does, a Member need not explain why it was adopted. In contrast, Article X:3 contains no reference to publication, suggesting that the words that are actually there – "administer in a uniform, impartial and reasonable manner" – do not require publication. Moreover, a Member can meet the Article X:1 publication requirement by indicating *what* the measure does, without describing *why* it took the measure. Thus, if any publication requirement can be read into Article X:3, it would seem to involve only the description of action taken by a Member, and not an explanation of how the measure complies with municipal or WTO rules.

1295. Finally, nothing in Article X suggests that it incorporates international law principles of *abus de droit* or "good faith." As a general matter, the DSU is specific when it incorporates customary rules of international law, which it does only in Article 3.2, and only with regard to rules of interpretation. *Abus de droit* does not fall into that category. Moreover, the Appellate Body noted in *US – Shrimp* that this concept "enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to

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[1522] *US – Shrimp*, AB Report, para. 183.
[1523] *E.g.*, *US – Line Pipe*, AB Report, para. 250, n. 250.
[1524] Japan's first written submission, para. 147.

say, reasonably.'"[1525] However, Article X applies to any measure described in its first paragraph – including a measure that *liberalizes* trade. Thus, it cannot be understood as the incorporation of a legal principle directed exclusively at measures that prejudice other signatories to an Agreement.

1296. 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 is implicated by 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.

1297. For the reasons described above, the Panel should not even reach Complainants' factual allegations that specific decisions by the President and the ITC were not uniform, impartial, and reasonable. Should it decide to reach that question, the facts show that with regard to each of these claims, Complainants have failed to meet their burden of proof to establish an inconsistency with Article X:3(a).

2. The ITC's Like Product Analysis Is Consistent with Article X:3(a)

1298. The ITC provided a uniform, impartial, and reasonable like product analysis by applying the same legal standards to the distinct facts of each case and reaching legal conclusions supported by the facts of the case. In evaluating Complainants' arguments that these actions were not "uniform, impartial and reasonable," the Panel should apply the ordinary meaning of these terms as used in Article X:3:

- uniform means "of one unchanging form, character or kind."[1526]
- impartial means "not partial; not favouring one party or side more than another; unprejudiced; unbiased; fair;"[1527] and
- reasonable means that the actions must be rational and not absurd.[1528]

[1525] *US – Shrimp*, AB Report, para. 158, *citing* B. Cheng, General Principles of Law as applied by International Courts and Tribunals (Stevens and Sons, Ltd., 1953), p. 125.

[1526] Japan first written submission, para. 127, n.189 (citing the *New Shorter Oxford Dictionary*).

[1527] *E.g.*, Japan first written submission, para. 127, n.189 (citing the *New Shorter Oxford Dictionary*).

[1528] *E.g.*, Japan first written submission, para. 127, n.189 (citing the *New Shorter Oxford Dictionary*).

1299. Article X:3(a) requires that the *administration* of a measure be uniform, and not that the results of the measure be the same each time it is applied. As the panel found in *Argentina – Bovine Leather*:

> We do not think this provision should be interpreted to require all products be treated identically. . . . There are many variations in products which might require differential treatment . . . .[1529]

Similarly, the panel in *Korea – Stainless Steel* found:

> the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ.[1530]

The ITC took exactly that approach. It applied the same like product factors that it uses in every safeguard investigation to each group of imports in the *Steel* investigation. Based on the facts, the ITC determined that those factors justified the product definitions that it used.

1300. Japan claims that the ITC failed to provide uniformity when it included slab in a single like product with finished certain carbon flat-rolled steel, while placing semifinished and finished products in separate like products for other steel products.[1531] However, Japan has shown only that the results were different, and has demonstrated no difference in the way the ITC applied the relevant legal standard to the facts. As we have explained above, the record before the ITC fully supported both the conclusions reached for each product, and the differences among those conclusions. Thus, the different outcomes all reflect the application of a uniform test to distinct facts. Since Japan addresses only the outcome of the analysis, and does not identify any way in which the analysis was itself applied in a less than uniform, impartial, and reasonable manner, it has failed to meet its burden of proof.

1301. To the extent that Complainants allege an inconsistency with more general due process requirements,[1532] these Complainants had the opportunity to fully present their views on this topic. The ITC considered, weighed, and explicitly rejected those views. This treatment affords *more* than Article X:3(a) requires.

