

ANNEX B

Parties' Answers to Written Questions

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ANNEX B-1

KOREA'S ANSWERS TO QUESTIONS FROM THE PANEL

(7 May 2001)

I. INTRODUCTION

Before responding to the Panel's questions, Korea would like to take the opportunity to note that on 1 May 2001, the Appellate Body released its decision in *US – Lamb Meat*. In Korea's opinion, that decision is quite helpful in evaluating the issues before the Panel in this proceeding. Due to the time constraints, Korea has not incorporated an analysis of that decision in its response to the questions posed by the Panel, although Korea believes that its positions are consistent with the views expressed by the Appellate Body. Korea has attempted, where possible, to incorporate references to the Appellate Body's decision in its Written Rebuttal, and Korea welcomes the opportunity to more fully explore the implications of this decision at the next session of the Panel.

(i) Increased imports

3. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia “recent enough.” (a) How “recent” should the increase in imports be, relative to the date of the competent authority’s decision to impose a safeguard measure? (b) What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? (c) In the present case, could the US line pipe industry have filed a petition before it did? Please explain. (d) Could the ITC have reached its determination before it did? Please explain.

Answer

(a) How recent?

It is the position of Korea that the “recent” increase in import levels should be in the period immediately preceding the authority's decision. From this it can be concluded that the last one-year period is the “recent period” and a decline in the interim six-month period would constitute the most relevant evidence in the recent period.¹

Korea's interpretation proceeds from the Appellate Body's admonition in *Argentina – Footwear* and *Korea – Dairy* that safeguard measures are reserved for emergency situations and thus the requirements of the SA must be construed strictly.² Only a conservative approach to the question

¹ A one-year period should be sufficient to evaluate whether a downward trend in imports (following an increase) is sustained such that imports are not “being imported ... in such increased quantities.” See Article 2.1 of the SA.

² See *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R (“*Argentina – Footwear (AB)*”) at para. 94 (“construing the prerequisites ... extraordinary nature must be taken into account.”).

of the “recent period” can ensure that the increase in imports is “recent enough” to satisfy the requirements of Article 2.1 of the SA.³

The concept of “recent” is crucial to the gravamen of Article XIX of the GATT 1994 and the SA. The purpose of import measures under Article XIX and the SA is to remedy present or imminent serious injury – not past injury.

In this case, the legal implications of the texts of Article XIX of the GATT 1994 and of Articles 2.1 and 4.2(a) of the SA, read together with the interpretations of the Appellate Body in *Argentina – Footwear*, are as follows:

- (a) “[I]s being imported ... in such increased quantities” refers to at the time the authority makes its decision. Here, the “recent” period is characterized by a sustained decline in absolute import levels which commenced in the second half of 1998 and continued through the end of the period of investigation, coupled with the decline in the level of imports relative to production in the six-month period immediately proceeding the ITC’s decision. That was the present.
- (b) It is not proper to analyze imports in 1999 by referring only to the same period one year earlier and ignoring the immediately preceding six months. Article 4.2(a) of the SA requires the consideration of all relevant factors concerning increased imports--including the “rate and amount.”⁴
- (c) Specifically, given the finding of the Appellate Body in *Argentina – Footwear* (“recent imports ... not simply trends ... during any other period of several years”),⁵ the determination of what is “recent” cannot be several years. “Recent imports” are those that occurred in the last year of the period with the most recent trends being the most significant trends.

(b) Minimum time

Korea does not know the minimum time an industry would need to file a petition; likely, this would vary from case to case. However, the petition not only must demonstrate that imports were increasing, it also must satisfy all of the other conditions of Article 2 of the SA. Thus, it must show that the industry is significantly impaired (“seriously injured”) or that serious injury is imminent and that the increase in imports is causally related to the serious injury of the industry. In this case, the petition was filed in June of 1999. By that time, imports had been declining for a 12-month period, two new US producers had emerged, and domestic capacity had increased by 25 per cent.⁶

³ See e.g., *Argentina – Footwear (AB)* at para. 130 (“... the use of the present tense of the verb phase ‘is being imported’ in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary ... to examine recent imports. ... the phrase ‘is being imported’ implies that the increase in imports must have been sudden and recent.”); see also para. 131.

