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

OPENING STATEMENT OF THE UNITED STATES
AT THE FIRST MEETING OF THE PANEL WITH THE PARTIES
29 October 2002

Mr. Chairman, Members of the Panel,

1. Before beginning our presentation, we would like to thank you for agreeing to take on this large and challenging case, and for providing us this opportunity to meet with you today and over the next two days. We would also like to thank the Secretariat for all their assistance in this dispute, and today in particular for helping to organize the smooth running of this meeting.

2. Our first written submission deals exhaustively with a number of issues. We will not attempt to address all of them in this oral statement, but will instead focus only on the key issues is dispute.

3. At the outset, however, we note that this morning we heard one of the Complainants assert that this is a "simple" and "straightforward" case. It is common in legal practice to see a brief that starts with a statement that the issues are simple and straightforward, but then proceeds in the next hundred pages to discuss very complicated legal arguments that purportedly explain the "simple" issues in dispute.

4. This is not a simple case. The record of the International Trade Commission ("ITC") runs to several hundred pages. The Complainants' briefs total approximately 1,000 pages. The Complainants' opening statements alone exceeded 80 pages. This is a complicated case that requires careful analysis. Each issue must be examined separately and each industry must be looked at individually. There are no shortcuts if we want to make sure the analysis is done right.

Overview

5. There is no dispute that the U.S. steel industry faced a crisis in 2001. The Asian financial crises that began in mid-1997, along with other unexpected events, resulted in a flood of imports that drove steel prices down even as the business cycle was reaching its peak. By 2001, prices had fallen to 20-year lows and 27 producers had declared bankruptcy in the United States, including some of the largest steel producers.

6. In response, on June 22, 2001, the United States requested a safeguard proceeding before the U.S. International Trade Commission. After an exhaustive investigation, which included written submissions and hearing testimony from hundreds of interested parties, the ITC reached affirmative determinations that increased imports of eight products caused serious injury[1] to the

[1] In this submission, "serious injury" or "injury" in the generic sense encompasses both serious injury and threat of serious injury.

domestic industry producing a like or directly competitive product. It also reached 17 negative determinations. The six Commissioners were evenly divided in their determinations with regard to four products.[2]

7. Based on these findings by the ITC, the President established safeguard measures on ten steel products on March 5, 2002.[3] Following consultations with WTO Members under the *Agreement on Safeguards* ("Safeguards Agreement"), the United States applied the steel safeguard measures. The President established safeguard tariffs at different levels, and one safeguard TRQ. In accordance with the Safeguards Agreement and the GATT, the President excluded certain developing country WTO Members and free trade agreement partners.

8. In broad terms, the Complainants' challenges to the safeguard measures fall into five categories.

9. First, Complainants assert that the ITC did not properly define the like product. The ITC found there were 27 such like products, each with its own unique characteristics. Complainants do not contest that there are multiple U.S. steel industries producing products like or directly competitive with the corresponding imported steel. They simply argue for a different grouping of products.

10. Presumably, the Complainants agree that the Safeguards Agreement requires a separate consideration of each industry, however defined. Yet, today we have seen the Complainants try to blur the lines between industries and to argue based on overly broad generalizations. In the first statement we heard today, the Complainants identified three factors that they assert should guide the Panel's analysis. One of these factors was intra-industry competition between integrated producers and minimills. Yet, integrated producers do not even produce six of the ten products on which safeguard measures were imposed, and are only marginally involved in producing two others. In fact, integrated producers and minimills only overlap in two of the ten product categories – flat steel and hot rolled bar. As this example shows, Complainants' sweeping generalizations serve only to cloud the proper analysis of the issues in this case.

11. Second, Complainants argue that the ITC did not properly determine whether unforeseen developments resulted in imports in such quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industries. In fact, the ITC identified several unforeseen developments – primarily the Asian financial crisis and the continued economic problems of the successor states to the Soviet Union. These events, combined with the persistent appreciation of the U.S. dollar and the continued strength of the demand for steel in the United States, severely disrupted the U.S. steel market.

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[2] *See*, *e.g.*, *Steel*, Inv. No. TA-201-73, USITC Pub. 3479, p. 1 ("ITC Report"), (Exhibit CC-6).
[3] Proclamation 7529 of March 5, 2002, 67 Fed. Reg. 10553 (Mar. 7, 2002).