1302. Complainants have also failed to establish that the ITC's product definitions were anything other than impartial. The ITC showed no favoritism to either side. In several instances

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[1529] *Argentina – Bovine Hides*, Panel Report, para. 11.83.

[1530] *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, Panel Report, WT/DS179/R, adopted 1 February 2001, para. 6.51.

[1531] Japan first written submission, para. 145.

[1532] *E.g.*, Japan first written submission, paras. 128-130.

the Commissioners decided in favor of foreign producers by rejecting domestic producer requests to join or subdivide product categories.[1533] The claims to the contrary are unsupportable. Japan claims that the ITC defined the flat-rolled steel like product group as "a willful gambit to facilitate an affirmative determination on flat-rolled."[1534] It presents no evidence of any kind in support of this attack on the integrity of the ITC. Such "evidence" does not meet Japan's burden of proof to establish inconsistency with Article X:3(a).

1303. Finally, Complainants have failed to establish that the ITC product definitions are "unreasonable." Rather, the agency fully explained its findings, and supported them with record evidence. Two Complainants argue that the ITC's like product definitions were not reasonable because the agency departed from a like product determination made in earlier investigations involving dumped and subsidized steel products.[1535] This argument is simply a variation of the argument relating to the "uniform" application of like product criteria, and fails for the same reasons. As the panel in *Korea – Stainless Steel* stated:

> Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts.[1536]

1304. With respect to differing like product determinations issued by the ITC in prior antidumping and countervailing duty cases, Article X:3(a) does not require "uniform" administration between different laws. It requires the uniform, impartial, and reasonable administration of each law. Otherwise, Complainants' approach would require all laws, no matter how different in their texts, purposes, and scope, to be administered in the same way with the same substantive outcome. So a public health law would have to be administered so as to cover the same product scope as a tariff law. This would be an absurd result. Furthermore, we explained above that the like product analysis in a safeguards investigation necessarily differs from the like product analysis in an antidumping or countervailing duty proceeding, an explanation that appears in the ITC Report.[1537] The Appellate Body has itself emphasized that

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[1533] For example, the ITC rejected a request made by the United Steelworkers of America to find a single like product consisting of all steel products. ITC Report, p. 32, n.39. Likewise, the ITC rejected domestic long product producers' request to group five articles together, and instead found them to be multiple like products. *Ibid.*, pp. 79, 82. The ITC rejected requests by domestic interests to treat tire beadwire as a separate like product. The ITC instead found that the product in question was part of a continuum of wire products produced by a single domestic industry. *Ibid.*, p. 88.

[1534] Japan first written submission, para. 138.

[1535] Japan first written submission, paras. 134-137, *citing Certain Flat-Rolled Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom*, Inv. Nos. 701-TA-319-354 and 731-TA-573-620 (Prelim.), USITC Pub. 2549 (Aug. 1992).

[1536] *Korea – Stainless Steel*, Panel Report, para. 6.51.

[1537] ITC Report, p. 30.

the like product analysis may differ among agreements. In any event, as we showed in Section M, the ITC provided factual *and* legal justifications for any changes from previous decisions. That is all that is needed for a uniform, impartial, and reasonable application of the relevant law.

1305. In sum, the ITC's like product findings for certain carbon flat-rolled steel and tin mill are substantive findings pursuant to U.S. safeguards law. They are not the "administration" of that law in the sense of Article X:3(a). Even if the Panel considers that Article X:3(a) does apply to this situation, the Complainants have failed to meet their burden of proof to establish that the ITC like product findings are not uniform, impartial, and reasonable.

3. The Treatment of Divided Votes by the ITC and the President Is Consistent with Article X:3(a)

1306. The ITC and the President permissibly exercised their authority under U.S. law in their treatment of divided votes. Although two of the Commissioners based their analyses on like product definitions different from those adopted by the remaining four Commissioners, all six of them rendered a determination that included imported tin mill and stainless steel wire. U.S. legislation permitted the ITC to count each of these individual determinations in deciding whether the determination of the ITC was affirmative, negative, or divided. The legislation also permitted the President to accept the determination of the ITC as reported to him. For the divided votes, the President also had the authority to consider the Commission determination to be affirmative or negative. That he made different designations with regard to the four divided votes does not call into question the uniformity, impartiality, or reasonableness of his action, since the individual Commissioners' determinations were based on the distinct facts related to each domestic industry.

