***** CHECK AGAINST DELIVERY *****

ORAL STATEMENT OF THE UNITED STATES
AT THE ORAL HEARING OF THE APPELLATE BODY

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

29 September 2003

1. Good morning Mr. Chairman, members of the Division. Thank you for this opportunity to present the views of the United States.

The Panel's standard of review and the competent authorities' obligations

2. Our claims in this appeal focus on the Panel's erroneous findings of inconsistency with Articles 2.1, 3.1, and 4.2 of the *Agreement on Safeguards* and Article XIX of the *General Agreement on Tariffs and Trade 1994*. The Panel's errors involve both incorrect interpretations of the covered agreements and an incorrect application of law to facts. We are not appealing any of the Panel's findings of fact.

3. Many of these errors arise, in part, from the Panel's incorrect application of the standard of review to the relevant provisions of the covered agreements. There is no dispute that the standard of review is laid out in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Dispute*, and calls for an "objective assessment of the matter . . . including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." There should also be no dispute that the Appellate Body has found that the *application* of this standard of review depends on the provisions of the covered agreements under examination.

4. For instance, the Appellate Body has found that the review under Article 4.2 has a "dual character." First, there is an inquiry into the conduct of the competent authorities – in the case of Article 4.2(a), whether they evaluated "all relevant factors." And, second, there is an inquiry into whether the competent authorities have provided a reasoned and adequate explanation of how the facts support their determination.[1]

5. The Panel applied this standard incorrectly in its findings that the U.S. determination was inconsistent with the Safeguards Agreement. It disregarded the dual nature of the standard, collapsing its inquiry into the single question whether the competent authorities provided a "reasoned and adequate explanation." The Panel then erred further in using this standard – which the Appellate Body explicitly linked to Article 4.2 – in evaluating Article XIX of GATT 1994 and Article 2.1 of the Safeguards Agreement. And throughout the report, the Panel erred in evaluating whether there was a "reasoned and adequate explanation" without reference to the

[1] *US – Lamb Meat*, AB Report, paras. 103 and 104.

specific terms of Article 3.1 or 4.2(c). These are the only obligations the Safeguards Agreement places on the *manner* in which the competent authorities' evaluation is set out in published documents. As such, they should have been the focus of any conclusion as to whether the ITC Report was consistent with WTO rules.

6. Complainants would have the Appellate Body dismiss the U.S. concern with the exact terms of the Safeguards Agreement, and one of them even refers to this view as "little more than sophistry."[2] We find these objections difficult to square with the central principle that treaty interpretation begins with the words of the agreement. But more importantly, the Panel's replacement of the specific terms of Articles 3.1 and 4.2(c) with the more generalized concept of a "reasoned and adequate explanation" led to an essentially standardless evaluation of the ITC Report. It is impossible to discern the principles that the Panel applied in deciding whether particular findings met the Panel's test for a "reasoned and adequate explanation." Its conclusions are often mutually contradictory, cursory, or conclusory, leaving the United States and the Appellate Body little basis to understand the underlying reasoning.

7. In applying the standard of review incorrectly, the Panel acted inconsistently with its obligations under Article 11 of the DSU. But the more important point is that, having framed its own examination incorrectly, the Panel went on to set incorrect standards for determining whether the ITC findings were consistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement and Article XIX of GATT 1994. For example:

- The Panel incorrectly treated explanatory approaches that past panels and the Appellate Body have either endorsed, or used themselves, as contrary to a "reasoned and adequate explanation."

- The Panel incorrectly concluded that certain findings did not provide a "reasoned and adequate explanation" without addressing the entirety of the reasoning underlying the finding.

- The Panel incorrectly evaluated findings in isolation from one another, without considering whether supposed omissions were, in fact, addressed elsewhere in the report of the competent authorities or their record.

