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

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

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

15 January 2002

1. Good morning Mr. Chairman, members of the Division. Thank you for this opportunity to present the views of the United States. Our oral statement today will address six points. However, I would like to begin with these general points. Korea repeatedly faults the Panel for failing to raise by itself arguments in favor of Korea's position, or against the U.S. position, that Korea never asserted. These tasks do not fall within a panel's duty under Article 11 of the DSU to make an objective assessment of the matter before it. Indeed, a panel would exceed the bounds of its authority were it to do so. To interpret the DSU to require that a panel do the work of one of the parties would be unfair to the panel and to the other parties, and would undermine the integrity of the panel system.

Articles 3.1 and 4.2(c) of the Safeguards Agreement – Serious Injury or Threat of Serious Injury

2. Let me begin with a fundamental point concerning the text of the Safeguards Agreement. The Panel found that the United States breached SGA Article 3.1. Article 3.1, last sentence, requires that competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The ITC's Report complied fully with this requirement. Both groups of USITC Commissioners making affirmative determinations fully explained their findings and conclusions. Korea has not contested this in its Appellee Submission.

3. The Panel failed to examine the ordinary meaning of Article 2.1. By requiring a discrete

determination of serious injury or threat, the Panel read into Article 2.1 a substantive requirement that does not exist in the Agreement. Such an interpretation of Article 2.1 is not supported by an analysis of the language of the Safeguards Agreement, considered in light of the Agreement's object and purpose.

4. Korea claims that the ordinary meaning of the word "or" in Article 2.1 is only exclusive. Korea's position on this point is completely at odds with accepted English usage. The word "or" is sometimes used *exclusively* to mean one or the other but not both, but is also used *inclusively* to mean at least one or the other and possibly both. We do not need to look far for examples of how the word "or" is used in the inclusive sense; it is used in this way in the very same sentence in Article 2.1 in which the contested reference to "cause or threaten to cause serious injury" appears. Korea admits this in its Appellee Submission.[1]

5. Requiring competent authorities to characterize affirmative determinations as being based exclusively on a finding of serious injury or on a finding of threat of serious injury serves no object or purpose of the Safeguards Agreement. It is important to note that neither GATT Article XIX nor the Safeguards Agreement make any distinction other than that noted below – in terms of the legal consequences – between a determination of serious injury or one of threat. It is clear that the Members believed that the existence of either present serious injury or threat would satisfy the injury requirement for the adoption of a safeguard measure. This is only logical, as the existence of serious injury is likely to follow a period in which threat of serious injury was evident.

[1] Korea's Appellee Submission, para. 18.

6. The Safeguards Agreement differentiates between serious injury and threat of serious injury in only two ways. One is the separate definitions for "*serious injury*"and "*threat of serious injury*" in Article 4.1. The other distinction is in Article 5.2(b), which precludes quota modulation in the case of threat of serious injury. Neither of these distinctions supports reading into the Safeguards Agreement a requirement that a Member choose only a finding of serious injury or threat.

7. Korea argued and the Panel found that a distinct characterization of serious injury or threat of serious injury is required because of the separate definitions of those terms in Article 4.1. Korea claims that there would have been no need for the drafters of the Safeguards Agreement to provide two separate definitions, if a distinct characterization of one or the other is not required.[2] This argument is unpersuasive. The Safeguards Agreement describes two variations of the same basic condition, separated by a temporal difference or degree of harm, and characterized by the same injury component, namely a "significant overall impairment" of the industry. Either variation of this condition satisfies the injury requirement for imposing a safeguard measure. The Appellate Body recognized the very close relationship between serious injury and threat in *U.S.-Lamb Meat*, where it explained that the use of the word "imminent," in the definition of threat, "implies that the anticipated 'serious injury' must be on the very verge of occurring," and that the word "clearly" is an "indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future."[3]

8. The Panel relied also on the first sentence of SGA Article 5.1. It reasoned that a discrete

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[2] Korea's Appellee Submission, para. 22.