1307. We have outlined the facts with regard to the tie votes in Section H, and will not repeat them here. Similarly, we will not address again the arguments that Article 3.1 or 4.2(c), or Article X:3(a) required the President to issue an explanation of the reasons for his designation of certain divided votes as affirmative or negative, which we addressed in subsection 2.

1308. Japan, Korea, and Brazil also pose several arguments that the designation of tin mill and stainless steel wire as affirmative determinations was by itself not uniform, impartial, or reasonable and, accordingly, inconsistent with Article X:3(a). None of these arguments meet Complainants' burden of proof.

1309. Japan argues that the President's "treatment" of the ITC votes on tin mill and stainless steel wire as "a tie" was inconsistent with Article X:3(a) because Section 330(d)(1) of the Tariff Act did not permit such treatment.[1538] Korea raises a similar argument, albeit in slightly different

[1538] Japan first written submission, paras. 163-164.

terms.[1539] However, Article X:3(a) does not bring within the mandate of a panel the allegation that a Member has acted inconsistently with its own domestic legislation.[1540] As stated by the panel in *United States - Stainless Steel Plate from Korea*, Article X:3(a) is not:

> intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the member's own domestic law and practice; that is a function reserved for each member's domestic judicial system, and a function WTO panels would be particularly ill suited to perform.[1541]

Thus, the question whether the ITC's treatment of these votes was consistent with Section 330 is not subject to Article X:3(a).

1310. 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 steel was consistent with U.S. law.[1542] Moreover, the Court specifically held that Commissioners Devaney and Bragg considered tin mill products in their analysis, and thus made affirmative injury and causation findings with respect to tin mill products.[1543] This same reasoning applies to the divided vote on stainless steel wire products.

1311. Japan, Korea and Brazil also contend that Article X:3(a) does not permit the "inappropriate integration" by the ITC or the President of affirmative votes from Commissioners who defined the like product differently from each other.[1544] It is unclear exactly why Complainants consider this to be "inappropriate." If their point is that it is impermissible to treat

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[1539] Korea first written submission, para. 170.

[1540] *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, Panel Report, WT/DS184/R, adopted as modified by the Appellate Body, WT/DS184/AB/R, 23 August 2001, para. 7.267 (Feb. 28, 2001) ("*United States - Hot-Rolled*") (rejecting Japan's request that the panel review several actions which amounted to claims that the decision in question differed from prior agency determinations, or otherwise violated controlling legal authority). As explained *infra*, at least some of the matters challenged under Article X:3(a) have been heard and upheld by U.S. courts reviewing the matter in question.

[1541] *United States - Stainless Steel Plate from Korea*, Panel Report, WT/DS179/R, adopted 1 February 2001 para. 6.50 ("*United States - Stainless Steel*"). As noted by the panel, it is for this reason that Article X:3(b) of GATT 1994 requires Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures. *Ibid.*, n.64. No claim has been made that such facilities are not available in the United States. Indeed, a party to the safeguard action has taken just such steps, challenging some of these same issues in a U.S. court.

[1542] *Corus Group plc v. Bush et al.,* slip op. 02-87, pp. 5-10 (Ct. Int'l Trade August 9, 2002) (US-1); *see also* United States, *Notification Under Article 12.1(b) of the Agreement on Safeguards*, G/SG/N/8/USA/Supp.1 (Jan. 7, 2002). This decision was issued before the first submissions were filed, but was not cited by Complainants.

[1543] *Corus*, Slip op. 02-87, pp. 9-10, *citing* ITC Report, pp. 36, n.65. No similar determination was made for stainless steel wire, as only tin mill was at issue in this appeal. Nonetheless, the court's analysis holds equally true for the stainless steel wire, as each Commissioner demonstrably considered stainless steel wire products in their analysis. ITC Report, pp. 256-60 (views of Chairman Koplan); *ibid.*, pp. 277, 280, 285, 288, 301-302 (views of Commissioner Bragg); *ibid.,* pp. 335-36, 342-47 (views of Commissioner Devaney).

[1544] Japan first written submission, paras. 149-159; Korea first written submission, paras. 169-170; Brazil first written submission, paras. 248-253.

an injury determination regarding a product (such as stainless steel wire products) as applicable to a subset of that product (such as stainless steel wire), that would seem to be an issue of interpreting the Safeguards Agreement, and not Article X.