8. As a final point on this topic, many Complainants have argued that the Panel should be upheld because it quoted the relevant provisions of the Safeguards Agreement, cited the relevant segments of Appellate Body reports, and took the words "reasoned and adequate explanation" from those reports. But, as the Appellate Body noted in *US – Lamb Meat*, there is an important difference between stating the standard of review correctly and applying it correctly in making findings. Although the Appellate Body described "reasoned and adequate explanation" as one

[2] New Zealand Appellee Submission, para. 3.3.

element of a panel's examination of consistency with Article 4.2, it never suggested that this general description of the standard of review could or should replace the explicit terms of the Agreement. Nor did the Appellate Body indicate that a cursory or partial analysis of the competent authorities' reasoning would "critically examine[] the explanation, in depth, and in light of the facts before the panel."[3] In short, the Panel failed to conduct the analysis required under the Safeguards Agreement, and its conclusions should be reversed.

Unforeseen developments

9. The Panel's treatment of unforeseen developments is an example of the deficiencies in its review of the results of the ITC investigation and associated errors in the interpretation of the Safeguards Agreement and Article XIX of GATT 1994.

Claims under Article 12.7 of the DSU

10. I will begin with our claims under Article 12.7 of the DSU that the Panel failed to provide the "basic rationale" for its decision. The Panel never actually considered whether the ITC's demonstration was reasoned and adequate for any of the measures under investigation, much less all of them. In fact, much of its analysis affirmed the ITC's basic approach to identifying unforeseen developments. But the Panel reached its conclusion that the ITC failed to demonstrate the connection between unforeseen developments and injurious increased imports without looking at the record, without finding any errors in the ITC's conclusions, and without finding any discrepancies or inconsistencies between the reasoning advanced by the ITC and the extensive data on the record. The Panel had a wealth of information available for its analysis. Yet it never found that the data cited by the ITC was either inaccurate or unrepresentative.

11. Contrary to Complainants' view, our claim is not that the Panel should have conducted a *de novo* review. Our claim is that the Panel reached its finding that the United States breached Article 3.1 of the Safeguards Agreement and Article XIX of GATT 1994 without considering the entirety of the report of the competent authorities and the evidence upon which it relied. This approach to the investigation resulted in an incorrect finding that the report was inconsistent with Article 3.1. It also resulted in a failure to "critically examine[] the explanation, in depth, and in light of the facts before the panel"[4] – a key element of the "reasoned and adequate explanation" inquiry that the Panel claimed to be conducting. As a result, the Panel made an incorrect finding that the United States acted inconsistently with its obligations.

---

[3] *US – Lamb Meat*, AB Report, para. 106.

[4] *US – Lamb Meat*, AB Report, para. 106.

The Consideration of Data in the ITC Report

12. Whether the proper test is the use of the words of Article 3.1 or the "reasoned and adequate explanation" formulation favored by the Panel, the Panel erred in concluding that the U.S. demonstration of unforeseen developments was inconsistent with Article 3.1. Neither test restricts the analysis to the data and statements in the unforeseen developments section of the report. Yet this is what the Panel did.[5] In particular, the Panel was perturbed by the ITC's alleged failure to show increased imports, although the Panel was aware that the ITC had made product-specific findings of increased imports. Neither the Panel nor the Complainants cites any authority supporting such treatment of the report of the competent authorities.

13. In justifying its refusal to consider data cited elsewhere in the ITC Report, the Panel stated that "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[6] This objection is nonsense. It assumes that data tables may serve only one purpose, and once they have been cited in one context, they may never support any other conclusion.

14. But the Panel's criticism is also wrong. The tables in question showed imports by product and by country for the period of investigation. They were cited in the course of the ITC's findings regarding NAFTA countries.[7] Under U.S. law, the ITC must find whether Canada or Mexico is among the top five suppliers of the imported product, and find whether the growth rates for imports from each of those two countries are appreciably different than the growth rate of imports from other countries.[8] Even if the Panel were right, and data tables could be used only in one way, to support one conclusion, these data tables were being used in just the right way – to evaluate the growth rates of imports from individual sources. The Panel erred in not examining those tables in making its finding.

The need to relate unforeseen developments to specific products

15. Both the Panel and Complainants take it for granted that only a demonstration of unforeseen developments that contains the name of the product can provide a reasoned and adequate explanation. Neither the Panel nor any Complainant cites any authority for this proposition. The only obligation is to set forth a finding or reasoned conclusion demonstrating that injurious increased imports were "as a result of unforeseen developments." Nothing in this provision indicates that the effects of unforeseen developments must be unique to an industry or

---

[5] Panel Report, para. 10.133.