12. Third, Complainants assert that imports did not increase, as required by the Safeguards Agreement. However, the facts are clear. Imports of all ten products spiked. For seven industries, imports peaked in 2000, and for the remaining three, in 1998 or 1999. Complainants do not argue to the contrary. The ITC Report details precisely how and when the increases in imports occurred for each product, and how those imports caused injury to each domestic industry.

13. Fourth, Complainants assert that imports did not cause or threaten serious injury to the domestic industries. Yet, in all cases, the increased imports either coincided with or were quickly followed by marked decreases in the performance of the relevant domestic industries. The ITC report contains detailed and precise explanations for how increased imports injured the domestic industries.

14. Finally, Complainants take issue with the safeguard measures established by the President. As demonstrated in our brief, the safeguard measures are entirely consistent with U.S. WTO obligations.

Evaluation of Complainants' claims by the Panel

15. The Panel must evaluate the Complainants' claims just as it would most other claims under the WTO Agreement. Under customary international law rules regarding the interpretation of treaties, the panel must interpret the Safeguards Agreement and Article XIX in accordance with their ordinary meaning, in light of their context and the object and purpose of the Agreement.

16. Many Complainants quote the Appellate Body's description of the conditions for application of a safeguard measure as "extraordinary," as if to imply that the panel must apply a heightened standard of review in this case. In fact, the word "extraordinary" does not even appear in the Safeguards Agreement or Article XIX.

17. No special standard of review applies to safeguard measures. Indeed, the ability of Members to take safeguard measures in compelling circumstances such as these has been a critical component of the trading system since the formation of the GATT. If actions cannot be taken when an industry is suffering injury in the form of bankruptcies, plant closures, and massive employment losses due to increased imports, then the fundamental rationale of the Agreement will be undermined.

18. The only measures at issue in this dispute are the steel safeguard measures themselves. The Panel should disregard arguments by Complainants that certain practices and methodologies applied by the ITC are, as a general rule, inconsistent with WTO rules. Complainants have not challenged these practices – nor could they. The concept of an agency "practice" as used by the

Complainants is not a "measure" and so is not subject to challenge under WTO dispute settlement.[4]

The ITC's Like Product Findings

19. We now turn to the question of like product. In considering the appropriate application of the term "like products" for review of the ITC's determinations of like products in the present Safeguards case, the Panel should be mindful of the following points:

> – With respect to the Safeguards Agreement, it has not been established in WTO dispute settlement proceedings what factors are appropriate to be considered in determining whether a domestic product is like an imported product.
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> – There are no universally accepted definitions of what constitutes a specific steel product.
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> – In defining the domestic like product, the competent 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 will not necessarily be the same since each begins with a different starting point, and are derived from a different factual record.
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> – In the present case, the ITC's definitions of like product are coextensive with the subject imports. 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 domestic steel corresponding to the imported steel covered by the investigation. The methodology employed by the ITC is unbiased and objective. The ITC's definitions of like products were adequate, reasoned and are consistent with U.S. obligations under the Safeguards Agreement.

20. The Appellate Body has found that the term "like products" "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears." The term "like products" is not defined in the Safeguards Agreement or GATT 1994. Moreover, it has not been at issue in dispute settlement proceedings involving the Safeguards Agreement. Rather it only has been addressed in the context of provisions with distinct and different purposes from those of the Safeguards Agreement. For instance, it is clear that the interpretation of the term "like products"

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[4] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Panel Report, adopted 23 August 2001, para. 8.129; *United States – Anti-dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Panel Report, adopted July 29, 2002.

in the context of provisions, such as Article III of GATT 1994, whose purpose is to protect the competitive relationship between products, will not be identical to the Safeguards Agreement, which has the purpose of permitting the temporary protection of a domestic industry under certain specified circumstances.

21. The Appellate Body has cautioned, most recently in *EC-Asbestos*, that 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. The Panel should recognize the clear distinction between purposes and reject, in accordance with the Appellate Body's findings, Complainants' proposals to automatically transpose interpretations made in another context to that of the Safeguards Agreement.

22. Moreover, in spite of Complainants' mischaracterizations, the dispute settlement proceedings in *US – Lamb Meat* provided little guidance on the issue of defining the like product. There was no suggestion in *US – Lamb Meat* regarding the definition of like product. Rather, the issue in *US – Lamb Meat* involved the definition of the domestic industry after the ITC had already defined the like product. The Appellate Body in *US – Lamb Meat* found that a domestic industry may include only the producers of the domestic like product. The finding did not require narrowly defining the like product, as Complainants have alleged.