1312. Even if this substantive decision somehow fell within Article X:3(a), it certainly represents a uniform, impartial, and reasonable application of the law. This analysis of individual Commissioners' determinations based on different like products applies in every case, making it uniform. It is also impartial, in that it does not favor one side over the other.[1545] Finally, the U.S. practice follows the logical principle that an affirmative (or negative) determination with regard to a product also covers subsets of that product. Although Complainants may disagree with this logic, it is plainly reasonable.

1313. If Complainants' "impermissible integration" point refers to their subsequent argument that the President agreed with one set of Commissioners in defining the like products for tin mill and stainless steel wire, but another set in deciding how to treat the injury votes, they misunderstand the President's action. The President did not evaluate and separately endorse parts of the ITC determination. With regard to the like products subject to safeguard measures, he accepted the findings of the ITC majority as presented, without agreeing or disagreeing with them. With regard to the divided votes, he considered the determinations of both sides, including the use of different like product definitions in the affirmative determinations for tin mill and stainless steel wire. As we have noted, U.S. practice recognizes that determinations based on different like products may be equally valid, albeit different, ways of analyzing imports, and this practice is uniform, impartial, and reasonable. For the President to consider a determination based on this principle to be the determination of the ITC is, therefore, also uniform, impartial, and reasonable.

1314. There is likewise no basis to Japan's claim that the President's actions deviated from an "ordinary and longstanding practice in the administration of U.S. safeguards law."[1546] Japan does not cite or otherwise identify this alleged practice, nor is there any authority to cite. As noted above, a U.S. court upheld the President's action in accepting these tie votes as affirmative determinations. In any event, it is impossible for the panel to determine whether the President acted inconsistently with a practice which has not been identified with specificity.

1315. Finally, the fact that the President designated some divided determinations as affirmative (tin mill and stainless steel wire) and others as negative (tool steel and stainless fittings and flanges) does not establish an inconsistency with Article X:3(a). As we have previously noted,

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[1545] If the situation with regard to stainless steel wire had been reversed – three affirmative votes for stainless steel wire, one negative vote for stainless steel wire, and two negative votes based on the broader class of stainless steel wire products, the U.S. vote counting system would still produce a divided determination. (Under Complainants' system, this would be a 3-1 affirmative determination.)

[1546] Japan first written submission, para. 164.

panels have found that Article X:3(a) requires identical treatment, not identical outcomes.[1547] Indeed, where the facts of two cases differ, uniform *treatment* might require different *outcomes*. Thus, the mere fact that administration of a law or regulation in different cases leads to different results cannot by itself establish inconsistency with Article X:3(a).

1316. In the case of the four divided determinations, there is no question that the facts differed tremendously. The four domestic industries produced different products, under different market conditions, and with greatly different performance levels of revenue, sales, market share, profits, and other performance indicators. Two of the Commissioners recognized that the four domestic industries might warrant different findings. Commissioner Miller issued an affirmative determination with regard to tin mill, but not the other three divided votes. Chairman Koplan issued an affirmative determination with regard to stainless steel wire, tool steel, and stainless steel fittings and flanges, but not with regard to tin mill. Therefore, by doing nothing more than to observe that the divided votes in different factual situations had different results, Complainants have failed to meet their burden of proof to establish an inconsistency with Article X:3(a).

4. The President's Determination Not to Apply Safeguard Remedies to Imports from Mexico Is Consistent with Article X:3(a)

1317. As noted in the preceding section, the ITC found that imports were substantial and contributed importantly to serious injury for two of ten like products for imports from Mexico, and for four of ten like products for imports from Canada.[1548] After receiving the report containing these findings, the USTR requested supplemental information from the ITC, including findings as to whether non-NAFTA imports alone caused serious injury with regard to several like products. After receiving the ITC's findings that non-NAFTA imports alone caused serious injury for each of the like products subject to the USTR's request, the President determined that NAFTA imports from Canada and Mexico either did not account for a substantial share of total imports or did not contribute importantly to serious injury for each of the ten products subject to safeguard measures.

1318. Korea asserts two bases for its claim that the President's decision was inconsistent with Article X:3. First, it argues that the mere fact that the President and the ITC reached "contradictory" conclusions with regard to the substantial share and contribute importantly standards establishes the existence of an inconsistency with Article X:3.[1549] Second, it argues that the lack of an explanation for this supposed contradiction creates an additional inconsistency with Article X:3.