⁴ We do not have information on the amount of the relative decline in imports because it is confidential, but the United States permits the Panel (First Substantive Meeting) to do its own calculations of relative import trends. Given that US domestic production increased in the first half of 1999 (ITC Determination, Staff Report at II-20) and imports declined in the first half of 1999 (US 16 February Letter), imports declined relative to domestic production in the first half of 1999.

⁵ *Argentina – Footwear (AB)* at para. 130 (emphasis added).

⁶ See ITC Determination, Separate Views on Injury at I-46; ITC Determination, Dissenting Views on Injury at I-61, n.26; Exhibit 48A (Welded Line Pipe – Domestic Industry Capacity, Apparent Consumption and Export Shipments)(KOR-48A).

(c) When the petition could have been filed

With respect to whether the US line pipe industry could have filed a petition before it did, this question highlights the temporary nature of the decline in the line pipe industry factors. It also confirms that there was no coincidence of trends between increased imports and declining industry economic indicators and that import relief therefore was improper. When imports were increasing (first half 1998), industry indicators were uniformly and strongly positive. In fact, many indicators exceeded 1997 levels.⁷ The industry was not suffering serious injury and imports were increasing together with domestic shipments. When those industry indicators declined in late 1998/first half 1999, so did imports. Then, after the first half of 1999, the industry indicators had already improved so any injury was no longer present at the end of the period.⁸ Some illustrative scenarios can be posed:

- (a) Instead of filing in June 1999, when subject imports had declined for 12 months, the industry could have filed in June 1998. Imports measured at that time would have shown an increase, but the domestic industry would have shown sustained and unprecedented growth, making an affirmative serious injury decision impossible.
- (b) The industry could have filed after June of 1999, but the recovery of the industry would have been even more apparent than it already was. The US industry had to “rush to file” the case⁹ due to the very temporary nature of the industry’s downturn and the 12-month reversal of import trends in the second half of 1998 through the first half of 1999.

Although the US industry could have filed the petition earlier or later than they did, it actually does not matter in this case since the performance of the line pipe industry was dependent on demand in the oil and gas sector, not imports.

(d) Could the ITC have reached its determination before it did?

The Petition was filed on 30 June 1999 and the ITC’s decision on injury was reached in October. Thus, there was only a three-month period between the filing of the petition and the decision of the ITC. The industry chose to file when it did even though the industry understood that its performance depended on the recovery of demand in the oil and gas sector and, thus, was tied to rising oil and gas prices and increased drilling activity. The industry’s rebound was apparent before June 1999.¹⁰ Oil prices began to recover after the first quarter of 1999¹¹, and the rig count recovered shortly thereafter.¹² The trends observed after the petition was filed confirmed that these trends would be sustained.¹³ If there was any doubt in that regard, the ITC could have taken additional time to

⁷ See Exhibit 48A (KOR-48A); Exhibit 48F (Average Monthly US Shipments of Line Pipe) (KOR-48F).

⁸ See generally Korea’s First Written Submission paras. 252-62; Exhibit 48D (The Status Of The US Line Pipe Industry At The “Very End Of The Period”)(KOR- 48D).

⁹ See Preston Pipe & Tube Report, United States & Canada, Vol. 17, No. 6 (June 1999) at 1 (KOR-47).

¹⁰ See ITC Determination, Staff Report, Figure 3 at II-46 (KOR-6).

¹¹ See id.

¹² See Exhibit 48B (Comparison of US Rotary Rigs in Operation with Domestic Shipments of Welded Line Pipe and Welded OCTG)(KOR-48B).