23. It has not been established in the context of the Safeguards Agreement what factors are appropriate to be considered in determining whether a domestic product is like an imported product. The Appellate Body in *EC-Asbestos* has recognized that while general criteria may provide a framework for the like product analysis, such criteria are "simply tools to assist in the task of sorting and examining the relevant evidence," with each finding "made on a case-by-case basis." Moreover, "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."

24. In a safeguards investigation, the ITC's like product analysis traditionally has taken into account such factors as the physical properties of the product, its customs treatment, its manufacturing process (that is, where and how it is made), its uses, and the marketing channels through which the product is sold, as well as any other relevant factors. The ITC traditionally has looked for clear dividing lines among possible products and has disregarded minor variations.

25. There is no support in the Agreement or dispute settlement reports for Complainants' contentions that the primary basis for the ITC's like product definitions should have been tariff classification nor that it was prohibited from considering manufacturing processes. In fact, the Appellate Body has explicitly 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. Instead, Complainants erroneously urge the Panel to apply Appellate Body findings regarding the definition of a domestic industry to the like product definition and ignore the Appellate Body's explicit recognition in *US – Lamb Meat* that

consideration of production processes may be a relevant factor in defining like products. The Appellate Body in *US – Lamb Meat* also recognized that, when faced with products at various stages of production, a relevant factor for determining the like product definition (as opposed to the domestic industry definition) was whether products at different stages of processing were different forms of a single like product or had become different products. Thus, the Appellate Body explicitly recognized the type of like product situation faced by the ITC in the present case (that is whether steel at different stages of processing were different forms of a single like product or had become different products).

26. In defining the domestic like product, the ITC starts with the imported articles that have already been identified in the request or petition for an investigation, or "subject imports," and examines the evidence in order to determine the domestic product or products that are like the subject imports. While the ITC begins with the universe of imports identified in the request, the ITC only is required to define the domestic product(s) like or directly competitive with the subject imports in the petition or request. As the Appellate Body in *US – Lamb Meat* explicitly stated, "the first step . . . is the identification of the products which are 'like or directly competitive' with the imported product," that is, the first step is defining the domestic like product.

27. 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 imported products prior to defining the domestic like product simply has no support in the Agreement.

28. In particular, Complainants' reliance on the Appellate Body's findings in *US – Lamb Meat* in alleging that the ITC was required to define "specific imported products" first is misplaced. In the finding quoted by Complainants, the Appellate Body rejected imposing a safeguard measure on a subject import, lamb meat, because of the prejudicial effects that such imported article had on the domestic producers of a product, live lambs, that had <u>not</u> been defined as part of the like product. The Appellate Body's finding pertains to defining who are the proper members of a domestic industry producing lamb meat, the like product, and does not speak to separating subject imports into categories prior to defining domestic like products, as Complainants allege.

29. Moreover, in this case, the facts are very different from those in *US – Lamb Meat*. The like product and domestic industry definitions in this case correspond exactly to the imports subject to investigation. The ITC considered the effects of only the subject imports (that is, those corresponding to each domestic like product definition) on the domestic industry consisting of the producers of the corresponding domestic like product. Thus, the effects of imports on domestic producers of goods that are not defined as like products is not at issue, as it was in *US-Lamb Meat*. The ITC's approach is clearly consistent with the Safeguards Agreement and the Appellate Body's findings in *US – Lamb Meat*.

30. An underlying premise of many of Complainants' arguments is that there are universally accepted definitions of what constitutes specific steel products, and that the ITC disregarded such definitions. Complainants' own arguments show that no such consensus on steel product definitions exists. In fact, the Complainants conceded as much today in their opening statements. Their proposals for appropriate like product definitions range from product definitions used in trade remedy cases under other statutes, to the 612 tariff classifications, 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.

31. The ITC does not predetermine its definitions of like product, contrary to Complainants' notion that such definitions must be made prior to the gathering of evidence. In particular, Complainants fail to recognize that like product definitions made in antidumping and countervailing duty investigations are dependent (as they are in a safeguard investigation) on the imports subject to each particular investigation. The instant investigation began with a different starting point regarding the scope of subject imports, was conducted under different trade remedy standards, and was based on different evidentiary records than the various antidumping and countervailing duty investigations involving steel referred to by Complainants. Thus, the ITC had no reason or obligation to explain why its like product definitions in this safeguard action were not the same as the various decisions in other types of trade remedy investigations that were based on different subject imports and different underlying facts, as Complainants allege.