[3] Appellate Body Report, para. 125.

finding of serious injury or threat is required because Article 5.1 specifies that a Member should "apply safeguard measures only to the extent necessary to prevent or remedy serious injury." The Panel was mistaken. In fact, Article 5.1 first sentence reinforces the overlap between serious injury and threat of serious injury in the Agreement. As we explained in our Appellant Submission, the text of Article 5.1 addresses serious injury in a generic fashion, without regard to whether the injury is current or imminent.[4]

9. "Serious injury" or a "threat of serious injury" are only broad characterizations. They do not provide the precise information that a Member needs to craft the appropriate measure, according to Article 5.1. It is the condition of the relevant industry and its need for adjustment that establish the benchmark by which a Member determines the nature of the safeguard measure that is required. This condition, and the need for remedy or adjustment, are not measured according to whether "serious injury" or a "threat of serious injury" exist. Rather, a Member ascertains the condition of the industry through an analysis of the factors enumerated in Article 4.2(a). The factors that are analyzed are the same regardless of whether the analysis leads to a conclusion of serious injury or threat thereof. Korea's argument that "the enumerated factors cannot be the same between serious injury and the threat of serious injury" is simply disingenuous and completely at odds with the plain language of Article 4.2(a).[5]

10. To sum up, the Safeguards Agreement does not require that competent authorities characterize their determination as solely present serious injury or primarily threat of serious injury. An affirmative determination satisfies the Agreement as long as the competent authorities

[4] U.S. Appellant Submission, para. 41.

[5] Korea's Appellee Submission, paras. 24-25.

properly evaluate the relevant Article 4.2 factors and explain their findings and reasoned conclusions in accordance with Articles 3.1 and Articles 4.2(c). The ITC did so in this case.

Article 4.2(b) of the Safeguards Agreement – Causation

11. As an initial matter, the United States agrees with the Panel that the Appellate Body Reports in *Wheat Gluten* and *Lamb Meat* provide useful guidance for this case. However, the Panel in this case simply rejected the United States' injury analysis out of hand without examining the specific factual findings and conclusions contained in the ITC's determination. As we have shown in our Appellant submission, the Panel essentially presumed that the ITC's application of its "substantial cause" test automatically precluded the ITC from also assuring that it did not attribute injury caused by other factors to the increased imports. The Panel was wrong in its presumption that the ITC substantial cause analysis and a non-attribution analysis are mutually exclusive.

12. This point is best illustrated by the detailed causation examination the ITC conducted in the *Line Pipe* determination. The ITC both conducted the comparative injury analysis of the substantial cause test and distinguished the effects of other factors to assure that it did not attribute injury caused by other factors to the increased imports, as required by the Safeguards Agreement. Unfortunately, the Panel presupposed that the ITC could not possibly have conducted an analysis consistent with Article 4.2(b), and failed to examine the analysis, findings and conclusions actually made by the ITC in this case.

13. Korea claims that the Panel "fully assessed the causation analysis of the US-ITC and

concluded that it failed to meet the requirements of Article 4.2(b)".[6] Yet, to support this argument, Korea cites only to the summary conclusions made by the Panel at paragraphs 7.287-7.290 of its Report.

14. We described in our Appellant submission why the Appellate Body does not have a sufficient foundation to conduct the analysis that the Panel should have performed. If the Appellate Body decides to complete the examination, it should do so based on the ITC's pertinent findings and associated analysis, which are summarized by the United States in Appendix A of its Appellant submission. This presentation is not, as Korea contends, an *ex post facto* finding. Rather, it relies exclusively on the findings and conclusions that the ITC reached in its determination, as noted in the citations that accompany the United States discussions on this issue.

15. The EC states that the United States is not capable of pointing to a single element in the ITC Report showing that the ITC did not attribute injury caused by other factors to the increased imports.[7] This assertion is simply untrue. Indeed, the United States explained in its submissions to the Panel how the ITC Report met the non-attribution requirements of Article 4.2(b) within the framework set out in *Wheat Gluten* and *Lamb Meat*. Footnote 56 of our Appellant submission lists the portions of the written submissions where the United States pointed out exactly the analysis that the EC claims is lacking.

16. Korea and the EC appear to contend that, without using the precise non-attribution

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[6] Appellee Submission of Korea, para. 48 (7 December 2001) ("Korea's Appellee Submission").