[1547] *Argentina - Bovine Hides*, Panel Report, para. 11.84; *Korea – Stainless Steel*, Panel Report, para. 6.51.

[1548] ITC Report, p. 1. With regard to certain welded pipe from Canada, the ITC was evenly divided as to whether imports were substantial and contributed importantly to serious injury.

[1549] Korea first written submission, para. 177.

1319. There are several flaws with Korea's reasoning. The most basic is that the ITC's findings are not subject to Article X:3. The ITC's findings under Section 311 have no legal effect. They do not change any party's legal rights, impose or remove any burden on imports, or require any other agency or government officer to take action. Therefore, they are not a law, regulation, judicial decision or administrative ruling of general application. Similarly, their lack of effectiveness means that the ITC findings with respect to Canada and Mexico are not part of the "administration" of such measures. Since the ITC findings on "substantial share" and "contribute importantly" have no legal effect, any difference between them and the Presidential determination would not represent a legally cognizable lack of uniformity, impartiality, or reasonableness in the "administration" of a measure.

1320. In any event, the alleged contradiction is illusory because the ITC and the President did not, as Korea alleges, apply "the same legal standard to the same set of facts."[1550] Unlike the ITC, the President based his determination on the original report *and* the supplemental responses, which were not available when the ITC made its findings. In addition, although the ITC is subject to a *statutory* standard almost identical to the one applicable to the President, nothing required the ITC and the President to reach identical results in applying that statutory standard. Reasonable minds may differ in applying the law to the same set of facts. This possibility is recognized even in within WTO dispute settlement, within which one panelist may issue a dissenting report if the panelist cannot agree with the other two panelists.[1551] Thus, even if we were to assume that different levels of government reached different results, that difference does not implicate Article X.

1321. Finally, as we discussed in subsection 1, Article X:3 does not obligate a Member to "explain" the reasons for administering a law, regulation, judicial decision, or administrative ruling in a particular manner. Thus, the absence of such an explanation for the President's decision on the application of the substantial share and contribute importantly standards cannot establish the existence of an inconsistency with Article X:3.

N. The EC Objects To The Redaction Of Confidential Business Information From The ITC Report, But Fails To Establish An Inconsistency With Provisions In The Safeguards Agreement

1322. The EC claims that the United States acted inconsistently with its obligations under Articles 2.1, 3.1, and 4.2 of the Agreement by not disclosing certain confidential information in its report. The EC references some 14 tables in the ITC report (confidential version) which

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[1550] Korea first written submission, para. 177..

[1551] *E.g.*, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel from Germany*, Report of the Panel, WT/DS213/R, para. 10.1 (3 July 2002).

contained confidential data, but from which the confidential portions were redacted from the public version of the report.[1552]

1323. The EC is the only Complainant in this proceeding to raise a claim concerning confidential information. Thus, all other Complainants found the public ITC report either to be adequate in this regard, or, at least, not a subject to be addressed by them in this dispute.

1324. The EC acknowledges that the United States has certain confidentiality obligations under domestic law,[1553] and does not ask the United States to violate those obligations or for the United States to provide the confidential versions of the 14 tables. Indeed, the protections afforded to confidential information under U.S. law are consistent with similar protections accorded by Article 3.2 of the Safeguards Agreement.

1325. The EC also claims that the United States "could have" indexed such information in its report,[1554] but it apparently now does not seek indexed information either. The EC states that it is too late for the United States "to cure its insufficient report by providing now the information".[1555]

1326. Whether the United States "could have" developed a non-confidential summary of the confidential data does not translate into a requirement that it must have done so. The Safeguards Agreement does not require that a Member publish indexed information or other public summaries as parts of its report, and the EC cites no provision in the Agreement or panel or Appellate Body findings in support of its inference that it does. Under Article 3.1 of the Agreement, it is sufficient that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." That the ITC did precisely that is demonstrated by the discussion in Sections C-F of this submission, which reference the specific portions of the ITC Report where the relevant findings and conclusions are set forth.

1327. The ITC published two versions of its report, a confidential version and a public version. The confidential version was sent to the President and to authorized persons under the ITC's administrative protective order (including attorneys representing most of the major EU steel producers).[1556] A redacted version was made available to the general public. Nothing in Articles

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[1552] EC first written submission, paras. 416-419.

[1553] EC first written submission, para. 418.