[6] Panel Report, para. 10.133.

[7] *See, e.g.*, ITC Report, p. 65-67.

[8] ITC Report, p. 35.

a product, or that an unforeseen development might not have similar effects on a broad range of industries. The Panel recognized these principles, and Complainants have not disagreed.[9] Far less does Article XIX impose on competent authorities a responsibility to differentiate the effects of those unforeseen developments.

16. Yet the Panel clearly considered that such a demonstration was necessary. Complainants argue that the United States has misread the Panel finding on this matter.[10] But the United States is merely relying on the Panel's own words, which follow the Panel's description of what is "necessary for the ITC to explain,"[11] namely, that "the ITC made no attempt to *differentiate* between the impact that the alleged unforeseen developments had on the different product sectors to which the various safeguard measures related."[12]

17. As we demonstrated in our appellant submission, this is a misinterpretation of Article XIX. But it also led the Panel to conclude that its task was complete when it concluded that the ITC had not provided separate demonstrations for each product. It looked no further, and made no attempt to determine whether the demonstration that the ITC stated was applicable to each of the products was, in fact, consistent with Article XIX and Article 3.1 with regard to any, much less each, of those products.

Increased imports

18. We turn now to the issue of increased imports. Our argument as to the standard for meeting the increased imports test rests squarely on the language of the Agreement. Article 2.1 asks whether a product "is being imported . . . *in such increased quantities* . . . *and under such conditions as to cause or threaten to cause serious injury* to the domestic industry." Article 2.1 does not specify that imports should have "a certain degree of recentness, suddenness, sharpness and significance," as the Panel would have it.

19. Instead, the text of Article 2.1 makes clear that the attributes of recentness, suddenness, sharpness, and significance, discussed by the Appellate Body in *Argentina–Footwear*, are inexorably linked to the ability of imports to cause or threaten injury. Whether an increase in imports has been recent, sudden, sharp, and significant enough to cause or threaten serious injury are questions that are answered as competent authorities proceed with their analysis of serious injury or threat and causation.

---

[9] Panel Report, para. 10.127.

[10] *See, e.g.*, EC Appellee Submission, para.92, n.57.

[11] Panel Report, para. 10.127.

[12] Panel Report, para. 10.128 (emphasis added).

20. Several complainants argue that our position is that "any increase will do" for a Member to apply a safeguard measure. This is simply not the case. An increase in imports must be sufficient to cause or threaten serious injury. That situation must be as a result of unforeseen developments. Any increase will *not* do.

21. Finally, the Panel's findings that the increased imports requirement for hot-rolled bar and stainless steel rod had not been met is flawed, even by the standard for evaluating increased imports articulated by the Panel. We urge the Appellate Body to examine the import data in paragraphs 116 and 131 of our submission – data about which the Complainants had remarkably little to say in their submissions. It should be clear that the Panel disregarded substantial and sustained increases in imports over several years in favor of a decrease only in the first six months of 2001.

Causation

22. Now, we will address the Panel's findings concerning the ITC's causation analysis. In our appellant submission, we have described the persistent legal errors committed by the Panel when analyzing the ITC's causation analysis. In particular, we showed that the Panel's findings were premised on mistaken interpretations of the Safeguard Agreement's requirements, or reflected an incomplete or incorrect understanding of the ITC's findings, or, in at least one instance, constituted an entirely *de novo* review of the record evidence.

23. Our submission on these issues is lengthy and detailed, and we will not address the specifics of each argument or rebut the Complainant's arguments at length in this oral statement. We look forward to the opportunity to discuss these matters during the next two days. Right now, however, I would like to discuss three specific issues that Complainants have discussed extensively in their own submissions. By doing so, I hope we will be able to highlight the types of flaws made by the Panel in its analysis, and to give you some idea of the detail and comprehensiveness that underlies the ITC's causation analysis.