[7] Third Participant Submission of the European Communities, para. 62 (14 December 2001) ("EC Third Participant Submission").

language contained in the Agreement, a competent authority cannot possibly comply with Article 4.2(b). However, the key question in examining consistency with the provisions of the Agreement is whether a Member's actions are consistent, not whether it parrots the words of the Agreement. Here, the United States clearly distinguished the demand-based effects of the oil and natural gas declines from the price-based effects of the increased line pipe imports, satisfying the substantive requirements.

17. Furthermore, the ITC did specifically state that it was not attributing injury caused by "other" factors to the increased imports.[8] Yet, Korea accuses the ITC of being "disingenuous" in citing to this statement. As discussed in the U.S. submissions to the Panel, the ITC's non-attribution findings were supported by its analysis, and the finding of non-attribution was not confined to a "passing passage."

18. The Panel found support for its conclusion in that the "ITC immediately determines whether there is a link between the increased imports and the serious injury, without first attempting to separate out injury that is being caused by other factors." [9] Even if this characterization of the ITC's analysis is accurate, it does not support the Panel's conclusion. Moreover, the Panel's view erroneously assumes that Article 4.2 constrains the sequence in which competent authorities conduct their causation analyses.

19. Korea and the EC respond that "logically" the separation of other factors must precede a

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[8] *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Publication 3261, p. I-30 (December 1999) ("ITC Report").

[9] *United States – Definitive Safeguard Measures on Imports of Circular Welded carbon Quality Line Pipe from Korea*, WT/DS202/R, para. 7.289 (19 October 2001) ("Panel Report").

finding of a causal link between the imports and injury.[10] They argue that the Appellate Body Reports in *Wheat Gluten* and *Lamb Meat* mandate such a sequence. However, the pertinent language from those Reports teaches only that the final identification of the injurious effects caused by increased imports must follow the separation of the effects from different causal factors. Nothing in the Agreement or in the relevant Appellate Body Reports precludes a Member from making an initial inquiry into the existence of a causal link between the imports and the injury before proceeding further with the causation analysis. As the Appellate Body has explained in both *Wheat Gluten* and *Lamb Meat*, the Safeguards Agreement does not require competent authorities to conduct their causation analyses under any particular methodology or in a specified order.[11]

20. To the very limited extent the Panel even addressed the actual findings in this case, the Panel noted the ITC analyzed the decline in the oil and gas industry. The Panel's cursory discussion, however, fails to even acknowledge the ITC's extensive discussion of the differences in the effects of that factor and those of the increased line pipe imports. Rather, having prejudged that the ITC's examination of relative injury could not possibly satisfy the requirements of Article 4.2(b), the Panel summarily concluded that "the ITC's analysis provides no insight into the nature and extent of the injury caused by the decline in the oil and gas industry."

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[10] Korea's Appellee Submission, paras. 56-58, EC Third Participant Submission, paras. 77-78.

[11] *United States – Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia*, WT/DS178/AB/R, para. 181, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 69 ("*Wheat Gluten*").

21. The EC faults the United States for proposing no other approach or order which would satisfy the goal of Article 4.2(b).[12] The EC overlooks that the United States has shown that its analysis did meet those requirements. Moreover, it is not the United States' burden to show that a different analysis would also have satisfied its obligations.

22. Finally, we note that the disagreement among the parties as to the findings of fact on this issue reinforces our view that there are not sufficient factual findings or undisputed facts to allow the Appellate Body to complete the causation analysis. If the Appellate Body believes it is in a position to undertake such an analysis, the United States satisfied its obligations not to attribute effects of other factors to the increased imports.

Article XXIV of GATT 1994

23. We will now move to our third point, the question of whether Members may exclude their FTA partners from safeguard measures. The answer, to the United States, is obvious. This Body, the WTO, and GATT before it have recognized that Article XXIV of GATT 1994 allows Members to exclude free trade agreement ("FTA") partners from trade measures that would otherwise have to be applied on an MFN or nondiscriminatory basis. This principle applies equally to safeguard measures under Article XIX of GATT 1994. The text of GATT 1994 and interpretations of that text by panels and the Appellate Body all support this conclusion. Korea and the EC have provided absolutely no basis to believe otherwise.