32. The ITC appropriately began its like product analysis with the imports subject to this particular investigation, which included a range of steel products. The ITC considered the record evidence using long established factors, appropriate for the context and the facts of this particular investigation, and looked for clear dividing lines among the various types of domestic steel corresponding to the imported steel subject to this investigation. 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 which are subject to review by this Panel.

The ITC's Findings Regarding "Increased Imports"

33. We now turn to the ITC's findings on increased imports. The "increased imports" requirements of the Safeguards Agreement were satisfied for each of the ten products on which the United States imposed a safeguard measure. We do not have time here to address the specific facts regarding each product. We will limit our presentation to a brief discussion of the general principles involved. Complainants' arguments are based on a misinterpretation of relevant Appellate Body and panel reports.

34. We turn first to the "recent, sudden, sharp, and significant" characterization of the increased import requirement outlined by the Appellate Body in *Argentina – Footwear*. Complainants misconstrue the Appellate Body's report by arguing that an increase in imports must be "recent, sudden, sharp, and significant," according to some absolute standards applicable

in all cases. In fact, a finding of increased imports depends on a case-specific determination. As the Appellate Body said, it is not a "mathematical or technical determination." Rather, imports must be recent *enough*, sudden *enough*, sharp *enough*, and significant *enough* to cause or threaten serious injury. These are questions that are answered as competent authorities proceed in the context of their consideration of injury and causation.

35. Second, Complainants misconstrue what the Appellate Body found in *Argentina – Footwear* about considering trends in imports over the period of investigation. The Appellate Body addressed trends in that case 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. In this case, the ITC did not engage in a simple end-points analysis of comparing import data in 1996 with import data in 2000. The ITC considered 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 as well as for the interim periods.

36. Third, Complainants mostly ignore the Appellate Body's later report in *US – Lamb Meat*, which made clear that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigation period.[5] Complainants' suggestion that the ITC selected 1996 as a base year in order to achieve a particular result has no merit. The ITC followed its established practice in safeguards investigations of using a period of investigation of five years plus whatever interim period is available. In the *Line Pipe* dispute, the Panel found this methodology did not give rise to any inconsistency with obligations under the Agreement.

37. Finally, Complainants attempt to downplay the panel report in *US – Line Pipe*, which explains that it is not necessary to find that imports are still increasing in the period immediately preceding the competent authority's determination, or up to the very end of the period of investigation.[6] Complainants' criticism that the ITC failed to give enough weight to interim 2001 import data when these showed a decrease in imports is unfounded. An exclusive focus on import data in interim 2001would disregard the annual data in preceding years, which would be inconsistent with the Safeguards Agreement.

38. In addition to misconstruing panel and Appellate Body reports, the Complainants raise the novel argument that the ITC should have considered data from the period after the ITC record was closed. Complainants attempt to expand the period of investigation to encompass full-year 2001 data. Indeed, earlier today, they appear in an exhibit to one of their oral statements to have

[5] *US – Lamb Meat*, AB Report, para. 137.
[6] *US – Line Pipe*, Panel Report, para. 7.207.

even presented 2002 data to the Panel.[7] There are fundamental legal and practical reasons why Complainants' arguments must be rejected.

39. First, to the extent that Complainants are suggesting that the ITC should have relied on full-year 2001 data without giving interested parties an opportunity to comment on those updated data, Complainants' position is directly at odds with Article 3.1.

40. Second, in setting the end of the period of investigation at June 30, 2001, the ITC was gathering the most recent information it could, given that the investigation was instituted in late June 2001 and the final determination was made in late October 2001. Complainants' proposed use of full-year 2001 import data would have started an endless process of updating data that would preclude any final decision. It is obvious that competent authorities must be permitted to set the end of a period of investigation at a point that will permit them to gather, compile and analyze all of the data relevant to their investigation.