24. Let me first address the Panel's finding that a collective assessment of the injurious effects of other factors is required by the Agreement, even when an authority has analyzed the effects of these factors on an individual basis. To put it simply, there is no justification for the imposition of such a requirement under the Agreement, since it is silent on the issue. Moreover, the Appellate Body has had the opportunity to address the non-attribution obligation of Article 4.2(b), second sentence, in a number of reports to date.[13] In those reports, the Appellate Body has never suggested a "cumulative" or "collective" analysis of the effects of non-import factors is required under Article 4.2(b). On the contrary, any reasoned reading of those past reports indicates that the Appellate Body contemplates that a competent authority may comply with its

[13] *See, e.g., Argentina – Footwear, US – Wheat Gluten, US – Lamb Meat*, and *US – Line Pipe.*

non-attribution obligation under Article 4.2(b) by examining the nature of the injury caused by non-import factors on an individual basis.[14] In fact, in *EC – Cast Iron Fittings* – a report issued under the *Antidumping Agreement* – the Appellate Body explicitly held that an authority need not, as a general matter, examine the effects of "other" on a collective basis, as long as the authority has properly analyzed the effects of injury factors on an individual basis.[15]

25. I would like to make one other point on this issue. The Appellate Body has consistently and clearly stated that a competent authority will satisfy the requirements of Article 4.2(b), by identifying and satisfactorily explaining the "nature and extent of the injurious effects of the other factors," as distinguished from those of imports.[16] It should be clear that a competent authority will be able to examine the "nature and extent" of a factor's injurious effects if it examines the effects of that factor on an individual basis, separately from the effects of other factors. This is because the "nature and extent" of the injury caused by any individual factor will vary from factor to factor. For example, an industry's "legacy costs" – that is, its pension, retirement, and related benefit expenses – will most directly affect its costs of goods sold and its costs of production. A decline in demand, on the other hand, might have its most direct and observable impact on shipment levels of the industry, or perhaps its pricing levels. Obviously, these two factors can and do affect an industry in different ways. Thus, a competent authority would need to examine and evaluate them on an individual basis in order to ensure that it accurately assesses their nature and extent.

26. Moreover, if the authority conducts this analysis and accurately assesses the nature and extent of each individual factor, the authority will have properly separated and distinguished the entire effects of each individual factor from the effects of imports. Thus, any additional assessment on a cumulative basis of these factors will not provide any additional separation or distinction of the effects of these factors from those of imports. Additionally, since each factor impacts the industry in a different manner and extent, it will generally not be practicable – or even useful – to examine their effects on the industry on a collective or cumulative basis. The Panel's analysis of this issue failed to consider any of these analytical problems.

27. In sum, a cumulative analysis of injury factors is clearly not required under the Agreement if an authority has properly analyzed them no an individual basis, and the Panel's finding to the contrary should be reversed by the Appellate Body.

28. Next, I would like to briefly address the Panel's *de novo* findings concerning the existence of a "coincidence in trends" between CCFRS imports and the declines in the CCFRS

---

[14] *US – Wheat Gluten*, AB Report, paras. 68, 71, & 72; *US – Lamb Meat*, AB Report, para. 180.

[15] *EC – Cast Iron Fittings*, paras. 190-192.

[16] *US – Line Pipe*, AB Report, paras. 213 & 215.

industry's condition. This issue is as clear as any in this proceeding. In its analysis, the Panel did not examine whether the ITC's "coincidence" analysis was "reasoned and adequate" or whether the ITC adequately explained how the facts supported its analysis, as the Appellate Body has stated it should. Instead, the Panel examined the record evidence on its own and supplied its own conclusions as to the existence of a "coincidence of trends" between imports and declines in the industry's condition. That is simply not the correct approach for a panel to take when analyzing a competent authority's causal link analysis, and the Appellate Body has made clear that this is so.