24. In accordance with the customary rules of interpretation of treaties, I will begin with the text. Article XXIV:8(b) defines an FTA as a group of customs territories in which "duties and

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[12] EC Third Participant Submission, para. 80.

other restrictive regulations of commerce . . . are eliminated on substantially all trade between the constituent territories." The paragraph contains an exception, "where necessary," for measures permitted under Articles XI, XII, XIII, XV, and XX of GATT 1994. The omission of Article XIX from this list indicates that WTO Members that are parties to an FTA may exclude safeguard measures among themselves.

25. The object and purpose of the Articles confirm this interpretation. The object of Article XXIV, as established in Article XXIV:4, is to "increas[e] freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements." The elimination of safeguard measures between such parties clearly advances this purpose. The purpose of Article XIX is to allow Members to suspend their concessions or obligations under GATT 1994 when necessary to prevent or remedy serious injury to a domestic industry. This goal does not in any way conflict with the goals of Article XXIV. Indeed, considering them in conjunction would suggest that FTA partners may be excluded from safeguard measures.

26. Korea and the EC both argue that the Panel should have analyzed the facts of this case in the same way as did the panel and Appellate Body in *Turkey – Textiles*. They have failed to recognize the significant differences between these disputes. In *Turkey – Textiles*, Turkey introduced new textile quotas selectively on other WTO Members when it formed a customs union with the EC. These restrictions were inconsistent with procedural and substantive obligations under the Agreement on Textiles and Clothing and Articles XI and XIII of GATT 1994. Turkey asserted Article XXIV not only as a defense to its exclusion of the EC from these measures, but also as a defense to other procedural and substantive inconsistencies with WTO

rules. Turkey did not (and could not) assert that these measures by themselves did anything other than increase trade restrictions on non-members of its customs union. Rather, it defended them on the basis that they were necessary to obtain EU acquiescence to one element of the trade liberalization program that created the customs union.

27. The NAFTA safeguard exclusion presents a different situation. When the NAFTA parties agreed to the NAFTA safeguard exclusion, they did not increase the likelihood that other WTO Members would be subjected to safeguard measures nor did they agree that safeguard measures on non-Members would be more stringent than they would otherwise be. They merely ensured that when safeguard measures were applicable to WTO Members, they would apply to NAFTA partners only in certain predetermined specific situations. In this appeal, the United States asserts only that Article XXIV permits it to exclude Canada and Mexico from certain safeguard measures. We do not assert, as Turkey did, that Article XXIV grants a blanket exemption from all WTO disciplines for measures introduced upon formation of an FTA.

Article 5.1 of the Safeguard Agreement

28. We will now move on to our fourth point. The Panel followed the Appellate Body's finding in *Korea – Dairy* that a Member need not explain, at the time of taking a safeguard measure, how that measure conforms to the first sentence of Article 5.1. In so doing, the Panel and the Appellate Body have simply recognized that the Safeguards Agreement places Article 5.1, first sentence, on the same footing as most other WTO obligations – a Member bears no duty to explain its compliance with the obligation at the time it adopts the measure. Rather, the Member may be called upon to explain the compliance of its measure in the context of dispute settlement if another Member puts forth a *prima facie* case that the measure is inconsistent with

the obligation.

29. Korea and the EC do not cite any authority to the contrary. Instead, they argue that an explanation at the time of taking a safeguard measure is necessary to evaluate the Member's conformity with the substantive obligations under Article 5.1. However, they provide no textual basis to conclude that an explanation at the time of taking a safeguard measure is an obligation under the Safeguards Agreement. Rather, Korea and the EC are essentially making a policy argument as to what they believe would be a better or more convenient approach from the perspective of Members subject to safeguard measures. That question, however, is a question for Members, and not the function of dispute settlement.

30. The EC argues that this obligation arises from the Article 3.1 obligation that the competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of law and fact." First, Korea did not make a claim under Article 3.1 with regard to Article 5.1,[13] and the Panel accordingly did not make any finding regarding compliance with that Article. Therefore, compliance with Article 3.1 is not an issue properly before the Appellate Body.