¹³ “Natural gas and oil prices have increased since early 1999 ... and hence increased demand for line pipe.” ITC Determination, Majority Views on Remedy at I-76-77 (KOR-6); “We note in this regard that natural gas and crude oil prices have increased since early 1999 and, consequently, drilling and production activity, as measured by the active rotary rig count, has improved.” Id. at I-80. See also ITC Determination, Bragg and Askey Views on Remedy at I-91 (KOR-6) (“Commissioner Askey also notes that the recent upturn in

review the case, including collecting an additional period of data. Given the extraordinary nature of this remedy, it would have been appropriate to do so if the ITC had any doubts whether the decline in imports and/or the recovery of the industry were sustained.

4. Please comment on the US assertion that “Korea has failed to show, as a matter of law, that the period it proposed for assessing increased imports is mandated by the Safeguards Agreement or by the Appellate Body and panel decisions interpreting the Agreement.” (para. 83, first US written submission)

Answer

Please see Korea’s First Written Submission and Oral Statement, which establish that there is a very specific legal requirement regarding the proper period. Specifically, in *Argentina – Footwear*, the Appellate Body stressed that, when examining the question of increased imports:

- (a) “[T]he relevant investigation period should not only end in the very recent past, the investigation period should be the recent past.”¹⁴
- (b) “. . . the use of the present tense of the verb phrase ‘is being imported’ in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years--or, for that matter, during any other period of several years.”¹⁵
- (c) “[T]he increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause ‘serious injury.’”¹⁶

The Appellate Body clearly was establishing a requirement as a “matter of law” regarding what period and what increase must be shown. Unequivocally, “recent” cannot mean a period of “several years.” Thus, the recent period, as a matter of law, is, at most, the last year of the period. The most recent data available is the most relevant--the six-month interim period, in this case.

The Appellate Body set the appropriate legal standard for increased imports in every case, not just for the facts presented in *Argentina – Footwear*. Paragraphs 129-131 of the Appellate Body’s decision demonstrate that the Appellate Body upheld the Panel’s conclusion that Argentina had not met the requirement of “increased imports,” but rejected the narrow grounds of the Panel’s determination and explained the proper legal basis for the analysis. The need for such a precise legal standard was justified by the Appellate Body on the grounds that Article XIX of the GATT 1994 is an extraordinary remedy dealing with fair trade, so “when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.”¹⁷ Clearly, it is the view of the Appellate Body that the extraordinary nature of Article XIX of the GATT 1994, dealing with “emergency action,” informs the interpretation of all of the provisions of Article XIX and the SA.¹⁸

the oil and gas industries, the line pipe industry’s principal customers, should assist the domestic industry in its efforts to respond to competition from imports.”).

¹⁴ See *Argentina – Footwear (AB)* at para. 130, n.130 (emphasis in original).

¹⁵ *Id.* at para. 130 (emphasis added).

¹⁶ *Id.* at para. 131.

¹⁷ *Id.* at para. 94.

¹⁸ *Id.* at para. 93.

(ii) **Serious injury**

5. At para. 214 of its first written submission, Korea refers to alleged violations of inter alia SA Article 4.2(c). In the title to section IV.B.3, however, Korea refers to SA Article 4 more generally. With regard to SA Article 4, do the claims set forth in section IV.B.3(b) – (e) only relate to paragraph 2(c) of that provision? If not, please explain which claim (in section IV.B.3) relates to which element of SA Article 4.

Answer

The claims made in Korea's First Written Submission with respect to Article 4 of the SA are not limited to Article 4.2(c). We apologize for any lack of clarity.

Korea's claims with respect to Article 4 of the SA encompass Articles 4.1(a), (b) and (c), and 4.2(a), (b) and (c). Specifically:

- (a) Korea's claims at paragraphs 214-224 are based on Articles 3.1 and 4.2(c) of the SA and Article 11 of the DSU.
- (b) Korea's claim at paragraph 225 is based on the preamble to the SA ("Emergency Action"), Article 11 of the SA and Article XIX of the GATT 1994.
- (c) Korea's claims at paragraphs 226-244 are based on Articles 4.1(c) (definition of "domestic industry") and 4.2(a) of the SA (as indicated in paragraph 226), as well as Articles 4.2(a) and 4.2(b) of the SA with respect to the need to evaluate "all relevant factors" and to isolate the effects of "other factors" causing injury.
- (d) Korea's claims at paragraphs 245-262 relate to the requirement to demonstrate serious injury, "significant overall impairment," in accordance with Articles 2.1, 4.1(a) and 4.2(a) of the SA.
- (e) Korea's claims at paragraphs 312-317 related to the requirement to demonstrate "threat of serious injury" in accordance with Article 4.1(b), 4.1(c) and 4.2(a).