The ITC's Determinations of Serious Injury and Threat of Serious Injury

41. We now turn to the ITC's findings on serious injury. For the ten products on which the United States imposed safeguards measures, the ITC found the domestic industry to be seriously injured or threatened with serious injury. The ITC's determinations reflect a thorough and objective evaluation of the evidence. No complainant has contested four of the ITC's ten serious injury or threat findings

42. Article 4.2(a) of the Safeguards Agreement identifies several relevant factors that competent 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.

43. The ITC's analysis focused on each industry as a whole consistent with U.S. law and the Safeguards Agreement. In particular, the data upon which the ITC relied concerning each industry's shipments, production, and market share were all computed on the basis of the entire industry. This is also true of the data the ITC used to analyze the financial performance of the various industries. The EC's contentions to the contrary are incorrect.

44. Moreover, the ITC's analysis of each industry was based on an evaluation of all of the factors enumerated in Article 4.2 . For each pertinent industry, the ITC explained in detail why there was a significant overall impairment of the state of each industry that amounted to serious injury. These industries uniformly reported poor financial performance. Numerous firms, and

[7] *See* paragraph 17 of New Zealand's oral statement.

often the entire industry, showed unprofitable operations. In several industries producers had gone bankrupt.

45. The six injury findings that Complainants challenge typically concern industries where not all factors pertaining to the industry's condition were declining. We never claimed otherwise. In challenging these findings, complainants disregard various WTO Appellate Body and panel reports stating that an investigating authority may find serious injury although not every single factor it examines pertaining to the industry's condition is declining. Instead, the authority must consider the totality of the trends and their interaction.

The ITC's Causation Analysis

46. The ITC's causation analysis also was fully consistent with the requirements of the Safeguards Agreement. The ITC thoroughly and objectively analyzed all of the record evidence in the steel determination. After doing so, it showed there was a "genuine and substantial" causal link between increased imports of the ten steel products in question and serious injury or threat thereof. Moreover, in its analysis, the ITC also adequately separated and distinguished the effects of imports from any effects of other factors for all of the steel products covered by the remedies. There is simply no basis for the Complainants' assertions that the ITC's analysis was inconsistent with the provisions of the Safeguards Agreement.

47. As an initial matter, it is important to summarize the basic rules that are applicable to a competent authority's causation analysis under the Agreement and the United States' general approach to causation in its safeguards statute.

1. Appellate Body Guidance

48. The Appellate Body has stated that the Safeguards Agreement has "two distinct legal requirements" that are applicable to a causation analysis in a safeguards proceeding. First, a competent authority must show that there is "'a causal link between increased imports of the product concerned and serious injury or threat thereof.'"[8] The Appellate Body has stated that the competent authority meets this basic requirement when there is a relationship between the movements in import trends and movements in injury factors.[9]

49. Second, the competent authority must also "separate and distinguish" the effects of imports on the industry from those caused by other factors in order to ensure that the "injury caused by factors other than the increased imports [is] . . . not . . . attributed to increased imports."[10]

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[8] *US - Line Pipe*, AB Report, para. 208.
[9] *Argentina – Footwear*, AB Report, para. 144.
[10] *US - Line Pipe*, AB Report, paras. 208.

50. The Appellate Body has only provided general guidance with respect to causation. For example, the Appellate Body itself has stated that its previous reports dealing with causation provide only a general level of guidance to competent authorities and leave "unanswered many methodological questions" relating to the requirements of the Safeguards Agreement.[11] Given this, the Appellate Body clearly recognized that the Safeguards Agreement has left the development of appropriate causation methodologies to the discretion of the competent authorities.

51. The Appellate Body also has recognized that it is not imports alone that must cause the serious injury being suffered by an industry. We were glad to hear that this was not disputed today. Instead, it is possible to impose a safeguards remedy when imports interact with other injurious factors to cause serious injury to an industry.[12]

2. The ITC's Analytical Methodology

52. The analytical process applied by the ITC is fully consistent with the basic guidance provided by the Appellate Body with respect to causation. The ITC performs a two-step causation analysis in a safeguards proceeding. As the first step in this process, the ITC examines the relevant economic data for the industry in question and assesses whether the correlation between import trends and declines in the overall condition of the industry is "important.".

53. As the second step in this analysis, the ITC identifies other factors that may be contributing to the serious injury being suffered by the industry. In this step of the analysis, the ITC examines the record evidence pertinent to each other factor and assesses whether the factors are causing injury to the industry. 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.