31. Even if this issue were properly the subject of this appeal, the EC's proposed interpretation disregards the ordinary meaning of the provision and its context. Article 3.1 addresses the investigation by the competent authorities. Article 4.2 establishes the subject of this investigation – the serious injury caused by increased imports. The "conclusions" that under Article 3.1 must be set forth in the report can, therefore, only be those conclusions related to the

[13] Panel Report, para. 7.126.

competent authorities' determination of serious injury, and not the subsequent decision by the Member itself whether and to what extent to apply a safeguard. Thus, Article 3.1 does not support the conclusion that a Member (or its competent authorities) must explain compliance with Article 5.1 at the time of taking a safeguard measure.

32. In closing, we note that in *Korea – Dairy*, the panel stated:

> [I]t must be possible for a Panel to evaluate, in accordance with the applicable standard of review, whether a Member has acted in compliance with Article 5.1. Therefore, the Member applying *the measure must provide a reasoned explanation* as to how the authorities reached the conclusion that the particular measure in question satisfies all the requirements of Article 5.1.[14]

This is exactly the argument that Korea raised in its submission. But the Appellate Body rejected this conclusion when it found that the first sentence of Article 5.1 does *not* require such an explanation. Korea has not provided any reason for the Appellate Body to take a contrary position in this appeal and, accordingly, Korea's appeal should be rejected.

Articles 12.3 and 8.1 of the Safeguards Agreement

33. I will now move on to our fourth point, the adequacy of consultations under Article 12.3. Korea has provided no factual basis that would suggest that the United States failed to satisfy the Article 12.3 obligation to provide an adequate opportunity for prior consultations. Korea asserts that the issuance of a press release on 11 February 2000 announcing the form and timetable of the line pipe safeguard "removed any possibility to have a meaningful consultation."[15] However, *Korea*'s pessimism about the usefulness of consultations simply does not amount to a failure by the *United States* to act consistently with WTO obligations. Moreover, that pessimism had no

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[14] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 94 (14 December 1999), *quoting Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, para. 7.101 (21 June 1999).

[15] Korea's Appellee Submission, para. 94.

grounding in fact. Even after the issuance of the press release and signature of the proclamation specifying the terms of the safeguard measure, the United States was fully able to engage in consultations under Article 12.3 and take action with regard to those consultations. Since Korea never attempted to hold such consultations, its assertions that they could not be meaningful are pure speculation, and cannot create a *prima facie* case of a breach of the Safeguards Agreement.

34. The text of Article 12.3 states:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations . . . with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the object set out in paragraph 1 of Article 8.

In *Wheat Gluten*, the Appellate Body explained that:

> In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified.[16]

35. It is clear that Korea had this opportunity. The U.S. Article 12.1(b) notification provided much of the information described in Article 12.2, and Korea had an opportunity to review it during the January consultations. The two-and-one-half weeks between issuance of the press release and the effective date of the safeguard measure provided ample time to discuss the other issues.

36. Korea's stated reasons for finding this opportunity inadequate do not make sense. It argues that the press release on 11 February described a decision already taken, making it "a command for all the related authorities in the U.S. government." This is plainly incorrect. The

[16] *Wheat Gluten*, para. 136.

press release had no legal force or effect. It merely announced what the President intended to do – exactly the information that Korea claimed it needed. Of equal importance, the press release on 11 February and proclamation of 18 February did not, as Korea argues, foreclose adjustment to the safeguard. The proclamation could be revised up until signature by the President, and, amended, at least up through the 1 March 2000 effective date, by a subsequent proclamation. Therefore, Korea errs in arguing that the 11 February press release terminated the opportunity for meaningful consultation.

37. Korea also argues that it is simply too small a trading partner to expect to convince the United States to modify a trade measure already announced by the President. (It was, in fact, the largest source of imported line pipe.) There is no textual basis in the Safeguards Agreement for Korea's "too small" argument. Furthermore, this is inconsistent with the record, and with common sense. The United States offered Korea numerous opportunities to make its views known – in the proceedings before the ITC, in the January consultations, and in subsequent consultations that Korea could have, but failed to, request. Thus, Korea had no reason to expect that expressing its views would prove fruitless. In fact, if consultations revealed a genuine legal deficiency in the safeguard measure, the United States had both the ability and the incentive to correct any deficiency quickly, regardless of the size of the country that identified the problem. In addition, the obligation is to provide an adequate opportunity for prior consultations. Contrary to Korea's implication, a Member bears no obligation to change a measure if asked.