These constitute Korea's claims of the US violations.

(iii) **The measure**

6. Article 5.1 of the Safeguards Agreement refers to quantitative restrictions that "reduce the quantity of imports below the level of a recent period" (a) Does a TRQ reduce the quantity of imports? Please explain. (b) If the second sentence of Article 5.1 is applicable to TRQs, why would a Member impose a TRQ instead of a simple quota?

Answer

- (a) Yes, a TRQ does restrict the quantity of imports.¹⁹ The distinction between a TRQ and an absolute quota is a difference of degree not kind. This question may best be addressed by referring to the ITC Majority's recommendation of a TRQ. A TRQ was recommended to reduce imports to a certain level unless purchasers sought specialty products not produced in the United States.²⁰ Following the requirement of

¹⁹ See also Response to Question 9.

²⁰ See ITC Determination, Majority Views on Remedy at I-81 (KOR-6).

Article 5.1 of the SA, the ITC Majority recommended a TRQ with a quota element of 151,124 tons, which the Majority states would be “approximately equivalent to the average level of imports in 1996-98.”²¹ The 30 per cent tariff was expected to “discourage” additional imports.²² The ITC concluded that restricting imports to this level would restore the industry to a “reasonable level of profitability.”²³ Thus, a TRQ also reduces the quantity of imports.

- (b) Concerning why a Member would impose a TRQ instead of a quota, we again refer to the ITC and the fact that the distinction between a TRQ and absolute quota is one of degree not kind. The ITC rejected a straight quota because it could severely restrict or eliminate imports of several specialty grades, where US demand had been “satisfied primarily by imports.”²⁴ Thus, a Member might want to impose a TRQ when it wants a less restrictive measure than a straight quota but still wants to restrict quantities.

7. Korea’s claim that the Line Pipe measure violates GATT Article XIX.1 and SA Article 5.1 because it is excessive appears to be based on its argument that the measure is more restrictive of imports than the ITC recommendation. How would Korea demonstrate that the Line Pipe measure is more restrictive than the ITC recommendation, taking into account all aspects of the measure and recommendation?

Answer

Korea’s claims regarding the violations of Article XIX.1 of the GATT 1994 and Article 5.1 of the SA are not based exclusively on the argument that the measure is more restrictive than the ITC recommendation. First, the United States violated the requirements in Article 5.1 that quantitative restrictions should not reduce imports below the level of the last three representative years unless clearly justified. Second, the United States is obligated by Article 5.1 to make explicit findings in their decision that the measure is “necessary” regardless of the form of the measure. Korea does not agree with the US interpretation of *Korea – Dairy* and, in any event, Articles 3.1 and 4.2(c) of the SA require the same explicit findings. Third, in this case, the analytical basis for the President’s remedy directly put into question whether the level of relief was more than necessary so the President had an obligation to address the issue. Article 5.1 places an affirmative obligation on the United States to ensure that the measure is limited to the extent necessary. The United States has produced no evidence to demonstrate that it complied with that obligation. These issues all relate to the amount of import relief imposed. Article 5.1 also requires that the form of the measure be the most suitable to achieve the objectives to prevent or remedy injury and facilitate adjustment. The United States also did not demonstrate that the form of the measure best met the objectives of Article 5.1, and therefore, is in violation of Article 5.1.

