BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2001-9)

APPELLEE SUBMISSION OF THE UNITED STATES

7 December 2001

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I. INTRODUCTION

1. Pursuant to Rule 22(1) of the Working Procedures for Appellate Review, the United States hereby responds to the submission filed 26 November 2001 by Korea pursuant to Rule 23 of the Working Procedures for Appellate Review challenging certain findings of the Panel in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*. The United States will not repeat here the arguments concerning the United States' own appeal.

II. EXECUTIVE SUMMARY

2. The Panel found that the United States met the requirements to assert Article XXIV of GATT 1994[1] as a defense against claimed inconsistencies with Articles I, XIII, and XIX and Article 2.2. This was the proper conclusion. The United States established that the North American Free Trade Agreement ("NAFTA") met all of the requirements for formation of a free trade area under Article XXIV. It also shows that the requirement to exclude imports from NAFTA partners from safeguard measures under certain circumstances was one of the measures to eliminate duties and other restrictive regulations of commerce on substantially all trade necessary to form the free trade area.

3. Korea provides no basis to reverse the Panel's conclusions that the NAFTA met the conditions for establishing a free trade area. Its only argument with regard to the Article XXIV:8(b) requirements is that the Panel was required to consider the preliminary analysis and conclusions in a draft report of the Committee on Regional Trade Agreements. However, the Panel correctly placed no weight on a draft document, which was still subject to change. Korea argues that the NAFTA safeguard exclusion is inconsistent with the Article XXIV:5(b) requirement not to increase restrictive regulations on trade with Members not party to a free trade agreement. However, the NAFTA did not change the applicability of its parties' safeguards laws to imports from non-parties. Korea asserts that the Panel misapplied the Appellate Body's reasoning in *Turkey – Textiles* by not evaluating whether the NAFTA safeguards exclusion by itself was "necessary" to formation of the free trade area. However, Article XXIV dictates that trade liberalizing measures be considered in aggregate in evaluating whether failure to adopt them would prevent formation of a free trade area.

4. Korea challenges the Panel's finding that, in light of the relationship between Articles XIX and the Safeguards Agreement, the Article XXIV defense applied also to Article 2.2. It found confirmation for this conclusion in the text of footnote 1 of the Safeguards Agreement, which provides that nothing in the Agreement shall interfere with the relationship between

[1] Unless otherwise indicated, all references to articles with Roman numerals are to the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and all references to articles with Arabic numerals are to the WTO *Agreement on Safeguards* ("Safeguards Agreement" or "SA").

Articles XIX and XXIV:8. Korea argued that the Appellate Body found in *Argentina – Footwear* that footnote 1 applied only to customs unions. However, the text of the last sentence of the footnote, which the Appellate Body did not address, explicitly applies both to the Agreement as a whole and to free trade areas.

5. Korea challenges the Panel's finding that Korea failed to establish a *prima facie* case of inconsistency with the so-called "parallelism" between Articles 2.1 and 2.2. The Panel correctly found that Korea did not demonstrate that the ITC failed to perform an injury analysis specific to imports from non-NAFTA sources. Despite the undisputed existence of an exhaustive discussion of the relevant data on imports from sources other than Canada and Mexico in footnote 168 of the ITC Report, Korea rests on its bare assertion that the ITC non-NAFTA analysis has "no legal significance." The Panel rejected this assertion, finding that footnote 168 clearly formed part of the ITC's published determination, and contained findings by the ITC.

6. Korea attempts in its appeal to "elaborate" its presentation to the Panel with entirely new arguments. Even if the Appellate Body considers these arguments, they are unconvincing. Korea incorrectly characterizes the ITC's analysis of imports from sources other than Canada and Mexico as merely a "conditional statement." The Panel's finding that the content of the footnote formed the basis for a finding that non-NAFTA imports caused serious injury to the domestic industry contradicts this view. The introductory statement to the footnote merely explained that, in conjunction with the analysis of all imports, the ITC conducted an analysis of imports from non-NAFTA sources, and that both analyses led to an affirmative injury determination. Thus, the Panel correctly found that the ITC conducted a separate analysis of imports from non-NAFTA sources, and that Korea failed to demonstrate otherwise.

7. Korea challenges the Panel's finding that Article 5.1, first sentence, does not require a Member to issue an explanation of its compliance with that provision at the time that it takes a safeguard measure. The text of Article 5.1 confirms this view in explicitly requiring a "justification" of certain types of quantitative restriction in the second sentence, while omitting such a requirement from the first sentence, which is generally applicable to all safeguard measures. The Appellate Body endorsed this interpretation in *Korea – Dairy*.

8. Korea criticizes the Panel's interpretation of Article 5.1 as "loose" and suggests that a more "rigorous" approach is necessary. However, it cites no authority for the view that the Safeguards Agreement may be interpreted by anything other than customary rules of treaty interpretation, which the Panel applied. Korea also argues that Members bear an obligation to "ensure" compliance with Article 5.1, which in its view, creates an obligation to issue an explanation of that compliance at the time of taking a safeguard action. However, ensuring conformity with obligations is part of the basic good faith with which Members undertake all WTO commitments. It has never been found to create a separate obligation to issue a public explanation, at the time of taking a measure, of how that measure conforms with WTO obligations. This interpretation does not prejudice Members whose exports are subject to a safeguard measure. Their position is no different from that of any Member concerned about

another Member's conformity with its WTO obligation. Indeed, they are in a better position, because compliance with Article 5.1 is determined with reference to the public findings of the competent authorities.

9. Also under Article 5.1, Korea challenges the Panel's finding that Korea failed to demonstrate that the United States applied the line pipe safeguard beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Korea's arguments are unconvincing. It first contends that the United States was required to indicate whether it based the measure on either serious injury or threat of serious injury because the Panel found that such a distinction was necessary in the determination of the competent authorities. As the United States showed in its Appellant Submission, the Panel erred in this finding. In any event, no such distinction is necessary to comply with Article 5.1, which puts a limit on the extent of application of a safeguard measure. If the limit implicated by a finding of serious injury is different from the limit implicated by a finding of threat, one measure that was less in extent than both limits could comply with both, thus removing any need to specify the basis for the measure.

10. Korea also argues that the United States failed to apply its measure only to that portion of the serious injury caused by imports. The Appellate Body's reasoning in past disputes establishes that the term "serious injury" refers to injury caused by both increased imports and other factors. In any event, the United States has shown that the line pipe safeguard did not address injury caused by factors other than imports. Korea argues that the Panel should have analyzed whether the U.S. explanation of its compliance with Article 5.1, provided in submissions to the Panel, was sufficient for purposes of Article 5.1. However, the Panel bore no such obligation, since Korea failed to present a *prima facie* case on its Article 5 claim. In any event, Korea has failed to identify any deficiency in the U.S. explanation. Finally, Korea contends that the Panel erred in rejecting import statistics for the period after application of the safeguard measure as evidence of the effect of the measure. As the Panel pointed out, in the absence of information on other factors that could be affecting imports, it could not assume that the safeguard measure was responsible in part or in full for observed import patterns.

III. ARGUMENT

A. The Appellate Body Should Uphold the Panel's Finding That the United States Met the Requirements to Assert Article XXIV as a Defense Against Claimed Inconsistencies With Articles I, XIII, and XIX and Article 2.2.

11. As part of the creation of a free trade area pursuant to the NAFTA, the United States, Canada, and Mexico agreed to eliminate the application of safeguard measures to each other in certain specified conditions. In accordance with this obligation, the United States excluded its NAFTA partners from the line pipe safeguard measure. Korea argued that the exclusion was inconsistent with Articles I, XIII, and XIX and Article 2.2. In response, the United States demonstrated that the NAFTA established a free trade area within the meaning of Article XXIV, that the safeguard exclusion was part of the package of the elimination of duties and other

restrictive regulations of commerce necessary for formation of the free trade area, and that Article XXIV also meant that there was no breach of Article 2.2. Korea presented no pertinent evidence to the contrary. The Panel accordingly found that the United States presented a *prima facie* case for asserting Article XXIV, that Korea failed to rebut that case, and accordingly, that Article XXIV provided a defense against the claimed breaches of the GATT 1994 and the Safeguards Agreement.

12. Korea argues now that the Panel analyzed Article XXIV in a perfunctory and flawed manner. It also contends that the Panel misapplied the *Turkey – Textiles* "necessity" test, which Korea interprets as limiting the Article XXIV defense to those trade liberalization measures that, by themselves, were indispensable to the creation of a free trade area or customs union. Korea's arguments do not withstand scrutiny.

13. The United States established before the Panel that NAFTA complied with both Article XXIV:8(b) and XXIV:5(b) by eliminating duties and other restrictive regulations of commerce on substantially all trade among the parties, while not increasing such restrictions on WTO Members not covered by the FTA.

14. Korea misconstrues *Turkey – Textiles*. That dispute concerned a measure – Turkey's introduction of textile quotas under its customs union with the EC – that increased trade restrictions on third parties, but did not advance the regional trade liberalization objective of Article XXIV. In contrast, the NAFTA left U.S. safeguards law unchanged as to other WTO Members, while liberalizing trade with NAFTA partners by eliminating safeguard measures in specific circumstances. Moreover, creating a free trade area requires a multitude of trade liberalizing measures, none of which can be characterized as "necessary" by itself. To allow an Article XXIV defense only for "necessary" measures would, therefore, make it universally inapplicable, a result inconsistent with the principle of effectiveness in treaty interpretation.

1. The United States established that the NAFTA safeguard exclusion was introduced as one of the trade liberalizing measures necessary to form a free trade area consistent with Article XXIV.

15. Korea and the United States agree that Article XXIV provides a defense for measures that are introduced to create a free trade area and might otherwise be inconsistent with GATT 1994 obligations. The United States demonstrated, and Korea never disputed, that the NAFTA safeguard exclusion was part of the package of trade liberalizing measures under the NAFTA.[2] The United States pointed out that the NAFTA provided for the elimination within ten years of all duties on 97 percent of the NAFTA Parties' tariff lines, representing more than 99 percent of the trade among them in terms of volume. These facts demonstrated that NAFTA exceeded the

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[2] First Written Submission of the United States, para. 218 (23 March 2001) ("U.S. First Written Submission").

Article XXIV:8 requirement to eliminate duties on substantially all trade among the parties. The United States observed further that the national treatment, transparency, and other market access rules (including the safeguard exclusion) eliminated other restrictive regulations of commerce. Finally, it pointed out that there is no question of NAFTA raising barriers to third countries, since none of the NAFTA parties increased tariffs or other restrictive regulations of commerce on trade with non-NAFTA parties.[3]

16. As further evidence, the United States incorporated by reference documentation that the NAFTA parties provided to the WTO Committee on Regional Trade Agreements ("CRTA"), addressing hundreds of questions posed by WTO Members. These materials demonstrate that NAFTA fully satisfies the requirements of Article XXIV. The Panel recognized that the U.S. presentation established a *prima facie* case, which Korea failed to rebut, that NAFTA complied with Article XXIV. Korea's appeal provides no basis to reverse these findings.

2. Korea provides no basis to reverse the Panel's conclusion that NAFTA eliminated duties and other restrictive regulations of commerce in accordance with Article XXIV:8(b).