29. Complainants are now trying, however, to rehabilitate the Panel's *de novo* analysis. Several claim that the Panel's analysis was not really *de novo* because the Panel relied on the ITC's own data to perform the analysis. Others argue that the Panel's analysis represents simply one "plausible" alternative explanation of the record data, and that this is consistent with the Appellate Body's discussion of the appropriate standard of review in *US – Lamb Meat*. These arguments miss the mark completely. The Appellate Body has clearly stated that a Panel is obliged by Article 4.2 of the Safeguards Agreement and by Article 11 of the DSU to examine "whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination."[17] The Appellate Body has also stated that "a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel."[18]

30. In the case of CCFRS, aside from the ITC's analysis of one minor factor (inventories), the Panel entirely failed to address "in detail" any aspect of the ITC's CCFRS "coincidence" analysis. The Panel did not address the ITC's findings that there was a clear coincidence of trends between the initial surge of low-priced CCFRS imports in 1998 and the declines in the industry's pricing, profitability, and market share levels that occurred in that year.[19] The Panel also did not address the ITC's findings that, although CCFRS import volumes in 1999 and 2000 slackened somewhat from their 1998 level, these volumes were higher than the levels seen in 1996 and 1997 and that these import volumes continued to be sold at low prices that caused continued depression and suppression of domestic pricing levels and declines in industry profits.[20]

31. The Panel's own "coincidence" analysis may – or may not – be one "plausible" explanation of the record evidence. That does not change the fact that the United States is entitled under the Agreement to have the Panel assess whether the *ITC*'s findings on this issue

---

[17] *Argentina – Footwear*, AB Report, para. 121.

[18] *US – Lamb Meat*, para. 106.

[19] ITC Report, p. 59-60.

[20] ITC Report, pp. 60-61.

were reasoned and adequate, and whether the *ITC* explained how the record evidence supports its determination, and whether the *ITC*'s explanation fully addressed the nature and complexities of the record evidence and responded to other plausible explanations of that data.[21]

32. In sum, the Panel performed a *de novo* review of the evidence and clearly substituted its own conclusions for those of the ITC on this issue. Such an analysis is not consistent with the panel's review obligations and may not be affirmed by the Appellate Body.

33. Next, I would like to address the Panel's findings with respect to the ITC's analysis of the nature and extent of the "other" factors causing injury. As we noted in our submission the Panel's finding that the ITC failed to provide a "reasoned and adequate" analysis of these "other" factors were premised on incorrect or incomplete understandings of the ITC's findings.

34. Rather than discussing each one of our arguments in detail, I would like to discuss, one example of the characteristic flaws in the Panel's analysis: its findings concerning the effect of minimill competition on the CCFRS industry. By doing so, I will explain how the Panel's analysis of the issue was incomplete and why the Panel's omission led it to conclude, incorrectly, that the ITC had not provided a reasoned and adequate explanation of the manner in which minimills affected the industry.

35. When discussing this issue, the Panel made only one specific criticism of the ITC's analysis of this issue. The Panel found that the ITC's analysis was not adequate because the ITC "appeared to dismiss this factor in its non-attribution analysis merely on the basis that 'the cost advantage enjoyed by minimills existed throughout the period of investigation.'"[22] The problem with this finding is that it reflects an extremely limited understanding of the ITC's entire analysis.

36. More specifically, in its analysis of this issue, the Panel failed to acknowledge that the ITC considered a number of other factors when assessing the nature of the injury caused by this competition. While the ITC did in fact note that "[m]inimills did typically enjoy cost advantages over integrated producers, based in part on differing product mixes, and raw materials costs," the ITC also found that:

- These "cost advantages existed throughout the period of investigation and integrated producers as well as minimills enjoyed declining costs throughout the period."

- The "addition of a greater volume of lower cost [minimill] capacity would be expected to have an effect on prices," and the ITC found "that it did."

---

[21] *See US – Lamb Meat*, para. 106.

[22] Panel Report, para. 10.400.

- A review of the quarterly pricing data, however, showed that "imports rather than minimills, typically led prices downward" and that imports undersold both integrated and minimill producers on sales of hot-rolled steel – the "primary commercial product for minimills" – during the period. This "result[ed] in lowered sales for domestically produced hot-rolled steel and subsequent price cuts by both the integrated producers and minimills."

- And finally, the ITC concluded, "while in general, minimills may have been in a somewhat better position to withstand low-priced competition than other domestic producers, "minimills were not primarily responsible for the declines in domestic prices" during the period.[23]

In other words, the ITC clearly and unambiguously rejected the argument that minimills were the "primary" cause of the pricing declines in the carbon flat-rolled steel market in 1998, 1999, and 2000.