[1554] EC first written submission, para. 418.

[1555] EC first written submission, para. 419.

[1556] Although not required by the Agreement, the U.S. competent authorities (the ITC) release, under an administrative protective order, the confidential business information obtained in the investigation to attorneys for the various parties and consultants working under them. Thus, counsel to the various European producers who participated in the investigation had access to all the confidential information that the ITC had, and were able to use such information in presenting their case. They also received a copy of the confidential version of the ITC's report

(continued...)

3.1 and 4.2(c) of the Safeguards Agreement requires the competent authorities to publish, in a public report, the confidential information that supports their findings and conclusions. Indeed, paragraph 2 of Article 3, the second paragraph of the very same article that requires the competent authorities to publish a report, acknowledges that the competent authorities are likely to have received confidential information in the course of their investigation, and very unambiguously states that "Such information *shall not be disclosed* without permission of the party submitting it." (Emphasis added.)

1328. The EC further asserts that as part of an effort to resolve this dispute it requested the United States to provide the information withheld in the public version of the ITC report, but that the United States never responded.

1329. After meeting with the EC representatives, USTR informally asked the ITC to review the public version of its report to determine whether any of the redacted data in the tables was improperly designated as confidential and should be disclosed. The ITC found that none of the data had been improperly designated as confidential. Accordingly, there was nothing for the United States to report. The Panel should be aware that the ITC report contained nearly 400 tables, the overwhelming percentage of which were made available *in their entirety* in the public version of the ITC report. The EC is taking issue with data redacted from only 14 of those tables.

1330. In short, other than to make a general claim that the United States acted inconsistently with its obligations by not publishing the confidential data, the EC does not ask for the tables either in their confidential form or in an indexed form. 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.

1331. The EC in particular claims that the ITC violated Article 3.1 by failing to publish certain "aggregated data" regarding domestic flat rolled producers.[1557]

1332. In its report, the ITC published data regarding the "results of operations of U.S. producers," and "U.S. producers' capacity, production, shipments, inventories, and employment" for each flat-rolled product (*i.e.*, slabs, plate, hot-rolled, cold-rolled, coated, and tin) except GOES.[1558] The reason data were not published for GOES was that, because there are only two domestic producers,[1559] such publication reveal confidential company-specific information. The

[1556] (...continued)
to the President.

[1557] EC first written submission, para. 407-418.

[1558] ITC Report, p. FLAT-16 to FLAT-29.

[1559] ITC Report, p. FLAT-4, n. 9.

ITC could not publish aggregate flat-rolled data because to do so would enable readers to determine GOES information simply by subtracting data for each of the other flat-products.[1560]

1333. According to the EC,

> While it is understood that the ITC is under certain confidentiality obligations under domestic law, this does not excuse the United States from its WTO obligations to provide an adequate and reasoned explanation of its factual findings and the legal conclusions drawn therefrom.[1561]

1334. It is not only domestic law which precludes the Commission from disclosing confidential information. Article 3.2 of the Safeguards Agreement itself requires that such confidentiality be maintained. As the Panel in *Wheat Gluten* found,

> Article 3.2 SA places an obligation upon domestic investigating authorities not to disclose – including in their published report setting 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.[1562]

1335. Given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, the requirement in Article 4.2(c) to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the required publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2 SA.[1563]

[1560] It is unclear why the EC considers such aggregated data (including GOES) to be particularly important. Four of the six commissioners voting affirmative on CCFRS did not include GOES in that like product and relied on aggregated data in Table FLAT-ALT-7, which is public. Only two commissioners – Bragg and Devaney – relied upon aggregated data that included GOES. Therefore, the affirmative determination on flat-rolled products did not depend upon data relating to GOES. The EC also complains that an aggregated table is required to eliminate double counting of internal consumption. EC first written submission, para. 413. However, the product-specific tables in the ITC Report at pages FLAT-16 through FLAT-22 already provide details regarding internal consumption and commercial shipments. Therefore, the aggregate data for flat-rolled products (other than GOES) can easily be determined from information already on the record.

[1561] EC first written submission, para. 418.

[1562] Report of the Panel, *United States–Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (July 31, 2000) ("*Wheat Gluten Panel Report*"), para. 8.19.

[1563] Id., para. 8.21.