17. Against the voluminous evidence submitted by the United States showing that NAFTA satisfied Article XXIV:8(b), Korea's sole rebuttal consists of reference to "the preliminary analysis" of the CRTA.[4] The Panel recognized that the analysis, in the form of a draft report, provides evidence of only one fact – that the CRTA has not issued a decision on NAFTA. The Panel found that the absence of a decision means only that the Committee has not decided, and does not suggest that NAFTA is inconsistent with Article XXIV. Korea does not challenge this finding by the Panel.

18. Instead, Korea criticizes the Panel's "perfunctory" analysis of the substance of the draft report. It views the "deliberations" and "preliminary conclusions" of the CRTA reflected in the report as relevant to the Panel's analysis.[5] The flaw in this approach is obvious. Preliminary conclusions are, by definition, subject to modification or even reversal. Thus, the Panel acted appropriately in giving them no weight.

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[3] United States Response to Questions from the Panel at the Second Meeting with the Parties, paras. 25-27 (15 June 2001) ("U.S. Second Responses").

[4] The Republic of Korea's Responses to Questions to the Parties from the Panel and the Republic of Korea's Initial Comments on Responses to the United States during the Second Substantive Meeting of the Parties, para. 12 (15 June 2001) ("Korea 2nd Responses").

[5] Other Appellant's Submission of Korea Pursuant to Rule 23 of the Working Procedures for Appellate Review, para. 20 (26 November 2001) ("Korea's Appellant Submission").

19. Korea argues that the Panel's dismissal of the draft CRTA report deviates from the "dual track" analysis employed by the GATT 1947 panel in *Korea – Beef*, and endorsed in the Appellate Body's *India – BOP Measures* report. It is a dual analysis in that the *Beef* panel referred to both a Balance-of-Payments ("BOP") Committee report and other sources of information, such as available economic data, to determine whether BOP measures were justified.[6] The facts differed from this dispute in one crucial way – the BOP Committee had finalized the report and the CONTRACTING PARTIES had adopted it at the time of the *Korea – Beef* panel's deliberations.[7] Thus, these reportss do not support Korea's view that a panel must give weight to draft report or preliminary conclusions of a WTO committee

20. Therefore, the Appellate Body should affirm the Panel's conclusion that the United States established a *prima facie* case that the NAFTA satisfied the Article XXIV:8(b) requirements for formation of the free trade area, and that Korea did not successfully rebut that case.

3. Korea provides no basis to reverse the Panel's conclusion that NAFTA satisfies the requirements of Article XXIV:5(b).

21. As the United States showed in the materials submitted to the CRTA, in implementing the NAFTA, the parties did not increase duties or other restrictive regulations of commerce with other WTO Members. As the Panel recognized, these facts establish a *prima facie* case of conformity with the Article XXIV:5(b) requirement that

> the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the . . . adoption of such interim agreement to the trade of contracting parties . . . not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to . . . the interim agreement.

The Panel found further that Korea did not argue that the NAFTA was inconsistent with this provision and, accordingly, found in favor of the United States.[8]

22. Korea now contends that it did make such arguments. It points to its second oral statement, which noted that the United States must meet the requirements of Article XXIV:5(b)

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[6] *Republic of Korea – Restrictions on Imports of Beef*, Complaint by the United States, L/6503, BISD 36S, p. 268, adopted 7 November 1989, paras. 121-123; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WWT/DS90/AB/R, para. 100 (23 August 1999).

[7] *Korea – Beef*, para. 121.

[8] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, para. 7.145 (19 October 2001) ("Panel Report").

and asserts, without support, that the NAFTA safeguards exclusion "results in more restrictive regulations of commerce for non-members."[9] Korea now identifies as support for this assertion three paragraphs in the first written submission, which allege without reference to Article XXIV:5(b) that Korea suffered discriminatory treatment under the line pipe safeguard.[10] The United States questions whether this disjointed set of assertions, with no obvious relationship, constitutes an "argument" on Article XXIV:5(b) that the Panel needed to address. However, should the Appellate Body conclude otherwise, completion of the analysis will demonstrate the validity of the Panel's conclusion.

23. Korea first contends that the United States could not have satisfied Article XXIV:5(b) because it believed that provision to be inapplicable. This is plainly untrue. In response to the Panel's question on whether NAFTA complied with Article XXIV, the United States stated that the NAFTA parties did not increase duties or other regulations of commerce on third parties in creating the free trade area.[11] This statement shows that the United States considered Article XXIV:5(b) to be applicable. In addition, the documents submitted to the CRTA, which the United States incorporated by reference, contain numerous references to that provision.[12]

24. Korea also argues that the United States failed to apply the *Turkey – Textiles* "economic test" to demonstrate that the trade measures and policies of NAFTA were not "more trade restrictive, overall, than were the constituent countries' previous trade policies."[13] However, that test is not applicable to a free trade agreement. The panel in the dispute described the "economic test" as "an overall assessment of the potential trade impact of any such *customs union*."[14] It derived the standard from ArticleXXIV:5(a) and paragraph 2 of the GATT 1994 Understanding on Article XXIV,[15] which deal exclusively with customs unions. Together, they specify the

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[9] Korea's Appellant Submission, para. 26, *citing* Korea's Second Oral Statement, paras. 34-35.

[10] Korea's Appellant Submission, paras. 27-28, *citing* Korea's First Written Submission, paras. 176-178.

[11] U.S. Second Responses, para. 26.

[12] *E.g.*, WT/REG4/1, answers to questions 39, 70, 121, and 124; WT/REG4/Add.1, answers to questions 5, 38-41, 43, 88, and 128.

[13] Korea's Appellant Submission, para. 23.

[14] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, para. 9.120 (31 May 1999) (emphasis added).

[15] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, paras. 9.117-9.120 (31 May 1999) ("*Turkey – Textiles (P)*"); *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 55 (22 October 1999) ("*Turkey – Textiles (AB)*") ("we also agree that this is: an 'economic' test for assessing whether a specific *customs*

analysis to determine compliance with the Article XXIV:5(a) requirement that the duties and other regulations of commerce imposed on formation of a customs union

> shall not *on the whole* be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union . . ..

Article XXIV:5(b), the comparable provision setting out the criteria for formation of a free trade area, contains no such requirement. Thus, there is no legal basis for applying the *Turkey – Textiles* "economic test" to a free trade area.

25. An evaluation of external trade restrictions "on the whole" is necessary for a customs union because Article XXIV:8(a)(ii) permits its members to harmonize their external duties by increasing some and decreasing others. Without an overall assessment, an imbalance in reductions and increases could result in an increase in the overall burden on third parties. A free trade area presents no such concern because Article XXIV:5(b) does not permit the parties to increase duties and other regulations of commerce on third parties, making the "economic test" unnecessary.

26. Korea notes that its share of total imports decreased after imposition of the line pipe safeguard, while the share held by NAFTA parties increased. Korea believes that this contrast proves that the formation of the free trade area introduced more restrictive regulations of commerce on third parties, contrary to Article XXIV:5(b). However, that provision does not call for a comparison between the experience of FTA parties and non-parties. Rather, it requires a comparison of duties and other regulations "applicable at the adoption of such interim agreement" with "the corresponding duties and other regulations" before adoption.

27. In addition, Korea's view would render Article XXIV meaningless. If differential treatment of FTA parties and non-parties through the elimination of duties or other restrictive regulations of commerce under Article XXIV:8(b) constituted a barrier to third parties, Article XXIV:5(b) would prohibit the application of that treatment. In that case, Members could never implement any of the trade liberalization measures necessary to create a free trade area, thus nullifying Article XXIV.

28. Thus, the proper analysis would compare treatment of non-parties upon formation of the free trade area with prior treatment before formation. Korea did not attempt such a comparison. If it had, it would have found that in implementing the NAFTA, the parties did not change the application of their safeguards laws to non-parties. Korea and other non-parties to NAFTA are no more liable now to safeguard measures than they were before the introduction of the NAFTA safeguard exclusion. The exclusion does not increase the likelihood of an affirmative

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union is compatible with Article XXIV.") (emphasis added).

determination of serious injury, either. The United States evaluates NAFTA exclusions only after applying the traditional safeguard standard that would have applied before the NAFTA took effect. Therefore, NAFTA is fully consistent with the requirements of Article XXIV:5(b).

4. The Panel correctly found that the United States satisfied the necessity requirement of the chapeau of Article XXIV:5, and Korea has presented no basis to reverse that conclusion.

29. The United States showed that the NAFTA safeguard exclusion was part of the package of trade liberalizing measures introduced in accordance with Article XXIV:8(b) and, therefore, was necessary to formation of the free trade area consistent with Article XXIV. This conclusion reflects that implementation of a free trade agreement requires a multitude of measures to meet the Article XXIV:8(b) requirement to eliminate duties and other restrictive regulations of commerce on substantially all trade among the parties. The Panel correctly found that each of those measures is "necessary" to the formation of the free trade area and, accordingly, subject to the Article XXIV defense against claimed inconsistencies with other provisions of the WTO Agreement.

30. Korea begins its "necessity test" discussion by observing that the Appellate Body in *Turkey – Textiles* quoted the preamble of the *Understanding on Article XXIV* to the effect that Members creating a regional trade area "should 'to the greatest possible extent avoid creating adverse effects on the trade of other Members.'" It views this purpose as informing the other obligations of Article XXIV, requiring a balance between the goal of integration among FTA parties and the need to protect the interests of non-parties. Korea argues that the Panel ignored this balance in finding that all of the liberalizing measures in a free trade agreement are "necessary" to the elimination of duties and other regulations of commerce on substantially all trade required by Article XXIV:8.

31. The text of Article XXIV does not support the view that the potential effect on non-parties must guide the analysis under Article XXIV:8. In *Turkey – Textiles*, the Appellate Body concluded that Article XXIV:4, as reaffirmed in the preamble of the *Understanding on Article XXIV*, "does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language *in the specific obligations* that are found elsewhere in Article XXIV." [16] In this scheme, Article XXIV:8 (a) and (b) contain the operative language to realize the Article XXIV:4 purpose "to facilitate trade among the constituent territories" of FTAs and customs unions. Article XXIV:5(a) and (b) contain the operative language to realize the purpose "not to raise barriers to the trade of other contracting parties with such territories." Thus, the analysis of NAFTA's compliance with Article XXIV:5(b) took account of the interests of non-parties to the NAFTA. There was no need to factor those same considerations into the Article XXIV:8(b) analysis.

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[16] *Turkey – Textiles (AB)*, para. 57 (emphasis added).

32. In Korea's opinion, the Article XXIV:4 objective of not raising barriers to non-parties applies equally to Article XXIV:8(b) because

> "The elimination of duties and other restrictive regulations of commerce among constituent members" is no different from "imposing restrictions against imports from a third country" in the sense that the former, as well as the latter, can have adverse effects on the trade from other Members.[17]

But there is an important difference. Elimination of trade restrictions among parties to an FTA leaves non-Parties in an unchanged position, while imposition of new restrictions worsens their position. Article XXIV:4 recognizes this distinction, stating that

> the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to *raise* barriers to the trade of other contracting parties with such territories.[18]

Thus, maintenance of existing barriers to non-parties, even while the parties to a regional trade agreement gain an advantage in trade with each other through the reduction in internal barriers, does not implicate the concerns of Article XXIV:4.