37. Moreover, it is important to note, the ITC did not just pick these findings out of the air. The ITC prepared detailed price comparisons charts that separated out the pricing patterns of minimills, imports, and integrated producers from one another. The ITC also prepared charts separating the financial results and production and shipments data of minimills from those of integrated producers.[24] The data in these charts allowed the ITC to distinguish the specific price effects of imports from those of minimills in the market. The charts also allowed the ITC to distinguish the effects that price competition from minimills and imports each had on the operations of minimills and integrated producers. The ITC's analysis of these charts, as set forth in its report, was fully consistent with this data and more than adequately explained the grounds for its conclusion that it was imports, not minimills, that led prices down from 1998 to 2000. By examining this evidence separating and distinguishing the effects of minimills from imports, and discussing it in detail in its report, the ITC properly satisfied its non-attribution obligation under Article 4.2(b).

38. In sum, the ITC did not reject minimills as a signicant cause of injury "merely" because their cost advantages existed throughout the period, as the Panel indicated. Instead, the ITC performed a comprehensive and detailed review of the record evidence on this issue and provided a detailed analysis of the issue in its report. In that analysis, the ITC separated and distinguished the effects of minimill competition from those of imports, provided a reasoned and detailed description of the manner in which it analyzed that data and explained, in a clear and unambiguous manner, that data showed the imports, not minimills, were responsible for the price declines between 1998 and 2000. Moreover, the ITC performed similar analyses separating and distinguishing the effects of non-import and import factors in every one of its causation analyses.

---

[23] ITC Report, p. 65.

[24] In this respect, *see* ITC Report, p. 65, nn. 301, 302, 303 (citing to these charts).

Nothing more is required of the ITC under Articles 3.1 and Article 4.2(b) of the Agreement, and the Panel's findings to the contrary should not be affirmed by the Appellate Body.

39. Finally, a number of Complainants argue that the United States has not challenged the Panel's legal findings on causation but is simply asking the Appellate Body to revisit the Panel's factual findings. The Complainants are wrong. There is little or no disagreement between the United States and the Panel with respect to the establishment of the facts underlying the ITC's and the Panel's causation findings. In fact, as the Panel noted in paragraph 10.359 of its report, the Panel expressly stated that it was relying on the data developed by the ITC to perform its causation analysis.

40. Instead, the United States is challenging the legal analysis performed by the Panel with respect to its finding that the ITC failed to provide "reasoned and adequate" explanations for certain of its causation findings. In this regard, the Appellate Body has consistently considered a panel's findings on the "reasoned and adequate" nature of an authority's causation analysis to be legal interpretations subject to appeal under the DSU.[25] Given this, the United States has properly appealed the Panel's causation analysis and conclusions to the Appellate Body.

Parallelism

41. We now turn to the question of parallelism. We have explained in our written submissions that the Panel reached its conclusion that the ITC's analysis of parallelism violated Articles 2.1 and 4.2 by imposing obligations on the United States not articulated in the Agreement.

42. For purposes of our oral statement, we will focus on the instance in which the Panel most egregiously took an action which had the effect of creating a new obligation. The Panel stated that, to satisfy parallelism requirements an authority had an obligation – and here we quote from paragraph 10.598 of the Panel Report – "to account for the fact that excluded imports may have had some injurious impact on the domestic industry." In our Appellant's submission, we called this "requirement" the "excluded sources accounting requirement." This terminology, as you can see, is based directly on the Panel Report. The Panel repeatedly referenced the ITC's failure to satisfy this "requirement" in rejecting its parallelism analysis.

43. The origin of the "excluded sources accounting requirement" was a mystery when the Panel issued its report and remains so today. The Panel, in articulating this "requirement," referenced no Agreement language. It cited nothing whatsoever.

44. The Complainants contend that the Panel was merely elaborating on pre-existing requirements. Because the Panel never identified the source of these requirements, the

---

[25] *Argentina – Footwear,* AB Report, para. 145; *US – Line Pipe,* AB Report, para. 218.