54. The ITC does not, however, attempt to "quantify" the amount of the injury caused by imports or any other factor. Instead, the ITC examines the nature and extent of the injury caused by imports and each other factor and then qualitatively assesses the degree to which 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. In this regard, it is important to note that two previous panels have found that the Agreement does not require that a competent authority "quantify" the precise amount of injury attributed to imports or other injurious factors in its non-attribution analysis.[13]

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[11] *US - Lamb Meat*, AB Report, para. 178.
[12] *US - Line Pipe*, AB Report, para. 209; *US - Wheat Gluten*, AB Report, para. 67.
[13] *US - Line Pipe*, AB Report, paras. 200-217; *US - Wheat Gluten*, AB Report, paras. 60-92.

3. The ITC's Causation Analysis Is Fully Consistent with the Safeguards Agreement

55. The United States has not "ignored" or "flouted" the Appellate Body's prior findings, as Complainants contend. In its prior reports, the Appellate Body has not found the ITC's two-step causation analysis to be inconsistent with the requirements of the Agreement, nor has it recommended that the ITC change its causation methodology. Instead, the Appellate Body found in those cases that the ITC failed to take account of certain specific factual issues or failed to adequately explain its causation findings. In its Steel determinations, the ITC provided the thorough and objective causation analysis found lacking by the Appellate Body in its prior decisions regarding previous ITC investigations.

56. Second, the "substantial cause" standard set forth in the U.S. statute does not lead to an inconsistency under Articles 2.1 and 4.2(b) of the Agreement, as Complainants assert. As stated previously, under the "substantial cause" standard of the U.S. statute, the ITC must make two separate findings as part of its basic causation analysis. The ITC must first find that increased imports are – in and of themselves – an "important" cause of serious injury to the domestic industry. Then, the ITC must find that imports are as "important" or more "important" a cause of injury than any other factor.

57. The first of these two standards requires the ITC to find a "genuine and substantial" causal link between imports and serious injury in a safeguards proceeding. As a result of the second of the two standards, the "substantial cause" test also requires the ITC to separate and distinguish the injurious effects of factors causing injury to the industry, including imports. By requiring the ITC to "examine factors other than imports" that are causing injury and to compare the "importance" of that injury to that caused by imports, the U.S. standard 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, the Appellate Body has stated that, by "examining the relative causal importance of different causal factors," the ITC clearly engages in a "process to separate out, and identify, the effects of the different factors, including increased imports . . ."[14]

58. In sum, the "substantial cause" standard is fully consistent with the causation guidelines announced by the Appellate Body.

59. Third, nothing in the language of the Safeguard Agreement or the findings of the Appellate Body indicates that the ITC must assess the effect of Canadian and Mexican imports differently than it currently does. The ITC is clearly not required to consider these imports to be a non-import factor causing injury when performing its initial assessment of whether imports have caused serious injury to the industry. In addition, as part of the parallelism requirement enunciated by the Appellate Body, the ITC did perform a second causation analysis segregating Canadian and Mexican imports from other imports whenever Canadian and Mexican imports are

[14] *US - Lamb Meat*, AB Report, paras. 184.

excluded from a safeguard measure.[15] By doing so, the ITC separates and distinguishes the price and volume effects of NAFTA imports from non-NAFTA imports. This process provides the non-attribution analysis required under Article 4.2(b), as explicated by the Appellate Body. Requiring anything more would be redundant.

60. Finally, the Panel should remain skeptical of any assertion made by Complainants that the ITC performed "cursory"or "minimal" discussions of certain causation issues, "failed to analyze" other issues, or "ignored" particular facts or causation arguments. When the ITC's determination is reviewed, one thing is clear: the ITC considered all of the record evidence for all issues raised in the investigation and performed a thorough and objective assessment of the issue in question. The length and detail of the ITC's Report in this proceeding shows the ITC took the time and made the effort to ensure that its analysis was comprehensive, well-reasoned, and fully supported by the record.

Parallelism

61. Turning now to the question of parallelism, the ITC found that increased imports from non-NAFTA sources (*i.e.*, all sources other than Canada and Mexico) caused serious injury or threat of serious injury to each pertinent domestic industry.

62. The ITC's analysis of non-NAFTA imports can be found in several places in its report. While the sections were not all prepared or published simultaneously, they constitute a single report. All sections of the report are intended to be read together. Thus, the ITC findings pertinent to non-NAFTA imports are not merely those provided in the document that the United States has designated, for purposes of convenience, the Second Supplemental Response. Instead, the pertinent findings are provided throughout the entire ITC Report.