33. After asserting protection of non-parties to an FTA as an objective of Article XXIV:8(b), Korea argues that the Panel failed to apply the "necessity test" described in the Appellate Body's *Turkey – Textiles* report, which it believes is applicable to "*any* measure taken by *any* free trade area."[19] Korea contends that the United States never met this standard. In addition, Korea views two illustrative scenarios in a U.S. written submission as indicating that no circumstances exist under which the exclusion could be conceived of as "necessary" to formation of the free trade area.[20] Korea asserts that this characterization of the U.S. position precludes the United States from arguing that the NAFTA safeguard exclusion satisfies the *Turkey – Textiles* interpretation of Article XXIV. These arguments do not withstand scrutiny.

34. What Korea calls the "necessity test" is the Appellate Body's finding in *Turkey – Textiles* that a party asserting Article XXIV as a defense "must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."[21] Korea argues that this test applies separately to each measure implementing a free trade area.

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[17] Korea's Appellant Submission, para. 43.

[18] Emphasis added.

[19] Korea's Appellant Submission, para. 43 (emphasis original).

[20] Korea's Appellant Submission, paras. 32-35.

[21] *Turkey – Textiles (AB)*, para. 58.

Under this approach, a measure would satisfy the test only if all other liberalizing measures in the agreement together do not rise to the Article XXIV:8(b) threshold of eliminating duties and other restrictive regulations of commerce on substantially all trade, and the measure in question puts the agreement over the threshold.[22]

35. This view results in an absurdity. Suppose the parties to an FTA needed to implement 90 out of 100 possible trade liberalizing measures to reach the Article XXIV:8(b) threshold. In that case, none of the 90 measures is "necessary" under Korea's test because each could be replaced by one or more of the remaining 10 measures. If this is the case, an FTA or customs union consistent with Article XXIV would *never* provide a defense, thus nullifying Article XXIV.

36. The ordinary meaning of Article XXIV:8(b) militates against a separate consideration of the necessity of each trade liberalizing measure. The text contains a verb (eliminate), a direct object (duties and other restrictive regulations), and a prepositional phrase (on substantially all trade) modifying the direct object. The direct object is both plural and conjunctive, indicating that the obligation (to eliminate) applies to the direct object, namely the duties and restrictive regulations of commerce on substantially all trade, *in the aggregate*. Thus, compliance with Article XXIV:8(b) is determined with reference to the entire package of duties and restrictive regulations of commerce that are eliminated.

37. Furthermore, nothing in *Turkey – Textiles* requires an analysis of whether each trade liberalizing measure introduced in forming a free trade area or customs union is by itself necessary to reach the Article XXIV:8 threshold. That dispute concerned Turkey's adoption of EC textile quotas as part of the harmonization of trade policies in its customs union with the EC. Turkey claimed that the quotas were necessary to meet the goals of Article XXIV:8(a)(i) because, without them, the EC would not eliminate its duties on Turkish textiles, which accounted for 40 percent of EC-Turkey trade. The Appellate Body found that the quotas were not "necessary" because other measures would satisfy the EC's textiles concerns and thereby permit elimination of textiles duties.[23]

38. This reasoning is inapplicable in this dispute for two reasons. First, the Appellate Body directed its 'necessity test" in *Turkey – Textiles* at whether the quotas were "necessary" in the sense of making a positive contribution to trade liberalization. The quotas failed because they made no such contribution – they were not part of the package of liberalization measures. The NAFTA safeguard exclusion unquestionably meets that standard, as it reduces the application of safeguard measures among NAFTA partners. Second, the quotas not only made no contribution to the facilitation of trade among customs union members, but also raised barriers to trade with other WTO Members. This was permitted under Article XXIV:8(a)(ii) as part of the harmonization of trade policies required of members of a customs union, but would not be

[22] Korea's Appellant Submission, paras. 34-35.

[23] *Turkey – Textiles (AB)*, paras. 62-63.

permitted in the context of formation of a free trade area. This is not true of the NAFTA safeguard exclusion, which did not change the situation of WTO Members that are not parties to the NAFTA. They remained subject to safeguards laws on the same basis as before the implementation of the NAFTA.

39. Finally, the U.S. scenarios cited by Korea merely recognize that if the trade liberalization package implemented by an FTA was near but not over the Article XXIV:8(b) threshold, a Member might be required to eliminate safeguard measures, too. But elimination would be optional if the remaining measures by themselves satisfied Article XXIV:8(b). These conclusions do not in any way suggest that a measure-by-measure analysis is necessary or appropriate.

B. The Appellate Body Should Uphold the Panel's Finding That a Member May Assert Article XXIV as a Defense Against Claims Under Article 2.2.

40. The Panel concluded that, in light of the interrelationship between Article XIX and the Safeguards Agreement, the Article XXIV defense applies to claims under both Article XIX and Article 2.2 that arise from the exclusion of an FTA partner from a safeguard measure. It found support for this interpretation in footnote 1 of the Safeguards Agreement, which provides that nothing in the Safeguards Agreement shall prejudge the relationship between Articles XIX and XXIV. The Panel, in a finding that Korea did not appeal, concluded that Article XXIV provides a defense against a claim that exclusion of an FTA partner from a safeguard measure is inconsistent with Article XIX.[24] The defense applies equally to claims that such an exclusion is inconsistent with provisions of the Safeguards Agreement, including Article 2.2, since it would interfere with relationship between Articles XXIV and XIX of the GATT 1994 to find that the Safeguards Agreement now prohibited what Article XXIV would have allowed.

41. Korea argues that footnote 1 does not apply to an exclusion of an FTA partner from a WTO safeguard measure. This view finds no support in the text of the Safeguards Agreement. The last sentence of footnote 1 states that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." Under the customary rules of treaty interpretation, as reflected in Article 31 of the Vienna Convention, these words 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."

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[24] Panel Report, para. 7.163.

42. 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 restrictive regulations on trade that it must eliminate, and those that it may retain.[25] 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.

43. 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."[26]

44. 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.

45. As this analysis shows, footnote 1 indicates how Article XXIV:8 and the Safeguards Agreement may be read together to determine the application of safeguard measures in the context of a customs union or free trade area. Korea nonetheless argues that the two agreements are in conflict, and that under the General Interpretative Note to Annex 1A of the WTO Agreement and the principle of *lex specialis*, Article 2.2 supersedes Article XXIV. This view fails to consider the presumption against conflicts under international law. As the panel in *Indonesia – Autos* explained:

> in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum.[27]

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[25] Article XXIV:8(a) defines a customs union and, therefore, is not relevant to this inquiry.

[26] The New Shorter Oxford English Dictionary, pp. 2332-2333.

[27] *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, para. 14.28 (2 July 1998) (footnotes omitted).

Later panels adopted this view, and recognized the principle that "to the extent possible, any interpretation of [the] provisions that would lead to a conflict between them should be avoided."[28]

46. Korea's interpretation has the opposite effect. It focuses on an illusory conflict between GATT 1994 and the Safeguards Agreement, disregards footnote 1 language describing the relationship between the two agreements, makes no effort to harmonize the two provisions, and leaps to a conclusion that one provision must apply in derogation of the other. Thus, the Panel's interpretation, which avoids placing GATT 1994 and the Safeguards Agreement in conflict, is clearly more sound.

47. Korea asserts that if Article XXIV allows the NAFTA safeguard exclusion, it conflicts with Article 2.2, which requires application of a safeguard measure to an imported product "irrespective of its source." Under the Panel's interpretation, the last sentence of footnote 1 resolves the supposed conflict. Korea disagrees, arguing that the placement of the footnote as an appendage to the word "Member" in Article 2.1 disproves the Panel's view that the last sentence of the footnote applies to the entire Safeguards Agreement. It finds support for this view in the finding by the Appellate Body in *Argentina – Footwear* that footnote 1 addresses the word "Member," and argues that this conclusion applies to the entirety of the footnote.[29]

48. However, Korea's analysis disregards the text of the footnote. As the Appellate Body recognized in *Argentina – Footwear*, the first three sentences deal with the situation of a customs union applying safeguard measures on its own behalf or on behalf of a member state.[30] However, the fact that the last sentence opens with "[n]othing in this *Agreement*...." (emphasis added) indicates that it has a broader reach than the first three. The use of different terminology in the fourth sentence confirms this conclusion. Where each of the first three sentences address "customs unions" and "member states" specifically, the last sentence does not mention them at all. Instead, it cites to a provision – paragraph 8 of Article XXIV – covering both customs unions and FTAs. Thus, the text of footnote 1, last sentence, indicates that it applies beyond the limited purpose of clarifying the meaning of the term "Member."

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[28] *Turkey – Textiles (P)*, paras. 9.95 & 9.147; *Canada – Term of Patent Protection*, WT/DS170/R, para. 6.45 (5 May 2000) ("This interpretation has the benefit of avoiding any conflict between paragraphs 1 and 2 of Article 70, which is consistent with the concept of presumption against conflict as it exists in public international law."); *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS170/R, para. 6.66 (15 June2000) ("We recall that it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them.").

[29] Korea's Appellant Submission, para. 56.

[30] *Argentina – Footwear (AB)*, para. 106.

49. Korea also misinterprets the Appellate Body's conclusion. Its exact finding was that:

> The ordinary meaning of the *first sentence* of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State."[95]
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>
> [95]We also note that footnote 1 relates to the word "Member" in Article 2.1, which is commonly understood to mean a Member of the WTO.[31]

It reached this conclusion in response to a panel's reasoning based on the *first* and *third* sentences of footnote 1.[32] At no point in seven pages of its own analysis did the Appellate Body address the fourth (and last) sentence of the footnote, or how that sentence might affect the meaning of the entire footnote.

50. Indeed, the Appellate Body specifically noted that

> Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of GATT 1994. . . . [W]e believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the *Agreement on Safeguards*.[33]

The Appellate Body in *Argentina – Footwear* never considered the last sentence of footnote 1 and found explicitly that Article XXIV was not at issue. Thus, its finding does not provide any guidance on the interpretation of the last sentence or the relationship of Article XXIV to the Safeguards Agreement.

51. Finally, Korea notes that the relationship between Articles XXIV:8 and XIX "has been, and continues to be, hotly contested among the Members."[34] From this disagreement, it concludes that footnote 1 cannot have prevented the Safeguards Agreement from determining the outcome of the debate. Korea is correct that the Members have not reached an agreed interpretation. Footnote 1 merely specifies that the Safeguards Agreement did not resolve the question, leaving the text of GATT 1994 as the authority. Since Korea has not appealed the Panel's conclusion that Article XXIV provides a defense to an Article XIX claim against the

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[31] *Argentina – Footwear*, WT/DS121/AB/R, para. 106 (emphasis added).

[32] *Ibid.*, para. 102.

[33] *Argentina – Footwear (AB)*, para. 110.

[34] Korea's Appellant Submission, para. 61.

exclusion of FTA partners from safeguard measures, that conclusion applies equally to the Safeguards Agreement.

52. In summation, Korea's appeal of the Panel's conclusion regarding Article 2.2 is thoroughly flawed. It disregards the ordinary meaning of the footnote. It manufactures a conflict between GATT 1994 and the Safeguards Agreement and disregards the interpretation that would avoid the conflict. And, it attributes to the Appellate Body findings on the meaning of footnote 1, last sentence, and the availability of Article XXIV, that the Appellate Body never made.

C. The Appellate Body Should Uphold the Panel's Finding that Korea Failed to Establish a *Prima Facie* Case of an Inconsistency with the So-Called "Parallelism" Between Articles 2.1 and 2.2.