38. Korea also contends that there was not time between issuance of the press release and the effective date of the safeguard to provide "sufficient and satisfactory opportunity" to achieve the objective of Article 8.1, "to maintain a substantially equivalent level of concessions and other

obligations to that existing under GATT 1994."[17] As we observed to the Panel, the press release provided both the information and the time needed for compliance with Article 12.3,[18] which covers the objective of Article 8.1. The Appellate Body indicated in *Wheat Gluten* that to achieve this objective, an exporting Member must be able to assess accurately the likely impact of the measure being contemplated and to consult adequately on overall equivalent concessions.[19] These tasks will not require substantial time, especially if the exporting party has prepared in advance. In addition, compensation (or retaliation) are separate measures that do not require changes to the safeguard measure itself. Consultations on these topics may continue after the measure takes effect. Therefore, Korea's stated concerns about U.S. openness to revising the safeguard measure announced in the press release should not have discouraged it from consulting over maintaining the balance of concessions and obligations.

39. In closing, we note that Korea's entire argument rests on a procedural formality – that it received the information in the press release directly, rather than through an Article 12.1(c) notification. Had the United States provided that notification on 11 February 2000, rather than 12 days later, Korea's ability to have meaningful consultations would not have changed in the slightest.

Article 9.1 of the Safeguards Agreement

40. We now move to our fifth and final point. Korea is equally incorrect in its analysis of the obligations under Article 9.1 of the Safeguards Agreement. Specifically exempting all Members

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[17] Korea's Appellee Submission, para. 98.

[18] Appellant Submission of the United States, para. 238 (20 November 2001).

[19] *Wheat Gluten*, para. 141.

from a safeguard measure simply does not equate to applying that measure to a specific Member or Members. Korea's arguments on this point are self-contradictory. On the one hand, it argues that under the U.S. exemption of a Member's imports from the 19 percent line pipe tariff, which occurred for all imports from developing country Members, a safeguard measure was "applied". On the other hand, it argues that under an exclusion of developing countries by name, a safeguard measure would not be "applied". In fact, the two situations are equivalent.

41. The terms of Article 9.1 make this especially clear. As Korea recognizes, the developing country exclusion applies only as long as a Member's imports account for less than three percent of total imports. Thus, even after excluding a developing country by name, a Member could include that country if it exceeded the three percent threshold. The only difference between this sequence of events and the line pipe safeguard measure is that the line pipe safeguard measure automatically applies to imports that exceed the threshold. In both cases, the measure is not applied to imports from countries that account for less than three percent of imports, and is applied when imports from those same countries exceed the threshold. Thus, the possibility of applying a safeguard measure in the future, which exists even for developing country Members that are excluded by name, is not the same as actually applying a safeguard measure in the present. Accordingly, the Panel erred in treating the *possibility* of application of a safeguard measure, under conditions that the Panel recognized as improbable, as the *actual* application of a measure.

42. In fact, an approach like the one used by the United States will often be more favorable to developing country exporters than the approach advocated by Korea. In Korea's view, if the U.S. safeguard measure was a tariff without any exemptions, the United States could include

developing countries by name if their imports accounted for more than three percent of the total. But under the U.S. approach, a fixed exclusion for all countries would allow even those developing country Members that historically accounted for more than three percent of total imports to have some tariff-free access to the U.S. market. In fact, the *Line Pipe* investigation indicated that both South Africa and Turkey accounted for more than three percent of imports at points during the investigation period.[20]

Conclusion

43. In summary, Mr. Chairman, for the reasons we have just stated as well as those in our written submissions, the Appellate Body should uphold the Panel's findings that the United States permissibly excluded Canada and Mexico from the line pipe safeguard and that a Member is not obligated to explain the consistency of a safeguard measure with Article 5.1 at the time of taking the measure. The Appellate Body should reverse the Panel's findings that the ITC failed to establish the causal link between increased imports and serious injury under Article 4.2(b); that the United States did not provide an adequate opportunity for prior consultations pursuant to Article 12.3, that a Member must make a specific finding of either serious injury or threat of serious injury, and that the United States applied its safeguard measure to imports from developing country Members that accounted for less than three percent of total imports.

[20] ITC Report, Table 3, p. II-16.