To answer the Panel’s question, there is *prima facie* evidence that the measure was excessive based on the ITC Majority’s conclusions regarding both the level of relief that is “necessary” and the level of relief which would be “excessive.” The ITC Majority concluded that limiting imports to 151,124 tons at normal bound rates of duty would allow the industry to recover from serious injury. The ITC also considered that the 30 per cent duty level would “discourage” any imports except for certain specialty products.²⁵ Therefore, the ITC viewed its remedy recommendation, in its totality (quota plus duty), as an import restriction at the approximate level of 151,124 tons.

²¹ *Id.* at I-82.

²² *Id.* at I-81.

²³ *Id.*

²⁴ *Id.* at I-80.

²⁵ *Id.* at I-81.

The ITC Majority also concluded that market participation of imports at only 105,849 tons “would be excessive.”²⁶ These conclusions were based on the findings in the ITC’s Economic Memoranda which the United States had previously implied were the basis for the President’s measure as well.

Neither Korea nor the Panel has the entire Economic Memoranda, so neither Korea nor the Panel knows the projected level of imports with a 9,000-ton quota and a 19 per cent tariff. Further, neither Korea nor the Panel knows: (i) whether the United States analyzed the projected level of imports under the TRQ measure actually imposed; or (ii) if it did, the results of the analysis. Further, it appears from the US Letter of 23 April that we will never know.²⁷

What Korea does know is that any reasonable calculation of the quota portion of the measure imposed results in far less than 151,124 tons. We also know that the measure as a whole actually restricted imports to 78,671 tons during the first quota year March 2000-February 2001.²⁸ The Panel also can consider the following facts from the ITC’s opinion which would indicate that very limited imports would enter at 19 per cent under the measure as constructed:²⁹

- (a) Total “in-quota” imports were projected to be approximately 63,000 tons, based on the fact that the ITC listed only seven significant suppliers other than Canada and Mexico. (Current US import data for March 2000-February 2001, show total “in-quota” imports of 64,067 tons.)³⁰
- (b) Very limited “out-of-quota” imports could be expected at the 19 per cent tariff level:
 - (i) The duty imposed was 6 to 10 times the level of the bound rate.
 - (ii) Each supplying country could supply 9,000 tons at bound rates. It could be presumed that the market would absorb these imports first (and those of Canada and Mexico) before the imports at the 19 per cent additional duty.
 - (iii) Two very significant suppliers were not controlled. (The actual data shows that Canada and Mexico now supply approximately 50 per cent of total imports.) The NAFTA exemption had a much more negative impact on other suppliers under the Presidential measure than it did under the measure recommended by the ITC. Under the ITC recommendation, it would have been only after imports of 151,124 tons entered that the preference for Canada and Mexico would have created a price advantage. Under the Presidential measure, the preference affects exporters after they reach 9,000 tons.

²⁶ *Id.* at I-80.

²⁷ See US 23 April Letter, Response to Question 6.

²⁸ See Exhibit 49 (Chart 1: US Imports of Line Pipe (1999-2001); Chart 2: US Imports of Line Pipe (March 2000-February 2001) (KOR-49). One question for the United States is whether that level of import restriction is what the United States intended to achieve.

²⁹ See generally ITC Determination, Majority Views on Remedy at I-76-78 (KOR-6); Bragg and Askey Views on Remedy at I-88-90 (KOR-6).

³⁰ See Exhibit 49 (KOR-49).

- (iv) Imported and domestic line pipe were highly substitutable.³¹ Moreover, according to testimony before the ITC, consumers preferred domestic products.³²
- (v) The US industry had substantial unused capacity and US capacity exceeded consumption.
- (c) Total imports, excluding Canada and Mexico, equalled 78,671 tons from March 2000-February 2001. Of that total, only 14,604 tons entered at the 19 per cent duty rate. In-quota imports totaled 64,067 tons.³³
- (d) The only economic analysis done for the purpose of meeting obligations under Article 5.1 of the SA were the Economic Memoranda. From these analyses, the ITC Majority concluded that 151,124 tons at bound rates would reduce imports to a “sufficient” level. These appear to be the only economic basis for the level of restriction recommended by the ITC. The ITC recommendation--which appeared to be more in line with WTO rules--was rejected in favor of a remedy that did not comply with WTO rules.³⁴