53. Korea failed to establish a *prima facie* case in support of its "parallelism"[35] claim because it simply ignored one of the two legal elements necessary to make such a claim – demonstrating that the ITC failed to perform an injury analysis specific to non-NAFTA imports. The Panel gave Korea an opportunity to correct the deficiency, but Korea chose instead to rely on its earlier, insufficient arguments. WTO jurisprudence grants a panel the authority to reject a claim in such a situation, and the Panel correctly exercised that authority in finding against Korea.

54. Korea on appeal now argues that it met its burden to establish a *prima facie* case with the statement that the ITC's analysis of imports from sources other than Canada and Mexico "has no legal significance." This view is obviously incorrect. WTO jurisprudence establishes that a "mere assertion" does not constitute sufficient proof to find a Member in breach of its WTO obligations.[36] Korea also argues that its "no legal significance" assertion, if inadequate by itself, obliged the Panel to make further inquiries to evaluate the alleged inconsistency with the parallelism claim. This view is also incorrect. WTO rules do not permit panels to use their powers of inquiry to construct arguments and find evidence in support of a claim (or defense) when the complaining (or responding) party has failed to state a *prima facie* case. Of course, a panel is not authorized at all to use its power of inquiry to conduct a *de novo* review of the competent authorities' determination.

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[35] Korea characterizes the Appellate Body's conclusion that "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" as a "parallelism" requirement. This term does not appear in the Safeguards Agreement. In addition, the Appellate Body in *Wheat Gluten* did not adopt this characterization, which the EC used in the dispute. *US – Wheat Gluten (P)*, para. 8.156. While we hesitate to use a shorthand term that the Appellate Body has rejected, we adopt Korea's terminology to avoid confusion. To avoid confusion, the Appellate Body may wish to use another term for the test, perhaps by labeling it a "same sources" test.

[36] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, p. 14 (25 April 1997).

55. Finally, Korea sets out two new arguments as an "elaboration" of its earlier "no legal significance" assertion. Even if the Panel had interpreted this assertion as encompassing the detailed (and quite different) arguments that Korea now raises, these arguments are themselves inadequate to establish a *prima facie* case. Accordingly, the Appellate Body should reject Korea's appeal on this issue and uphold the Panel's finding.

56. Korea's arguments address three main issues: (1) the standard applied by and role played by a panel in evaluating a *prima facie* case; (2) the proper standard for establishing a *prima facie* breach of the parallelism obligation; and (3) whether Korea satisfied that standard, before the Panel or in its Appellant Submission. The following analysis discusses each in turn.

1. The Panel acted within its competence and conducted an objective assessment in finding against Korea for failing to establish a *prima facie* case.

57. The Panel had the authority to reject Korea's claim for failure to establish a *prima facie* case, used the proper standard in its analysis, and conducted an objective assessment of the law and facts. The Appellate Body has affirmed panels' authority in this regard, and upheld panels that have found against complainants that failed to establish a *prima facie* case for their claim.[37] The Panel also acted correctly in determining the elements necessary to establish an inconsistency with the parallelism obligation, and requiring Korea to establish each of them. The Panel's approach was also consistent with Article 11 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), which charges a panel to make an objective assessment of the matter before it and make other findings to assist the WTO Dispute Settlement Body. It is beyond a panel's authority to make claims or manufacture arguments – that would entail dispute creation, rather than dispute settlement.[38]

58. The Appellate Body has consistently defined a *prima facie* case as "a case which, in the absence of effective refutation by the defending party . . . requires a panel, as a matter of law, to

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[37] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, paras. 216 and 219; *Japan – Agricultural Products*, para. 126.

[38] We note in this regard the Appellate Body's admonition that

> A panel is entitled to seek information and advice from experts and from any other relevant source it choosees, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.

Japan – Agricultural Products, para. 129.

rule in favour of the complaining party presenting the *prima facie* case."[39] This concept is built into the burden of proof, which for a complaining party is to establish a *prima facie* case for its claim. These rules follow from the presumption of good faith – that a WTO Member's actions are presumed to comply with its obligations until proven otherwise.[40] Finding against parties for failure to state a *prima facie* case is also a sensible tool for managing judicial resources in that it allows a panel to focus on claims that are fully developed and amenable to resolution.

59. Korea notes that in past reports the Appellate Body has not required panels to issue explicit findings on the establishment of a *prima facie* case. It interprets this practice as a rule prohibiting a panel finding on whether arguments state a *prima facie* case unless it first seeks relevant arguments from the parties and solicits any relevant information that the parties do not submit themselves.[41] Korea's argument would appear to imbue a panel with an investigative role that the DSU does not confer. However, the reports cited by Korea stand only for the proposition that a panel is not *required* to determine for each claim whether the complainant has perfected its *prima facie* case.[42] They do not remove or limit a panel's authority to find against a party that has failed to carry its burden of proof.

60. Korea criticizes the Panel's finding as having "no objectivity," arguing that if the Panel considered that Korea had failed to state a *prima facie* case, it should have gone beyond oral questioning of the parties and requested written responses.[43] We are not aware of any rule

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[39] *Canada – Aircraft*, para. 192; *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, para. 104 (16 January 1998) ("*EC – Hormones*"). Korea, without explanation, disregards the established definition and relies instead on one from *Black's Law Dictionary*, to the effect that a *prima facie* case is "such as will prevail until contradicted and overcome by other evidence". Korea's Appellant Submission, para. 70. The definitions appear to have the same meaning. To the extent that Korea may be suggesting that a *prima facie* case can exist if the complainant failed to present enough evidence for a panel to find in its favor as a matter of law, that view it should be rejected.

[40] *Brazil – Export Financing Programme for Aircraft*, WT/DS46/RW/2, para. 5.124 (26 July 2001) ("when the executive branch of a Member is not required to act inconsistently with the requirements of WTO law, it should be entitled to a presumption of good faith compliance with those requirements.")

[41] Korea's Appellant Submission, para. 67.

[42] *Thailand – Anti-Dumping Duties on Angles, Shapes and Section s of Iron or Non-alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 12 March 2001, para. 134; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 145; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, para. 142.

[43] Korea's Appellant Submission, paras. 93-99 and 108.

requiring panels to ask questions on a particular topic. Under Article 13 DSU, "[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate." That this is a *right* of the panel, rather than an obligation, indicates that the DSU reposes discretion in panels to decide for themselves what areas warrant further inquiry. Moreover, a panel's authority under Article 13 DSU must be construed in light of all the provisions of the DSU, such as Article 11 DSU.

61. Thus, we do not see any provision of the DSU charging the panel to help a complainant to perfect a claim that a complainant has failed to assert properly, and Korea has cited none. Nor can Korea claim inequitable treatment. The Panel's oral question as to whether Korea had dropped its parallelism claim should have put Korea on notice that the Panel considered its argument on parallelism up to that point so inadequate as to be nonexistent. Even so, Korea chose to add nothing, relying on its earlier arguments.

62. Korea's arguments on the nature of a *prima facie* case and the role of panels in WTO dispute settlement find no support in GATT 1994, the Safeguards Agreement, or the DSU. The Appellate Body should, therefore, uphold the Panel's actions in this regard.

2. The Panel applied the correct substantive standard in evaluating whether Korea made a *prima facie* case of inconsistency with parallelism.

63. The Panel recognized that the parallelism concept requires that the exclusion of a country from a safeguard measure be accompanied by an injury analysis for the imports from the countries covered by the measure. Therefore, it concluded that a *prima facie* case of breach of parallelism exists only upon a demonstration of both an exclusion and the absence of an injury analysis applicable to imports from the included countries by themselves. Since Korea failed to show that the ITC did not conduct such an analysis, the Panel acted properly in concluding that Korea failed to make a *prima facie* case.

64. As noted above, a *prima facie* case is one that in the absence of effective refutation by the defending party requires a panel, as a matter of law, to find in favor of the party presenting the *prima facie* case. Thus, the party asserting a claim must show that it has set out each element necessary to prove an inconsistency with the obligation in question.

65. In the *US – Wheat Gluten* report, the Appellate Body derived the parallelism concept from the use of the same terminology – "product being imported" – to describe the coverage of both the injury determination under Article 2.1 and the application of the safeguard measure under Article 2.2. Accordingly, the Appellate Body found that if a Member proposes to exclude an import source from a safeguard measure, it must analyze whether the remaining sources (which we will describe as the "covered sources") satisfy the injury criteria under Article 2.1. It found a breach of this requirement in *US – Wheat Gluten* because "although the safeguard measure was applied to imports from all sources, *excluding* Canada, the USITC did not establish

explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure."[44]

66. Thus, a breach of parallelism has two elements: (1) exclusion of particular import sources from application of a safeguard measure, and (2) omission of an injury analysis as to imports from the covered sources by themselves. Korea itself admits as much, stating that "Korea's burden to establish a *prima facie* case stops by establishing that the U.S. excluded Canada and Mexico from the line pipe measure without establishing that non-NAFTA imports caused injury."[45]

67. However, at various points in its appellant submission, Korea describes a *prima facie* case differently, as being satisfied by identification of "a gap between the scope of the injury investigation by the U.S. and the scope of its safeguard measure."[46] This plainly misstates the test established by the Appellate Body, which requires a comparison of the *determination* of serious injury with the application of the measure.[47] It also disregards the fact that the parallelism concept derives from Articles 2.1 and 2.2, which do not mention the investigation.

68. Korea's comparison of the scope of the safeguard measure with the coverage of the *investigation* also does not make sense. Even if a Member excludes imports from an FTA partner from a safeguard measure, the competent authorities would need to include them in the investigation to gather information on their volume and value to ensure their accurate subtraction from the data used for the analysis of serious injury for imports from covered sources. The competent authorities would also need to evaluate the role of imports from FTA partners in the market as one of the "conditions" under which imports from other sources were being imported so as to cause or threaten to cause serious injury to the domestic industry.[48] Thus, a difference between the imports covered by a safeguard measure and the imports investigated by the competent authorities is irrelevant to determining whether a Member complied with parallelism.

69. Korea also argues that the Panel should have found the Appellate Body's *Wheat Gluten* reasoning to govern only the burden of proof for a Member *defending* a safeguard measure, and should not have used it to evaluate the case against a measure. Nothing in the report so

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[44] *US – Wheat Gluten*, para. 98.

[45] Korea's Appellant Submission, para. 72.

[46] Korea's Appellant Submission, paras. 70 and 100.

[47] *US – Wheat Gluten*, paras. 96 and 98.

[48] Korea itself argued that it was necessary for the ITC to gather data on oil country tubular goods and standard pipe, two products plainly outside of the scope of the application of the safeguard measure, in order to better understand how imported line pipe affected line pipe produced in the United States.

constrains its relevance in this manner. In that dispute, the U.S. defended the exclusion of imports from its NAFTA partners from a safeguard measure on the basis that an ITC analysis of Canadian imports by themselves was equivalent to an analysis of imports from other sources.[49] But before reaching that defense, the Appellate Body had to address the U.S. argument that no breach had occurred because Articles 2.1 and 2.2 did not mandate parallelism. In so doing, the Appellate Body defined the parallelism concept, and derived from it a generally applicable standard for determining whether a Member has complied with the requirement. Korea has provided no basis to consider the reasoning applicable only to the defense of an exclusion.

3. Korea did not satisfy the standard for a *prima facie* case in its arguments before the Panel, and has added nothing in its Appellant Submission to correct that inadequacy.