1336. The EC also argues that the ITC should, at the very least, have published "aggregated data" to maintain confidentiality, while complying with the publication requirements of Article 3.1.[1564] This identical argument has already been addressed, and rejected, by the *Wheat Gluten* panel.

1337. As the panel in *Wheat Gluten* concluded, in view of:

> the fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not "cause" has been shown for information to be treated as "confidential"; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information "which is by nature confidential or which is provided on a confidential basis," *including aggregate data*.[1565]

1338. Most recently, the panel in *Line Pipe* confirmed that the publication requirements of Article 3.1 must be construed so as not to impair the confidentiality requirements of Article 3.2. In particular, the panel stated that:

> In respect of Korea's claim that a failure to include relevant confidential information in a published determination constitutes a violation of Articles 3.1 and 4.2(c), we note that the panel in *US - Wheat Gluten* found that the requirement in Article 4.2(c) to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2.

1339. We see no reason why this Panel should not to be guided by the *US - Wheat Gluten* panel's finding in respect of the EC's Article 4.2(c) claim. Similarly, and given the express reference in Article 4.2(c) to Article 3, we fail to see how the Article 3.1 (last sentence) requirement to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" could entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2. Accordingly, we encourage the Panel to reject the EC's claim that failure to include relevant

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[1564] EC first written submission, para. 418.
[1565] *Wheat Gluten Panel Report,* para. 8.24 (emphasis added).

confidential information in a published determination is *per se* a violation of Articles 3.1 and 4.2(c).[1566]

1340. There was no requirement, therefore, that the United States publish confidential information, even in an "aggregated" format.

V. CONCLUSION

1341. For the foregoing reasons, the United States requests the Panel to find that the measures that Complainants have challenged are not inconsistent with the U.S. WTO obligations that Complainants have cited.

[1566] Report of the Panel, *United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2002), paras. 7.272-7.273.

EXHIBIT LIST

US-1 *Corus Group plc v. Bush et al.,* slip op. 02-87, pp. 5-10 (Ct. Int'l Trade August 9, 2002)

US-2 19 U.S.C. § 2252

US-3 H.R. Rep. No. 93-571, at 45 (1973); S. Rep. No. 93-1298, at 120-122 (1974)

US-4 *Extruded Rubber Thread*, Investigation No. TA-201-72, USITC Publication 3375, pp. I-5-6 (December 2000)

US-5 *Crabmeat from Swimming Crabs*, Investigation No. TA-201-71, USITC Publication 3349, p. I-6 (August 2000)

US-6 *Circular Welded Carbon Quality Line Pipe*, Investigation No. TA-201-70, USITC Publication 3261, pp. I-10-11 (December 1999)

US-7 *Certain Steel Wire Rod*, Investigation No. TA-201-69, USITC Publication 3207, pp. I-9-10 and I-35 (July 1999)

US-8 Joint Respondents' Posthearing Flat-Rolled Steel Brief (October 1, 2001), pp. 22-23

US-9 *Certain Cameras*, Inv. No. TA-201-62, USITC Publication 2315, p. 9 (September 1990)

US-10 *European Communities - Provisional Safeguard Measures on Imports of Certain Steel Products*, Commission Regulation (EC) No. 560/2002 of 27 March 2002, paras. 8-11 and Annex 1

US-11 *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Investigation Nos. 701-TA-404-408 and 731-TA-898-908 (Preliminary), USITC Publication 3381, pp. 3-4 and I-1 (January 2001); *Hot-Rolled Steel Products from Argentina and South Africa,* Investigation Nos. 701-TA-404 and 731-TA-898 and 905 (Final), USITC Publication 3446, pp. 3-6 (August 2001)

US-12 *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353, 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Publication 2664, pp. 12-14 (August 1993).

US-13 *Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine*, Inv. Nos. 731-TA-753-756 (Final), USITC Publication 3076, pp. 5-7 (December 1997)

US-14 *Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela*, Inv. No. 701-TA-225-234, USITC Publication 1642, pp 8-10 (February 1985)

US-15 *Certain Hot-Rolled Carbon Steel Plate from the Republic of Korea*, Investigation No. 731-TA-151 (Final), USITC Publication 1561, pp. 3-4 (August 1984)

US-16 *Certain Carbon Steel Products from Brazil*, Investigation No. 701-TA-205-207 (Final), USITC Publication 1538, pp. 3-5 (June 1984)