Thus, the pattern of imports resulting from the import restriction could have been and should have been anticipated. Total imports, excluding Mexico and Canada, equalled 78,671 tons during the first quota year – far below the 151,124 tons analyzed by the ITC as “necessary” and sufficient to remedy the injury.³⁵ In the absence of contrary analysis that: (i) the President concluded that a higher level of relief was “necessary” and not “excessive”; or (ii) the level of imports subject to the restrictions had been projected to equal or exceed 151,124 tons, the Panel can only conclude from the facts available that the measure imposed was greater than necessary to remedy the injury.

8. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury? If the competent authority finds that increased imports have caused “serious injury or a threat thereof,” how does that authority ensure that the resultant safeguard measure is “necessary to prevent or remedy serious injury” within the meaning of Article 5.1 of the Safeguards Agreement? Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Answer

The texts of Articles 4.1, 5.1 and 5.2(b) of the SA show that the nature and effect of a “serious injury” finding are not the same as those of a “threat of serious injury” finding. The different nature of these findings has specific implications for the measure that is imposed.

³¹ See US First Written Submission at para. 170.

³² See Transcript of Hearing on Injury, Circular Welded Carbon-Quality Line Pipe, Inv. No. TA-201-70 (30 September 1999) at 145-147 (KOR-50).

³³ See Exhibit 49 (KOR-49).

³⁴ It is now unclear, based on the US Letter of 23 April, whether the measure imposed by the President was based on the economic assessment of the ITC. To the extent that the United States now claims that the Presidential Proclamation and Memorandum “form the entirety of the explanation of the decision to impose the line pipe safeguard measure,” there is no economic support for the measure. See US 23 April Letter, Response to Question 6, p.(i).

³⁵ See Exhibit 49 (KOR-49).

First, in the case of serious injury, the industry must be in a state of significant overall impairment caused by increased imports. In contrast, for threat of serious injury, the increase in imports already must have occurred, but the industry is not yet in a state of significant overall impairment. These are mutually exclusive findings: an industry cannot simultaneously be and not be in a state of significant overall impairment.

For this reason (as well as others), the decisions of the ITC Majority (on serious injury) and the Separate Views on Injury (on threat of injury) are contradictory. Because the ITC failed to reconcile these contradictions and inconsistencies in its detailed analysis and findings and conclusions, its analysis and determination are insufficient under Articles 3.1 and 4.2(c) of the SA.

Article 5.1 of the SA applies this distinction between present and threatened serious injury to the safeguard measure, itself. The measure is to be imposed only “to the extent necessary” to “prevent” or “remedy” serious injury. A measure necessary to remedy injury that has already occurred and needs to be reversed would have a different objective and might be more restrictive than a remedy to keep the industry healthy. This interpretation is confirmed by Article 5.1, which also requires a Member to choose the measure “most suitable for the achievement of these objectives” (*i.e.*, prevent or remedy injury). Due to the difference in objectives, the measures should vary.

The ITC Commissioners in this case recognized that the remedy had to be tied to their injury findings. They also appear to have recognized that distinct remedies would be warranted based on whether the Commissioners found serious injury or only threat of serious injury. The ITC Majority, which made a finding of present injury, recommended a TRQ of 151,124 tons.³⁶ They determined that a limit at that quantity was sufficient to remedy the serious injury.³⁷

In the Separate Views on Injury concerning threat, the Commissioners state that in considering the form and amount of the relief, “we took into account ... the threat of serious injury that we found to exist ...”³⁸ The tariff increase they recommended was based on “estimates by Commission staff” that “indicate that our recommended remedy will result in increased revenues to the domestic industry through a combination of increased prices and sales volumes ...”³⁹ In the Separate Views on Remedy, the Commissioners sought a “modest” price increase.⁴⁰ Because the United States has not supplied the ITC calculations in the Economic Memoranda, we do not know what level of imports was projected at that tariff level. We do know that it was above the level recommended by Petitioners⁴¹ because the increases in price levels and revenue were projected to be smaller than those sought by Petitioners.⁴²

Article 5.2(b) of the SA further shows that a measure to “remedy” serious injury and one to “prevent” injury differ. The departure referred to in that paragraph, to allocate quotas in “disproportionate” shares, is not permitted in the case of threat of serious injury. This confirms that the two findings support different measures.