70. Korea failed to establish a *prima facie* breach of parallelism because it did not demonstrate *both* the exclusion of imports from a country from the line pipe safeguard *and* the absence of an injury analysis specific to the imports from covered sources. Korea did establish that the line pipe safeguard excluded imports from Canada and Mexico. The United States has never argued otherwise. But Korea basically ignored the ITC analysis specific to imports from covered sources referenced in footnote 168 of the ITC Report, stating merely that it had "no legal significance." As the Panel recognized, this does not constitute a *prima facie* case of inconsistency with parallelism. In its appellant submission, Korea presents new arguments in the form of an "elaboration" on its "no legal significance" assertion. It cannot at this stage create a *prima facie* case that it failed to present to the Panel. In any event, the new arguments are not convincing.

71. Korea did not establish before the Panel that the ITC failed to make an injury finding regarding imports from covered sources. In its written submissions, Korea raised only one argument related to parallelism – "since all imports must be included in the Article 2.1 determination, parallelism requires that the measure be applied to all imports."[50] In support of this argument, Korea stated:

> The ITC's footnoted analysis, separating out the imports from Canada and Mexico, has no legal significance. The United States could only impose a safeguard remedy on the basis of a serious injury analysis which was based on all imports. Articles 2 and 4 of the Agreement on Safeguards as well as Article XIX

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[49] *US – Wheat Gluten (AB)*, para. 97

[50] Korea's First Written Submission, para. 173.

> of the GATT 1944 speak only in terms of "imports." There is no basis on which certain imports can be excluded. Therefore, all imports must be examined.[51]

72. This reasoning demonstrates that Korea recognized that the ITC report did contain an analysis of imports with those from Canada and Mexico excluded – exactly what the Appellate Body in *Wheat Gluten* found necessary for an exclusion from a safeguard measure to conform to WTO rules. It also shows that the sole basis for Korea's claim that the footnote had "no legal significance" was Korea's view that the Safeguards Agreement and GATT 1994 forbid an investigation, injury determination, and application of a safeguard measure covering anything less than all imports. This argument does not reflect in any way the point that the ITC failed to analyze imports from covered sources or that its analysis did not meet the substantive requirements of Article 4. It reflects only Korea's erroneous view that the analysis of imports from covered sources that the ITC *did* conduct was irrelevant – a point decidedly at odds with the Appellate Body's findings in *Wheat Gluten*.

73. Moreover, the Panel's acceptance of the U.S. Article XXIV defense to the claimed inconsistency with Article 2.2 removed what little support Korea provided for asserting that footnote 168 had "no legal significance." Under the reasoning in *Wheat Gluten*, the conclusion that the term "imports" in Article 2.2 may exclude some sources dictates that the term has the same meaning elsewhere.[52]

74. Korea argues that Claim 7 in its request for formation of a panel presented a *prima facie* case.[53] That claim states simply that

> The United States also violated Articles 2 and 4 of the Agreement on Safeguards by including Mexico and Canada in the analysis of injurious imports but by excluding Mexico and Canada from the application of the safeguard measure.[54]

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[51] Korea's First Written Submission, para. 172. Korea included this argument in a section entitled "The MFN principle of the WTO is embodied in numerous agreements including Article XIII:1 of GATT 1994 and the Article 2.2 of the Agreement on Safeguards and requires that such measures be applied to all suppliers." Accordingly, the Panel and the United States considered the argument to be a subsidiary point in Korea's arguments on various MFN obligations, and not an argument related to the separate claim on parallelism.

[52] *US – Wheat Gluten*, para. 96 ("The same phrase – "product . . . being imported" – appears in *both* these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2.").

[53] Korea's Appellant Submission, para. 70.

[54] Request for the Establishment of a Panel by Korea, p. 2 (14 September 2000).

Korea asserts that "the Panel admits [that] the claim itself provides 'sufficient detail' for the relatively simple fact underlying the claim."[55]

75. Korea misquotes the Panel, which actually stated "*it could be argued* that there is *probably* sufficient detail in Claim 7 for us to understand it, and rule on it, even in the absence of additional argumentation by Korea during the course of these proceedings."[56] This scarcely represents an admission. It shows that the Panel proceeded with the analysis not because Korea made a *prima facie* case, but as an analysis in the alternative, assuming *arguendo* that Korea had made such a case. In any event, it is clear that a naked assertion does not satisfy a party's burden of proof or establish a *prima facie* case in a WTO dispute. As the Appellate Body stated in *US – Wool Shirts*, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."[57]

76. Korea also argues that it did not have to address or rebut footnote 168 of the ITC Report to establish a *prima facie* case.[58] As we have shown above, absence of an injury analysis for imports from covered sources is one of the two elements necessary to establish an inconsistency with parallelism. As Korea recognized, and as the text of the ITC Report shows, footnote 168 contained an analysis of imports from covered sources alone. Thus, to establish a *prima facie* breach of parallelism, Korea would have to address that analysis in some way. It did not, thereby justifying the Panel's conclusion that it did not establish a *prima facie* case.

77. Korea contends that its parallelism analysis actually did rebut footnote 168, and proceeds to "elaborate on why, in Korea's view, the footnote has no legal significance."[59] The arguments that it then presents cannot be discerned anywhere within the discussion of parallelism in Korea's written submissions to the Panel. Accordingly, the Appellate Body should treat them as new arguments.

78. However, in the context of a panel finding of failure to state a *prima facie* case, the obligation under consideration is a disputing party's obligation to meet its burden of proof by presenting a case to the panel that would require the panel, as a matter of law, to find in favor of that party. Thus, an appeal of such a finding must revolve around whether the party presented a *prima facie* case to the panel. Arguments that the party did not make, but could have made, have no relevance in such an analysis because they indicate nothing about the case that the party

[55] Korea's Appellant Submission, para. 75.

[56] Panel Report, para. 7.168.

[57] *US – Wool Shirts*, p. 14.

[58] Korea's Appellant Submission, para. 100.

[59] Korea's Appellant Submission, para. 102.

actually presented to the panel. Therefore, the Appellate Body should disregard new arguments raised by Korea on this issue.

79. However, if the Appellate Body decides to address the new arguments that Korea "elaborated upon" from the "no legal significance" assertion, it should conclude that they do not create the *prima facie* case Korea failed to present to the Panel.

80. Korea's first new argument is based on its characterization of the ITC's evaluation of imports from covered sources as merely a "conditional statement."[60] The Panel found otherwise, concluding that footnote 168 "clearly forms part of the ITC's published determination and contains findings by the ITC."[61] These include explicit findings that imports from covered sources increased significantly over the investigation period in absolute terms and as a percentage of domestic production. The Panel found that these contain "the basis for a finding that non-NAFTA [imports] caused serious injury to the relevant domestic industry."[62] Korea did not dispute, and does not now dispute the accuracy of the data in the footnote.

81. Korea dismisses these findings, and addresses only the introductory language to the analysis. Specifically, Korea suggests that the Panel should have ignored the substantive content of the footnote and that the Appellate Body should reverse the Panel for failing to do so because the ITC introduced the note by stating that "we would have reached the same result had we excluded imports from Canada and Mexico from our analysis."[63] Korea treats this language as indicating that the ITC did not actually perform the analysis set forth in the remainder of the footnote. This is incorrect. The introductory statement reflects that the ITC conducted *two* analyses – one of covered imports and one of all imports – and that both led to an affirmative injury determination. Moreover, footnote 168 does not stand alone, but is part of the ITC's clear analysis of injury and causation. The ITC continued in the footnote explicitly to provide data excluding NAFTA-sourced imports from the relevant data. Thus, Korea is wrong to claim error in the Panel's finding that footnote 168 "contains the basis for a finding that non-NAFTA [imports] caused serious injury."[64]

82. Belatedly, Korea argues that the Panel's conclusion on this question does not meet the standard articulated in *US – Wheat Gluten* as necessary to satisfy parallelism.[65] As an initial matter, Korea failed to assert or prove that the footnote did not satisfy the *Wheat Gluten*

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[60] Korea's Appellant Statement, para. 103.

[61] Panel Report, para. 7.170.

[62] Panel Report, para. 7.170.

[63] ITC Report, pp. I-20 - I-21, note 168.

[64] Korea's Appellant Submission, paras. 104.

[65] Korea's Appellant Submission, paras. 104-105.

requirements. Korea now also argues that to meet the "establish explicitly" requirement in *Wheat Gluten*, the United States had to provide a "reasoned and adequate explanation of determination of injury or threat thereof, arising from non-NAFTA imports alone."[66] It bases this argument on the Appellate Body's conclusion in *Lamb Meat* that under Article 11 DSU, a panel considering a claim under Article 4.2(a) "must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination."[67] The Appellate Body derived this standard from the particular obligations of Article 4 to consider relevant facts and explain how the facts supported the determination. Korea alleges that the Panel's conclusion that the footnote provided a "basis" for a finding regarding non-NAFTA imports did not meet this standard.

83. Korea has also misinterpreted the Appellate Body's reasoning in *US – Lamb Meat* that

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

If this reasoning applied to the evaluation of whether the complaining party has established a *prima facie* case, as Korea believes, any claim arising from Article 4.2(a) – even a bare allegation of inconsistency – would require a panel to conduct a full review. Thus, the complaining party would bear no burden of proof, a notion contrary to principles of WTO dispute settlement. A more logical interpretation of the quoted reasoning is that it applies only to a claim under Article 4.2(a) that the claimant has perfected by establishing a *prima facie* case.

84. Finally, Korea argues that it was not enough for the U.S. to cite footnote 168 in an oral response to the Panel's question as to whether Korea had abandoned its parallelism claim. As noted above, since Korea did not make a *prima facie* case, the United States bore no burden to respond in any way.[68] In any event, the content of footnote 168 speaks for itself, and was cited by the Panel in its conclusion that Korea failed to present a *prima facie* case.[69] Moreover, Korea

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[66] Korea's Appellant Submission, para. 106.

[67] Korea's Appellant Submission, para. 106, *quoting US – Lamb Meat*, para. 103.

[68] Korea views the Panel Report consideration of the U.S. oral citation to the analysis referenced in footnote 168 as a rebuttal to Korea's written arguments as evidence of the Panel's lack of objectivity. Korea's Appellate Submission, para. 94. In accordance with the standard for evaluating a *prima facie* case, Korea's own written citation to footnote 168 would have justified an evaluation of its affect on the claim, even if the United States had remained silent.

[69] Panel Report, para. 7.170 ("On balance, therefore, and particularly in light of the contents of note 168, we are unable to find that Korea has established a prima facie case that the

based its parallelism claim before the Panel on its view that the Safeguards Agreement forbade exclusions from the application of a safeguard measure. The United States showed numerous errors in that conclusion, most particularly by establishing its right to assert Article XXIV as a defense against Korea's Article 2.2 claim. Thus, the United States did rebut all of the points actually raised by Korea.

D. As With Any WTO Obligation, a Member Is Not Required to Explain Its Compliance with Article 5.1, First Sentence, at the Time It Takes a Measure.

85. The first sentence of Article 5.1 imposes a straightforward substantive obligation – "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." In so doing, it operates no differently than a myriad of other WTO obligations, with which a Member complies by conforming its actions to the terms of the obligation. Nothing in the ordinary meaning of theses words requires the Member to explain, at the time of taking a safeguard measure, how it has complied with the first sentence of Article 5.1.