63. The ITC's analysis of imports from all sources contained discrete sections discussing the conditions of competition for each domestic industry. These findings generally focused on the U.S. marketplace as a whole and did not relate specifically to imports, much less to imports from particular sources. The findings on conditions of competition were equally applicable to the analysis of non-NAFTA imports as to the analysis of all imports. Consequently, there was no need for the ITC to repeat these findings in the portion of the report specifically addressing non-NAFTA imports.

64. Similarly, the findings the ITC made in its analysis concerning serious injury from imports from all sources were based on data concerning the particular U.S. industry at issue. Those data did not relate to imports, and, thus, did not change depending on the set of imports being examined. In other words, 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

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

was also no need for the ITC to repeat these findings in the portion of the report specifically addressing non-NAFTA imports.

65. The ITC provided a particularized discussion of increased imports and causal link for non-NAFTA imports in its analysis of non-NAFTA imports for each pertinent domestic industry. 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. The nature and timing of the serious injury suffered by the domestic industry was the same regardless of the set of imports examined.

66. Additionally, in its discussion of causal link for all imports, the ITC made findings concerning factors other than imports that were alleged to cause serious injury. These findings often focused on data pertaining to the U.S. industry or the U.S. marketplace as a whole. Thus, 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 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.

67. Consequently, to support its conclusions concerning non-NAFTA imports, the ITC Report contains for each industry: (1) a specific finding that non-NAFTA imports increased; (2) a finding, appearing in the analysis of all imports, that the industry was seriously injured; (3) findings, located in the analysis of all imports, concerning the pertinent conditions of competition in the industry; (4) a specific finding describing the causal link between the non-NAFTA imports and the domestic industry's serious injury; and (5) findings, set forth in the analysis of all imports, concerning factors other than imports that were alleged to cause serious injury. These findings satisfy the requirements of Articles 2.1, 2.2, and 4.2.

Unforeseen Developments

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

69. The term "unforeseen developments" covers any change that the negotiators did not foresee when they undertook obligations or tariff concessions with regard to the product subject to the measure. The appropriate focus is on what was actually "foreseen" rather than "theoretically 'foreseeable.'"

70. Neither Article XIX nor the Safeguards Agreement requires that the unforeseen developments be limited to, or even directly related to, the particular product or products under

investigation. Likewise, there is no requirement that the finding of "unforeseen developments" be "coupled with" the effect of the obligations, including tariff concessions, incurred under the GATT 1994.

71. The ITC's demonstration of unforeseen developments showed the sequential relationship implied by Article XIX between trade concessions, unforeseen developments, and imports in such quantities and under such conditions as to cause serious injury. The ITC's analysis also showed that the increased imports and the conditions which caused injury were a result of unforeseen developments.

72. Each of the events cited by the ITC is an unforeseen development under Article XIX. The financial crises that engulfed Southeast Asia and the depth and length of the financial crises of the former USSR republics were unforeseen and had unforeseen, radical, and lasting effects on the level of steel exports from those countries. The continued strength of the U.S. market and with the persistent appreciation of the U.S. dollar, were also unforeseen developments which made the U.S. market especially attractive for imports displaced from other markets as a result of the financial crises in Southeast Asia and the former USSR republics. Each of these developments was unforeseen, as was simultaneous occurrence of such events.

Extent of application of the safeguard measures

73. Article 5.1 of the Safeguards Agreement states that "a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." While Complainants assert that the safeguards measures are inconsistent with Article 5.1, they generally have not attempted to substantiate their claims. Instead, their challenges to the safeguard measures are premised on their challenges to the ITC's injury findings, as if their claims regarding injury and those regarding the measures themselves rise and fall together. They don't. And even if they did, the Complainants' challenge to the measures must fail because the ITC determinations were consistent with the Safeguards Agreement and Article XIX of GATT 1994 as we have discussed.

74. If the Panel were nonetheless to examine the consistency of the safeguard measures imposed in this case, independent from an analysis of the ITC's injury findings, there are three important principles that should guide its analysis.

75. First, the Appellate Body has repeatedly found that the Safeguards Agreement does not require a Member to explain at the time of taking a safeguard measure how that measure complies with Article 5.1. The sole exception is for a safeguard measure in the form of a quantitative restriction – a remedy not used in this case.