Complainants step forward to do so. But they do not march in unison. Instead, the Complainants cannot seem to agree among themselves as to the basis of the excluded sources accounting requirement articulated by the Panel. Some rely on Article 2.1 of the Agreement. Others reply principally on Article 4.2. Some state that the Panel was merely elaborating on requirements the Appellate Body identified in its reports in *Wheat Gluten* and *Line Pipe*. All the Complainants, however, are wrong.

45. Article 2.1 of the Agreement cannot serve as the basis for the "excluded sources accounting requirement." To the extent that it establishes any parallelism requirement at all, Article 2.1 merely states the nature of the analytical steps an authority must undertake with respect to imports covered by a safeguards measure. It cannot be read to impose the "requirement" articulated by the Panel – that an authority perform additional analytical steps for imports not covered by the measure.

46. Those Complainants that state that Article 4.2 can serve as the basis for the "excluded sources accounting requirement" overlook that the Panel itself never purported to rely on Article 4.2. Moreover, Article 4.2 requires only that an authority not attribute to imports injury caused by sources other than imports. The text does not elaborate upon the nature of the non-attribution analysis, much less require use of a particular analytical technique. Moreover, the text does not distinguish among sources of imports. Indeed, one of the Complainants that cites Article 4.2 as a basis of the "excluded sources accounting requirement" can do so only by inserting words into that provision which appear nowhere in its text.[26]

47. Finally, the Panel could not have relied on either *Wheat Gluten* or *Line Pipe* to establish the "excluded sources accounting requirement." In neither case did the Appellate Body set forth specific steps an authority must undertake in conducting a parallelism analysis. Moreover, the Appellate Body does not impose on an authority obligations that do not arise from the text of the Agreement.

48. Consequently, there is a very simple reason that the Panel did not cite a source for the "excluded sources accounting requirement" and that the Complainants cite diverging sources for the "requirement." This is that the "requirement" simply does not exist in the Agreement. It was a device created by the Panel.

49. The Panel had no authority to create such a "requirement." Article 3.2 of the DSU makes clear that the dispute settlement process cannot add to or diminish the rights and obligations provided by the WTO agreements. Consequently, this legal interpretation of the Panel – as well as the other incorrect interpretations we have identified in our submissions – must be reversed.

---

[26] *See* EC Appellee Submission, para. 335.

Commissioners' use of "different" reasoning

50. We turn now to the question of whether the affirmative determinations for tin mill and stainless steel wire need to be based on identical like product definitions. The crux of our argument is that each of the ITC Commissioners making an affirmative determination satisfied each of the elements for imposing a safeguard measure – including increased imports, causation and parallelism – and that this is all that is required by the Safeguards Agreement.

51. The Panel's finding on this issue rests on the assumption that the increased imports determinations of different Commissioners were somehow "inconsistent" with each other. The Panel used the terms "divergent," "impossible to reconcile," and "inconsistent."[27] Now, it is true that the import data associated with different like product definitions will not be the same. But why does this raise a legally significant inconsistency? Why is it necessary to compare the data used by one Commissioner with that used by another? The answer is that it is not necessary.

52. There are many other ways in which the determinations of individual Commissioners might differ from each other. For example, in evaluating whether serious injury exists, one Commissioner might identify certain Article 4.2(a) factors (for example, capacity utilization and employment) as being particularly significant to his or her determination, while another Commissioner might focus on other 4.2(a) factors (for example, sales and production). Does this make the two Commissioners views "divergent," "impossible to reconcile," and "inconsistent" – such that the ITC's overall determination is inconsistent with the Agreement? Of course not.

53. In the same way, the "inconsistency" identified by the Panel in this case is not legally meaningful. As long as each Commissioner voting in the affirmative satisfies each of the elements for imposing a safeguard measure, the requirements of the Agreement are satisfied.

Conclusion

54. In summary, Mr. Chairman, for the reasons we have just stated as well as those in our written submissions, the Appellate Body should reverse the findings of the Panel referenced in paragraph 397 of the U.S. appellant submission.

[27] Panel Report, para. 10.194.