86. The Appellate Body reached just this conclusion in *Korea – Dairy*. It noted that the second sentence of Article 5.1 requires a "clear justification" for a safeguard in the form of a quantitative restriction reducing imports below their historical level. It found that this justification "has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure.*"[70] In contrast, the Appellate Body went on to conclude that, "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."[71] The Panel adopted this reasoning as the basis for its conclusion that Article 5.1 did not obligate the United States to explain, at the time of taking the line pipe safeguard, how it complied with the requirements of Article 5.1. Korea has provided no reason to deviate from this conclusion.

1. The Panel correctly interpreted the first sentence of Article 5.1 not to require an explanation of compliance with its terms at the time a Member takes a safeguard measure.

87. The ordinary meaning of the first sentence of Article 5.1 does not require an explanation of how a Member complies with its terms at the time of taking a safeguard measure, or at any other time. It affects one activity – applying a safeguard measure – and places a limit on that activity, namely, that it go no farther than the extent necessary to prevent or remedy serious

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United States 'also violated Articles 2 and 4 of the Agreement on Safeguards. . . .").

[70] *Korea – Dairy (AB)*, para. 98.

[71] *Korea – Dairy (AB)*, para. 99.

injury and facilitate adjustment. Explaining how a Member complies with this obligation is simply unnecessary to actually achieving compliance.

88. The second sentence of Article 5.1 confirms this conclusion. It forbids a Member to apply a safeguard in the form of a quantitative restriction lower than historical levels[72] "unless clear justification is given that a different level is necessary to prevent or remedy serious injury." The "clear justification" requirement would obviously be redundant if Article 5.1, first sentence, required a Member to provide a contemporaneous explanation[73] of how it applied a safeguard measure no more than the extent *necessary to prevent or remedy serious injury* and to facilitate adjustment. Thus, the principle of effectiveness in treaty interpretation, indicates that the Appellate Body should avoid interpreting Article 5.1, first sentence, in the manner advocated by Korea.[74] The Appellate Body's conclusions in *Korea – Dairy*, which we outlined above, reflect these principles.

2. The Panel correctly interpreted Article 5.1, first sentence, in accordance with customary law on the interpretation of treaties.

89. The analysis made by the Panel and provided above in subsection 1 applies the customary rules of treaty interpretation under international law. Korea variously criticizes this interpretation as "loose" and suggests that a more "rigorous" approach is necessary for obligations like those in the first sentence of Article 5.1. However, it cites no authority for these interpretative principles.

90. Korea first argues that Article 5.1 cannot be "loosely interpreted" because it informs all other disciplines in the Article, and is the only general guideline on the imposition of safeguard measures. Korea has failed to identify any principle suggesting that *any* provision of the Safeguards Agreement may be interpreted other than in accordance with the ordinary meaning of its words in their context and in the light of its object and purpose. The Panel followed these principles. It is Korea that would "loosen" them by disregarding the ordinary meaning of Article 5.1, first sentence, to impose on Members applying a safeguard measure an entirely different

[72] For the sake of simplicity, we will use "lower than historical levels" as shorthand for the Article 5.1, second sentence, obligation that quantitative restrictions not reduce the level of imports below the level of the average of imports in the last three representative years for which statistics are available. Neither Korea nor the United States has appealed the Panel's conclusion that the line pipe safeguard measure was *not* a quantitative restriction at lower than historical levels.

[73] For the sake of simplicity, we use "contemporaneous explanation" to refer to an explanation provided at the time of taking a safeguard measure.

[74] *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, para. 88, n. 76 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

obligation to provide a contemporaneous explanation of compliance with the "no more than the extent necessary" requirement.

91. Korea also suggests that comparison with the "precise" disciplines on the form and level of antidumping and countervailing duties demonstrates the importance of a "rigorous" interpretation of the first sentence of Article 5.1. Again, it is the customary rules of treaty interpretation that apply. Korea cites none suggesting that some provisions of an agreement merit a different level of rigor in interpretation than others. In addition, Korea's comparison of Article 5.1, first sentence, with the Antidumping and SCM Agreements merely reveals further errors in its analysis. The cited provisions show that the WTO Agreement specifies precise restrictions on trade remedies when necessary. The absence of such disciplines from the Safeguards Agreement indicates not that obligations from another agreement should be imported or implied, but that the WTO Agreement takes a different approach for safeguard measures.

92. Finally, Korea suggests that a "looser" interpretation of Article 5.1, first sentence, is inappropriate because safeguard measures restrict fair trade, and "[r]estriction[s] on fair trade *cannot* and *must not* be subject to a looser disciple than restrictions against unfair trade."[75] Korea fails to recognize that, except for antidumping and countervailing duties, all trade restrictions permitted under the WTO Agreement – whether tariffs within bound rates, quotas consistent with Article XI or XIII of GATT 1994, sanitary and phytosanitary measures permitted under the SPS Agreement, etc. – affect fair trade.[76] Thus, safeguard measures do not warrant any rigor beyond that normally applied to WTO obligations under customary rules of treaty interpretation.

3. The arguments advanced by Korea do not support its view that Article 5.1, first sentence, requires a Member to provide a contemporaneous explanation of compliance with the "no more than the extent necessary" obligation.

93. Korea makes several arguments as to why Article 5.1, first sentence, requires a contemporaneous explanation of how a Member complied with the obligation to apply its safeguard measure "no more than to the extent necessary." None of these arguments supports a departure from the conclusion reached by the Panel.

94. Korea notes that the Appellate Body found in *Korea – Dairy* that Article 5.1, first sentence, "imposes an *obligation* on a Member applying a safeguard measure to *ensure* that the measure applied is commensurate with the goals of preventing or remedying serious injury and of

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[75] Korea's Appellant Submission, para. 119 (emphasis in original).

[76] Nor does Korea acknowledge that "fair" or "unfair" trade are not terms used in the WTO Agreements, and thus have no textual basis for interpretive purposes. Rather, they are labels others have devised as a shorthand way to characterize, accurately or inaccurately, the situations described.

facilitating adjustment."[77] Korea then posits that a Panel can only ascertain whether a Member actually did "ensure" compliance if the Member explains the basis for its safeguard measure at the time of taking the measure. Thus, argues Korea, the explicit obligation to apply a safeguard measure no more than the extent necessary must imply an obligation to explain compliance with that obligation.

95. This reasoning is flawed. WTO Members generally undertake to act in good faith to comply with their obligations under the WTO Agreement, and are presumed to do so.[78] Under Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization, every WTO Member commits to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." This obligation – which actually includes the word "ensure" in its text – has never been interpreted to require a contemporaneous explanation of how a law, regulation or administrative practice is consistent with WTO obligations. If Korea's interpretation were correct, all WTO Members would have been obligated to explain how every measure in effect at the time of entry into force of the Marrakesh Agreement complied with its obligations. Thus, any need to "ensure" compliance with Article 5.1, first sentence, which reflects an interpretation of the provision rather than the text itself, cannot give rise to such an obligation.[79]

96. Korea also notes that the Appellate Body in *Korea – Dairy* quoted Article 5.1, first sentence, and found that "this obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied 'only to the extent necessary.'"[80] Korea believes that under this reasoning, the Panel's conclusion creates an impermissible double standard, requiring a "justification" for quantitative restrictions lower than historic levels, no explanation for other types of measures.[81] Korea fails to recognize that the obligation to justify particular

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[77] *Korea – Dairy (AB)*, para. 96 (emphasis on "obligation" original; emphasis on "ensure" added).

[78] *Brazil – Export Financing Programme for Aircraft*, WT/DS46/RW/2, para. 5.124 (26 July 2001) ("the rationale underpinning the traditional GATT/WTO distinction between mandatory and discretionary legislation is that, when the executive branch of a Member is not required to act inconsistently with the requirements of WTO law, it should be entitled to a presumption of good faith compliance with those requirements.")

[79] As the Appellate Body has recognized, the customary rules of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation of concepts that were not intended." *EC – Hormones (AB)*, para. 83, *quoting India – Patents*, adopted 16 January 1998, WT/DS50/AB/R, para. 45.

[80] *Korea – Dairy (AB)*, para. 96, *cited in* Korea's Appellant Submission, para. 120.

[81] Korea's Appellant Submission, para. 123.

quantitative restrictions arises under the *second* sentence of Article 5.1, whereas the Appellate Body's finding that "this obligation applies regardless of the particular form" of a safeguard measure referenced only to the *first* sentence of Article 5.1. Thus, *Korea – Dairy* does not support the extension of the justification requirement of the second sentence of Article 5.1 to all forms of safeguard measure.[82]

97. Korea claims, based on two statements in the Panel Report, that the Panel "admits" that a contemporaneous explanation is necessary.[83] This argument distorts the Panel's findings. In the first instance, the Panel found with regard to Korea's interpretation of Article 5.1 that "*[a]lthough* such an approach may have some merit, *on balance it does not reflect a fair reading of the Appellate Body's findings*."[84] Korea omitted the italicized text from its quotation; the full statement reveals that, far from accepting Korea's views, the Panel rejected them as not a "fair" reading of the Appellate Body report in *Korea – Dairy*.

98. In the second instance, the Panel states that

> *Although* we find it difficult to imagine how a Member could ensure that its safeguard measure does not exceed what is "necessary to prevent or remedy serious injury and to facilitate adjustment" without performing some form of economic analysis at the time of imposition, *failure to do so does not constitute a violation of Article 5.1, first sentence*.[85]

This comment does not support Korea's argument. As we discussed above, "ensuring" compliance with WTO obligations is not an independent obligation. Rather, it is part of a Member's good faith in complying with its obligations. Thus, unless otherwise provided in a covered agreement, a WTO obligation does not imply an independent obligation to issue a public explanation of how the measure complied with the obligation. This holds true for the preparatory steps that a Member takes to develop a measure consistent with its obligations. It is the *result* that is measured against the relevant obligations, and not the preceding steps. Thus, the fact that an economic analysis might be helpful (or in the view of some observers, necessary) does not make it a requirement under the WTO Agreement.[86]

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[82] It also bears noting again that this interpretation would violate the principle of effectiveness in treaty interpretation.

[83] Korea's Appellant Submission, para. 135.

[84] Panel Report, para. 7.81, note 85 (emphasis added).

[85] Korea's Appellant Submission, para. 137, *quoting* Panel Report, para. 7.106 (Korea's emphasis omitted; U.S. emphasis added).

[86] Articles 5.1 and 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") provide a useful analogy. Article 5.1 requires that Members base

99. For example, some might consider a detailed analysis of import data to be "necessary" to "ensure" compliance with the Article XIII:2(d) quota allocation rules. However, that does not mean that Article XIII:2(d) requires a Member to make such an analysis public upon imposition of the quota allocation, or to rely only on an analysis contemporaneous with imposition of the quota allocation in defending it.

100. Korea also seeks support for its analysis in the clause in the preamble of the Safeguards Agreement, "*[r]ecognizing* the need . . . to re-establish multilateral control over safeguards and eliminate measures that escape such control." Korea views the Panel's interpretation as inconsistent with this objective because "there is no effective means of *multilaterally* verifying if the U.S. *ensured* that the measure applied is commensurate with the goal of preventing or remedying serious injury and of facilitating adjustment."[87]

101. As an initial point, the objective of multilateral control cannot extend to "verifying" whether the United States "ensured" compliance with its obligations, since the only obligation is to actually comply. And, in any event, that objective finds full realization in the detailed provisions requiring notification of major steps in the safeguard process, and providing surveillance by the Committee on Safeguards and Council on Trade in Goods, consultations upon request, and dispute settlement if the preceding steps are unsuccessful. In the context of these provisions, the objective of establishing mulitlateral control does not justify a reading of Article 5.1, first sentence inconsistent with the ordinary meaning outlined in subsection 1.