76. Second, Article 5.1 sets an outer limit for the application of a safeguard measure, which is defined in terms of *two* objectives: (1) to prevent or remedy serious injury *and* (2) to facilitate

adjustment. The "and" indicates that these two objectives are additive, and both must be taken into account in evaluating whether a safeguard measure is consistent with Article 5.1. If a given measure would prevent or remedy serious injury, but not fully facilitate adjustment, a Member would be justified in applying a stronger measure. On the other hand, a Member is free to choose among various measures that meet these criteria, or even to apply a measure *less* than the extent necessary if the Member considers that to be appropriate.

77. Third, the Safeguards Agreement does not require quantification of the extent of the effects of a safeguard measure or of the effects of increased imports. Earlier today, we heard an apparent split of opinion among Complainants on this point. Brazil asserted that "no one has argued that competent authorities must, or even could, quantify every causal factor . . . ."[16] Norway, on the other hand, argued that "[q]uantification is the one logical answer to the question of how to find the legitimate level of the measure."[17]

78. While Complainants themselves appear divided, it is clear that a numerical measurement of the effects of imports is both impossible and impractical. It is impossible in that the Safeguards Agreement defines serious injury in terms of numerous industry indicators that cannot be aggregated into a single measurement of injury. It is impractical in that there is no calculation or computer model that can accommodate the large number of variables and potential changes in market situations that would be necessary to measure the effect of a measure – or of increased imports – on a domestic industry.

79. Despite these limitations, the United States has provided in its submission two numerical tests of the safeguard measures. These tests do not purport to quantify "injury" or the effect of the safeguard measure in remedying injury. However, they do provide calculations to compare the price, quantity, and revenue effects of applying a safeguard measure with the price, quantity, and revenue effects of increased imports. These calculations provide a complete rebuttal – to the extent that one is necessary – of Complainants' claims that the safeguard measures were excessive. In addition, the product exclusions granted by the United States have also lessened the extent of the initial application of the steel safeguard measures, and should remove any doubt as to whether they comply with Article 5.1.

Nonapplication of the steel safeguard measures to developing country WTO Members

80. Finally, two Complainants, China and Norway, argue that the exclusion of developing country WTO Members from the safeguard measures was inconsistent with Article 9.1 of the Safeguards Agreement.

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[16] *See* paragraph 34 of Brazil's oral statement.
[17] *See* paragraph 12 of Norway's oral statement regarding Articles 5.1 and 7.1.

81. In assessing this claim, the Panel need not address the procedure used by the United States for identifying developing country Members as a general matter. The covered agreements do not provide a general rule for identifying developing country Members. Article 9.1 itself places the obligation for identifying developing countries squarely on the Member imposing the measures. Other rules would apply in other contexts. However, in this case, the United States – not the exporting Members – had the right and obligation to decide in the first instance which Members are developing country Members.

82. None of the Complainants have established a *prima facie* case of inconsistency with the Safeguards Agreement. In order to do so, they would have had to show that the safeguard measures were applied to a developing country Member accounting for less than three percent of total imports, when total imports from such countries did not exceed nine percent of total imports. Neither China nor Norway has met this threshold requirement.

83. Norway does not identify any developing country Member that it believes was improperly subjected to a safeguard measure. China, for its part, argues only that it has designated itself a developing country Member for purposes of Article 9.1. As we have demonstrated, self-designation by an exporting Member is not how Article 9.1 works. Furthermore, as we point out in our written submission, China's Protocol of Accession to the WTO indicates that China's self-designation for certain purposes does not by itself establish its entitlement to treatment as a developing country Member in all situations. Rather, this issue must be decided on an agreement-by-agreement basis. China has provided no basis to conclude that it qualifies as a developing country Member under the Safeguards Agreement.

84. Since the Complainants have not met their burden of proving an inconsistency with the Safeguards Agreement, the Panel need not address the merits of this claim.

Conclusion

85. This dispute is perhaps the largest and most complex to have come before a WTO panel. Complainants have submitted approximately 1000 pages of arguments. This presentation has addressed only a few of the issues discussed in our written submissions. It is possible that we have not responded to a particular argument or point in one of the submissions. We will be glad to respond to any additional arguments that the Complainants may have raised or to elaborate further on the arguments that we have addressed here.