US-17 *Certain Flat-Rolled Carbon Steel Products from Brazil*, Investigation No. 731-TA-123, USITC Publication 1499, pp. 3-8 (March 1984)

US-18 *Hot-Rolled Carbon Steel Plate from Brazil*, Investigation No. 701-TA-87 (Final), USITC Publication 1356, pp. 3-4 (March 1983)

US-19 *Certain Carbon Steel Products from the Republic of Korea*, Investigation No. 701-TA-170, 171, 173 (Final), USITC Publication 1346, pp. 3-5 (February 1983)

US-20 *Certain Carbon Steel Products from Spain*, Investigation No. 701-TA-155, 157, 158-160, 162 (Final), USITC Publication 1331, pp. 3-5 (December 1982)

US-21 *Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany*, Investigation Nos. 701-TA-86-144, 146, and 147, and 731-TA-53-86 (Preliminary), USITC Publication 1221, pp. 10-16 (February 1982)

US-22 Prehearing Submission on Injury of the European Commission (September 10, 2001), pp. 3-4.

US-23 *Stainless Steel and Alloy Tool Steel*, Inv. No. TA-201-48, USITC Pub. 1377, pp. 16, n.21 (May 1983)

US-24 *Carbon and Certain Alloy Steel Products*, Inv. No. TA-201-51, USITC Pub. 1553, pp. 10 and 15-23 (July 1984)

US-25 *Bolts, Nuts, and Large Screws of Iron or Steel*, Inv. No. TA-201-37, USITC Pub. 924, pp 4 (November 1978)

US-26 *Certain Headwear*, Inv. No. TA-201-23, USITC Pub. 829, p. 5 (August 1977)

US-27 ITC Memorandum INV-Y-207, Tables X-1 and X-2

US-28 *Circular Welded Non-Alloy Steel Pipe from China, Indonesia, Malaysia, Romania, and South Africa*, Investigation Nos. 731-TA-943-947 (Preliminary), USITC Publication 3439, pp. 3-5 (July 2001)

US-29 *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, USITC Pub. 3400, pp. I-5-6 and Table I-2 (March 2001)

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

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

US-32 General Information, Instructions, and Definitions for Commission Questionnaires

US-33 ITC Memorandum INV-Y-209

US-34 Schagrin Associates Prehearing Brief (September 12, 2001), p. I-1

US-35 ITC Memorandum EC-Y-042

US-36 *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353, 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Publication 2664, p. 21 (August 1993).

US-37 New Shorter Oxford English Dictionary (1993 ed.), pp. 1324 & 3124

US-38 ITC Memorandum INV-Y-215

US-39 ITC Memorandum INV-Y-212

US-40 ITC Memorandum INV-Y-180

US-41 Producers Questionnaire Form, Question I-7

US-42 Importers Questionnaire Form, Question I-6

US-43 Purchasers Questionnaire Form, Question I-6

US-44 Hearing Transcript, pp. 326-27 (September 17, 2001)

US-45 Hearing Transcript, p. 343 (September 17, 2001)

US-46 Hearing Transcript, p. 1445 (September 24, 2001)

US-47 Hearing Transcript, p. 2626 (October 1, 2001)

US-48 Respondents' Joint Prehearing Framework Brief, pp. 107-08 (September 11, 2001)

US-49 ITC Dataweb

US-50 NAFTA Article 802

US-51 CFTA Article 1102

US-52 Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel Article 5.3

US-53 Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area U.S.-Jordan Free Trade Agreement, Article 10.8

US-54 Section 502 of the Trade Act of 1974, 19 U.S.C. § 2462

US-55 Proclamation 7328 of July 6, 2000, 65 Fed. Reg. 42595.

US-56 Safeguard Measure Worksheets

US-57 Modeling Results Worksheets

US-58 Imports from Israel

US-59 Lamy Waffles on Steel Compensation, Highlights Exclusions *Inside U.S. Trade* (28 June 2002)

US-60 Minimill Trade Data

US-61 ITC Prehearing Report, pp. STAINLESS-C-4 and STAINLESS-C-7.

US-62 ITC Report; Stainless Steel Angles From Japan, Korea, and Spain, Inv. No. 731-TA-888-890 (Final) USITC Pub. 3421, p. IV-2 (May 2001)

US-63 Stainless Steel Rod

US-64 ITC Memorandum EC-Y-046

US-65 ITC Memorandum EC-Y-050

US-66 Annex I