102. But, more importantly, this argument reflects a fundamental flaw in Korea's reasoning – that evaluating the consistency of a safeguard measure is impossible (or nearly so) without access to a contemporaneous explanation of compliance with Article 5.1. The following section demonstrates why this is incorrect.

4. The Panel's interpretation of Article 5.1, first sentence, does not prejudice Members' rights.

103. Korea returns repeatedly to a single point – that Members, WTO organs, and dispute settlement panels cannot adequately evaluate compliance with Article 5.1, first sentence, unless the Member applying a safeguard measure provides a contemporaneous explanation of

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their sanitary and phytosanitary measures on a risk assessment, In addition, Article 5.6 of that Agreement requires Members to "ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection." In evaluating the EC measure on beef hormones, the Panel and Appellate Body did not require that the risk assessment establish compliance with SPS Agreement Article 5. Rather, they looked to the explanation presented by the EC in the dispute settlement process. *EC – Hormones (AB)*, paras. 190-191.

[87] Korea's Appellant Submission, para. 122.

compliance with that provision.[88] An evaluation of these claims shows that they have absolutely no basis.

104. Korea sets out the supposed problems in greatest detail in paragraphs 132-133 of its Appellant Submission, stating:

> Since there is no demonstration on the basis for determining the level of the measure, the complaining party is deprived of effective means of challenging the measure and has to rely on inferential evidences. . . . Since the U.S. provided absolutely *no* information on how the level of the measure was calculated in Presidential Proclamation No. 7274, Korea had to rely on inferential evidences. For example, Korea employed, as a benchmark to be compared with the actual measure, the level of remedy recommended by the ITC. It was only too easy for the U.S. to argue, and the Panel to accept, that there is no guarantee that ITC recommendation was in conformity with Article 5.1, first sentence.[89]

Korea's complaint, then, is that without a contemporaneous explanation of compliance with Article 5.1, it has no means to evaluate whether the United States actually applied its safeguard measure no more than the extent necessary, and no way to construct a *prima facie* case demonstrating the inconsistency with Article 5.1 that it is certain has occurred.

105. If this were truly the case, Korea would be in no worse position than any Member that suspected that a measure of another Member breached some WTO obligation. For example, suppose a Member considers that a law of another Member affects the internal sale of imported products in a manner inconsistent with Article III. It has no way of determining in advance why the importing Member considers its measure to conform to Article III. It may have to evaluate complicated issues of foreign law to establish a *prima facie* case of an inconsistency. And, just as with a safeguard measure, the discriminatory treatment places a burden on fair trade.

106. However, Korea disregards that a Member seeking to challenge a safeguard measure is actually in a *better* position than Members facing other types of measures because it can refer to the report of the competent authorities. As we noted above, Article 5.1 obligates a Member to apply a safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment. As the Panel found, this establishes the condition of the domestic industry as the benchmark for application of the safeguard measure.[90] In the *Line Pipe* case, that report contained, *inter alia*, the determination of the ITC, financial, production, sales, and pricing

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[88] Korea's Appellant Submission, paras. 114, 122, 124, 129, 130-134.

[89] Korea's Appellant Submission, paras. 132-133.

[90] Panel Report, para. 7.266.

data for domestic products, similar data for imported products, and supplemental data on products that opponents of the safeguard measure thought would be relevant to the analysis.

107. Thus, Korea has no basis to claim prejudice. The ITC Report contained voluminous data with which it could have made arguments that the United States applied the line pipe safeguard beyond the extent necessary. The United States relied upon that same evidence to explain how the measure conformed to Article 5.1, first sentence, and the Panel accepted that analysis.[91] That Korea chose not to use this evidence is not the fault of the United States, or of the absence of a contemporaneous explanation of conformity with Article 5.1, first sentence. And it certainly does not demonstrate any legal error in the Panel's conclusion that Article 5.1, first sentence, does not require such a contemporaneous explanation.

E. The Appellate Body Should Uphold the Panel's Finding That Korea Failed to Demonstrate That the United States Applied the Line Pipe Safeguard Beyond the Extent Necessary to Prevent or Remedy Serious Injury and to Facilitate Adjustment.

108. The Panel evaluated each of the arguments presented by Korea regarding compliance with Article 5.1, first sentence, and properly found that none of them presented a *prima facie* case of inconsistency with that provision. Korea does not appeal that conclusion on the basis that its arguments actually established a *prima facie* breach of Article 5.1, first sentence. Instead, it argues that the United States did not rebut Korea's arguments and that the Panel did not fully scrutinize the U.S. arguments. As with its appeal of the Panel's conclusions on the ITC's analysis referenced in footnote 168 of the ITC Report, Korea's argument evinces a misunderstanding of the fact that a *prima facie* case is one that in the absence of effective rebuttal entitles a decision in favor of the party asserting the case. Having found that Korea failed to present a *prima facie* case, the rebuttal presented by the United States became unnecessary, and the Panel had no duty to scrutinize the U.S. arguments.

109. The Appellate Body should reject Korea's appeal on that ground alone. In addition, the arguments in its Appellant Submission do not identify any flaw or inadequacy in the Panel's conclusions regarding the arguments by the United States and Korea.

1. Article 5.1, first sentence, did not obligate the United States to indicate whether serious injury or threat of serious injury formed the basis for the extent to which it applied the line pipe safeguard.

110. The United States has appealed the Panel's finding that a competent authority must choose between serious injury and threat of serious injury as a basis for its determination, and may not assert both. Likewise, Article 5.1 does not obligate a Member to indicate whether its

[91] Panel Report, paras. 7.101-7.102.

safeguard measure reflected a finding of serious injury or threat of serious injury. Regardless of the outcome of the U.S. appeal, the Appellate Body should find that Article 5.1, first sentence, does not require such a distinction. Article 5.1 places a *limit* on the *extent* of application of a measure, and does not restrict a Member's choice among the variety of measures that could fall within that limit.[92] Thus, if a finding of serious injury would require one limitation on the extent of a safeguard measure, and a finding of threat of serious injury another limitation, a single safeguard measure could still would satisfy both. Thus, there would be no need to specify which finding formed the basis for the measure.

111. Article 5.1, first sentence, places a limit on the *extent* to which a Member may apply a safeguard measure – no more than necessary to prevent or remedy serious injury and to facilitate adjustment. Article 4.1 defines "serious injury" as a "significant overall impairment in the position of a domestic industry," and "threat of serious injury" as "serious injury that is clearly imminent." Under Article 4.2(a) serious injury, whether present or threatened, is determined with reference to "all relevant factors of an objective and quantifiable nature," including the share of domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. Thus, the condition of the industry, as measured by these and other relevant factors, provides the benchmark for application of the measure.

112. In the United States' view, the characterization of the industry's condition as reflecting serious injury or threat of serious injury does not change the analysis of what type of measure will prevent or remedy that serious injury and facilitate adjustment. Thus, a Member would not be required to decide between serious injury and threat of serious injury before taking a safeguard measure.

113. The Panel adopted the U.S. view that the condition of the domestic industry is the benchmark for application of a safeguard measure. However, it concluded further that Article 5.1, first sentence,

> allows a Member to apply a safeguard measure to "prevent . . . serious injury", which presupposes a finding of threat of serious injury, or to "remedy serious injury", which presupposes a finding of serious injury. Since Article 5.1 does not allow Members to apply safeguard measures to "prevent and/or remedy serious injury", we consider that Members must clearly determine in advance whether

[92] Article 5.1 speaks to the application of a measure, not to the measure itself. In this respect, the obligation under the first sentence of Article 5.1 is similar to that in Article X of the GATT 1994, which speaks to the administration of measures rather than to the measures themselves, as the Appellate Body recognized in *Bananas* (see para. 200 of the Appellate Body report in *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (AB-1997-3)(WT/DS27/AB/R)).

there is either a threat of serious injury to be prevented, or present serious injury to be remedied.[93]

114. Korea argues that, having adopted this reasoning, the Panel had to accept Korea's argument that the U.S. measure was invalid because it did not indicate the type of injury determination that it addressed.[94] As an initial matter, this argument merely reprises Korea's earlier argument that a Member must provide a contemporaneous explanation of its compliance with Article 5.1, first sentence, and likewise fails in this context for the reasons discussed above in Section D.

115. As we have demonstrated in our appeal, the Panel's reasoning on this point is flawed. In any event, the Panel's reasoning does not require adoption of Korea's view. The Panel identified two reasons that require a Member to choose between serious injury and threat of injury in advance of taking a safeguard measure – to determine availability of quota modulation under Article 5.2(b) and to decide whether the measure will prevent threat of serious injury or remedy serious injury. The absence of a designation of serious injury or threat of serious injury does not give rise to either concern in this dispute. The Panel found that Article 5.2(b) would not apply to the line pipe safeguard,[95] and Korea did not appeal that finding. Therefore, the United States did not need to determine whether the ITC had made a finding of serious injury, which would be necessary to invoke Article 5.2(b).

116. As a general matter, actions to remedy serious injury will necessarily have much in common with actions to prevent the threat of serious injury. A remedy that does not forestall future injury will be ineffective, and certainly will not have facilitated adjustment. That is especially true in the case of line pipe. The Commissioners who found serious injury reached conclusions about the condition of the domestic line pipe industry almost identical to those of the Commissioners who found threat of serious injury. They differed mainly in their views as to whether the industry's condition indicated that the serious injury was current or imminent. Thus, the permissible extent of application of the measure under either scenario would be essentially equivalent, as whether the particular label given to the condition of the industry requiring remediation was threat of injury or injury, the condition of the industry as reflected in the Article 4.2(a) factors was the same.

117. The U.S. explanation of compliance with Article 5.1, first sentence, demonstrated the similarities between the two determinations.[96] Based on the Commissioners' consensus findings as to the condition of the industry, the United States applied the line pipe safeguard no more than

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[93] Panel Report, para. 7.267.

[94] Korea's Appellant Submission, paras. 149-152.

[95] Panel Report, para. 7.75, note 79.

[96] U.S. Second Written Submission, para. 98.

the extent necessary.[97] The measure consisted of a 19 percent supplemental duty in the first year, dropping to 15 percent in the second year, 11 percent in the third year, with the first 9000 tons imported from each source in each year exempt from the duty. In its demonstration to the Panel, the United States showed that the 19 percent duty would likely increase prices of imports, allowing domestic producers to increase their own prices or volume sold. At the same time, the per-country 9000 short ton exemption from the duty would lessen any effect. Thus, the United States demonstrated that it applied the measure no more than the extent necessary, regardless of whether the Panel would determine "necessary" with reference to *preventing* serious injury and facilitating adjustment, or *remedying* serious injury and facilitating adjustment.

2. The Safeguards Agreement did not obligate the United States to identify injury from imports alone in applying the line pipe safeguard.

118. The Panel found that Korea "has failed to establish any factual basis" for its argument that the U.S. line pipe measure addressed the injurious effects of factors other than imports. Accordingly, the Panel did not address the legal basis for Korea's claim.

119. Korea does not dispute that it failed to meet its factual burden. It argues instead that the United States was required to limit its safeguard measure to remedy only the injury caused by imports alone. In Korea's view, once the Panel accepted the argument that the United States failed to meet the non-attribution requirement of Article 4.2(b), that same finding also satisfied Korea's burden of proving that the United States failed to limit the safeguard measure to the injury caused by increased imports. According to Korea, this shifted to the United States the burden of proving that the line pipe safeguard did not address injury caused by other factors. In that case, "the United States had to demonstrate that it re-assessed the scope of injury before choosing the measure and ensured that the measure addressed only the injury caused by increased imports."[98]

120. Korea argues that "'serious injury' as it appears in Article 5.1, first sentence, and 'serious injury' as it appears in Article 4.2(b) cannot mean two different things."[99] It assumes that serious injury for purposes of Article 4.2(b) is only such injury as is caused by increased imports alone, and accordingly concludes that the serious injury remediable by a safeguard measure under Article 5.1 is the same. However, the Appellate Body in *US – Wheat Gluten* and *US – Lamb Meat* found that the "serious injury" referenced in Article 4.2(b) includes injury caused by all factors, and not only injury caused by imports.[100] Thus, the "serious injury" in Article 5.1, first

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[97] U.S. Second Written Submission, paras. 101-106.

[98] Korea's Appellant Submission, paras. 157-157.

[99] Korea's Appellant Submission, para. 158.

[100] *US – Wheat Gluten (AB)*, para. 70 ("the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the

sentence – which Korea admits is a proper subject for a safeguard measure to prevent or remedy – is the entirety of the serious injury experienced by the domestic industry, and not just the injury attributable to increased imports.

121. Thus, under Korea's own analysis, the United States safeguard measure could properly prevent or remedy injury caused by factors other than increased imports. However, the line pipe safeguard did not attempt to do this. The ITC found, and Korea did not contest, that a decline in the fortunes of the oil and gas industry caused a decline in demand for line pipe by that industry.[101] The line pipe safeguard did nothing more than apply an import duty, which in turn would be expected to result in increased import prices. This would have no significant effect on the oil and natural gas industry's demand, which as the ITC found, bore little relationship to line pipe prices.[102] Moreover, the United States demonstrated that the safeguard measure would result in an increase of domestic line pipe producers' operating income margins to *at most* 3 or 4 percent of total revenues, and probably less, far below the 8.1 percent profit before the oil and gas crisis.[103] Therefore, the Appellate Body should reject Korea's arguments both that the United States could apply a safeguard measure only to remedy that part of serious injury caused by imports and that the line pipe measure addressed injury caused by factors other than imports.

3. The Panel was not obligated to evaluate whether that the U.S. explanation of the line pipe safeguard actually established compliance with Article 5.1.

122. In its presentation to the Panel, the United States explained how the application of the line pipe safeguard satisfied the requirements of Article 5.1 and, in fact, was less than the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The Panel did not evaluate whether this analysis satisfied Article 5.1, first sentence. However, it did cite the analysis as rebuttal to Korea's argument that the line pipe safeguard would preclude any imports beyond the 9000 tons excluded from application of the supplemental duty.

123. Korea argues that "[t]o verify that the U.S. complied with such an explicit obligation, the Panel had to see if the *ex post facto* demonstration of the U.S. offered a *reasoned and adequate* explanation that the safeguard measure was limited to the necessary extent."[104] This argument

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Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury."); *US – Lamb Meat*, para. 166.

[101] ITC Report, p. I-28.

[102] ITC Report, I-29 - I-30.

[103] U.S. Second Written Submission, para. 107; ITC Report, Table 9, P. II-27.

[104] Korea's Appellant Submission, para. 163.

shows a misunderstanding of burdens of proof in WTO disputes. In *US – Wool Shirts*, the Appellate Body found that

> the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[105]

The Appellate Body expanded on the burden facing a defending party in *India – BOP*, stating:

> Assuming that the complaining party has successfully established a *prima facie* case of inconsistency with Article XVIII:11 and the Ad Note, the responding party may, in its defence, either rebut the evidence adduced in support of the inconsistency or invoke the proviso.[106]

124. Thus, the party defending against a *prima facie* case of inconsistency may rebut by asserting a defense *or* by disproving the evidence asserted for the *prima facie* case. Nothing suggests that the defending party must rebut the entirety of the *prima facie* case, for example, by proving that it complied fully with the cited obligation. The defending party successfully rebuts the case if it shows that the complaining party has failed to establish one element of the case, even if it does not rebut the others.

125. This is the approach taken by the Panel. Having found that the U.S. explanation rebutted Korea's argument on the likely effect of the safeguard measure and that Korea had, accordingly, failed to meet its burden of proof, the Panel was not required to address the U.S. explanation further.[107]

126. Korea has provided no sound basis to question this finding. In the first place, its arguments before the Panel on Article 5.1, first sentence, essentially disregarded the injury determination and data on the condition of the industry in the ITC report which, as the Panel found, provide the benchmark for application of a safeguard measure.[108] Consequently, few of its arguments are even relevant, leaving the United States little to rebut.

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[105] *Wool Shirts*, p. 14.

[106] *India – BOP*, para. 136.

[107] The Appellate Body found in *India – BOP* that "we do not find it objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States." *India – BOP*, para. 142.

[108] Panel Report, para. 7.266.

127. In any event, Korea's Appellant Submission does not prove any flaw in the U.S. explanation of compliance with Article 5.1, first sentence. Korea first argues that the explanation failed to take account of the fact that demand was improving rapidly.[109] It notes that the Panel found that the evidence relied on by the ITC did not support this characterization, but dismisses this finding as "counter-factual."[110] However, this conclusion by the Panel is factual and, therefore, the Appellate Body should not disturb the Panel's conclusion.[111]

128. Korea then argues that the U.S. explanation did not account for the effect of "operating leverage," a term describing the phenomenon that an increase in the production volume will decrease average cost of production because fixed costs are spread over a larger volume of output.[112] Thus, increased production volume may increase profitability even if prices remain unchanged. However, the U.S. explanation of compliance with Article 5.1, first sentence, indicated that the line pipe safeguard would result in an increase in the price for imports. Domestic producers could respond in three ways: (1) increase their prices by the same amount (sacrificing any increase in sales volume, and thus obtaining no benefits from operating leverage); (2) not increase prices (likely prompting an increase in sales volume, with accompanying benefits of operating leverage); (3) or some middle position.[113] These scenarios show that an operating leverage benefit that producers realized by increasing production after imposition of a safeguard measure would likely be counterbalanced by reducing their ability to raise prices and, accordingly, would have little or no effect.

129. Should the Appellate Body decide to consider this issue, it should note that Korea exaggerates the effect of operating leverage. Because raw material and direct labor are generally variable costs, the most significant contributors to operating leverage are the fixed portions of factory overhead and selling, general, and administrative expenses. Thus, the majority of average

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[109] Korea's Appellant Submission, para. 165.

[110] Korea's Appellant Submission, para. 167. Korea characterizes this as a "finding" of the ITC. The Panel in fact relied on the *evidence* that the ITC used in the remedy recommendation.

[111] *EC – Hormones (AB)*, para. 132 ("Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts."). We also note that relative to the 23 percent increase in demand from 1996 to 1997, and then a 37 percent decrease in the first half of 1999 as compared to the first half of 1998, 4 to 5 percent is clearly not "rapid." ITC Report, p. 2., Table 2.

[112] Korea's Appellant Submission, para. 169.

[113] U.S. Second Written Submission, para. 107.

unit costs were ultimately variable and, therefore, could not be directly influenced by changes in production volume.[114]

130. Korea also argues that the Panel should have considered the combined effect of operating leverage and the projected increased demand for line pipe in the oil and gas industry. Since we have shown that these individually would not have a significant effect, their combined effect would not change the result. Thus, the absence of these considerations does not affect the validity of the U.S. explanation of consistency with Article 5.1.

131. In sum, Korea has presented no basis to conclude that the Panel was required to evaluate whether the U.S. explanation demonstrated compliance with Article 5.1, first sentence. It has also provided no reason to question the results of that analysis. Accordingly, the Appellate Body should affirm the Panel's findings in this regard.

4. The Panel properly found that it could not draw any conclusions based on import statistics for the period following application of the line pipe safeguard.

132. The Panel concluded that, in evaluating compliance with Article 5.1, first sentence, it would be "speculative" to draw conclusions based on actual import data for the period following imposition of the line pipe safeguard. It explained that,

> [i]t is not certain that imports dropped to their actual level between March 2000 and February 2001 purely as a result of the line pipe measure. Other factors, such as unfavourable economic conditions causing a slow-down in demand, could have contributed to the decline in imports of line pipe.[115]

In short, the actual data did not reliably indicate the effect of the safeguard measure, so it could not support any conclusion regarding compliance with Article 5.1.

133. Korea continues to argue that "the actual outcome of the measure can be an effective test to assess the appropriateness of the level of restriction." It dismisses the Panel's concern about the effect of other factors on the grounds that it does not explain why Korea's share of imports decreased relative to other exporting Members.[116]

134. Korea cannot dismiss the Panel's concern so lightly. As the Panel recognized, there was no factual context within which to consider raw data for the period following application of the

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[114] ITC Report, p. II-28, Table 10.

[115] Panel Report, para. 7.104.

[116] Korea's Appellant Submission, paras. 177-178.

safeguard measure, such as the import statistics. In contrast to the extensive data covering the ITC investigation period, the Panel had very limited data for the period following application of the safeguard measures. Thus, it could not determine how much of the decrease was due to the safeguard measure, or if other factors were responsible.

135. Korea's argument regarding the decrease in its share of imports relative to other sources is simply irrelevant for purposes of the analysis under Article 5.1, first sentence, which deals with the extent of application of the measure in general. Nothing in the Safeguards Agreement guarantees supplying Members that a safeguard measure in the form of a tariff or TRQ will protect their historic share of imports. For a TRQ, Article XIII does require the allotment of the preferential in-quota duty rate on a historical basis. However, it does not restrict shipments at the out-of-quota rate causing deviations from the historical shares. Even Article 5.2(a), regarding allocation of a quantitative restriction among import sources, requires only the allotment of a share of the total quota equivalent to their share in a recent representative period. It does not guarantee that market conditions will permit them to fill the quota.

136. Finally, Korea criticizes the Panel for not making more vigorous requests for the ITC's economic analysis, and for not drawing adverse inferences when it did not receive those analyses. As the United States showed in its submissions, these analyses were not relevant to the Panel's evaluation of Korea's claims.[117] The Panel found that these documents were not necessary to its deliberations.[118] In this dispute, as in *US – Wheat Gluten* and *Canada – Aircraft*, there is no basis to find that the panel improperly exercised its discretion by failing to draw any inferences adverse to the U.S. position. The full *ensemble* of facts supports the Panel's conclusion. Korea has not even identified what facts supported a particular inference, indicated what what inferences the Panel should have drawn from those facts, or explained why the failure of the Panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU.[119] Korea has provided no basis to question the Panel's conclusion, and the Appellate Body should uphold it.

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[117] Letter from the United States to Chairman (23 April 2001).

[118] Panel Report, para. 7.11.

[119] *US – Wheat Gluten*, paras. 177-181.

IV. CONCLUSION

137. For the reasons set forth above, the United States asks the Appellate Body to reject each of the requests set forth in paragraph 181 of Korea's Appellant Submission.

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Dated: 7 December 2001