This discussion highlights an important point that should be considered when examining the safeguard measure. The last sentence of Article 5.1 of the SA confirms that the form of the measure

³⁶ See ITC Determination, Majority Views on Remedy at I-81 (KOR-6).

³⁷ *Id.* at I-82.

³⁸ See ITC Determination, Bragg and Askey Views on Remedy at I-88 (KOR-6).

³⁹ See *id.* at I-92.

⁴⁰ See *id.*

⁴¹ See *id.* at I-90.

⁴² See *id.*

should be a function of the objective of the measure.⁴³ First, the Member should determine the level of imports (or the “amount” of the restriction) that is necessary to prevent or remedy the injury (“the objective”). This determination should be based on an analysis of the price and volume effects of certain levels of import restriction. The “amount” is likely to vary depending on the industry’s condition (*i.e.*, significantly overall impaired or only threatened with such a condition). Only when the determination of “amount” is made, can the form of the measure (*e.g.*, a tariff, an absolute quota, or a TRQ) be determined based on which is most “suitable” to achieve the amount of import relief necessary to effectuate the objective (*i.e.*, “necessary” to remedy or prevent serious injury).⁴⁴

In fact, this is the analytical approach of the ITC. The ITC first develops a number of scenarios to see what economic effects are produced on the industry’s volumes and/or prices by various import restrictions.⁴⁵ After determining the appropriate level of imports (the “amount” of the measure) based on the volume and/or price effects to be realized, then the ITC selects the form of the measure that will best achieve that level of import restriction. In other words, the form of the measure is just a means to an end – a level of import relief that will have the desired effect on the industry.

Thus, an authority cannot ensure that a measure is limited to what is “necessary” without distinguishing between threat and present injury. Without exercising the intellectual discipline to determine whether serious injury either exists or is merely threatened, an authority cannot limit the measure to what is “necessary.” That which is “necessary” to remedy what presently exists may not be necessary to avoid that which otherwise might exist in the future.

In conclusion, before applying a measure, an authority must distinguish between threat of serious injury versus serious injury, because the measure: (i) must only be imposed to the “extent necessary;” and (ii) must be tailored to meet very different objectives (it must be the “most suitable” measure). In this case, the President failed to indicate both which type of injury determination he was adopting and whether his remedy was intended to prevent or remedy serious injury. This is a violation of the provisions of Articles 3.2, 4.2(c) and 5.1 of the SA, which require a detailed analysis of the case as well as published findings and conclusions on all relevant issues of fact and law.

9. In Section F.2.b of its first written submission, the United States argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does Korea consider that the terms “quantitative restriction” and “quota” (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term “quota” (Article 5.2) not refer to the quota element of a TRQ?

Answer

- (a) Quantitative restrictions are a broader concept than quotas

Quotas are one form of quantitative restriction. There are other forms as well, which are specifically noted in Article XI of the GATT 1994, including “import or export licenses” and an all-encompassing category of “other measures.”⁴⁶

⁴³ See Article 5.1 of the SA (“Members should choose measures most suitable for the achievement of these objectives.”).

⁴⁴ See *id.*

⁴⁵ See *e.g.*, USA-9 (USITC Memorandum EC-W-070); USA-10 (USITC Memorandum EC-W-072); USA-11 (USITC Memorandum EC-W-073); USA-12 (USITC Memorandum EC-W-074).

⁴⁶ Many other forms of import restrictions, “other measures,” have been found to fall within Article XI, including minimum price systems. They have been held to constitute “quantitative restraints” since the quantity

Article XI of the GATT 1994 defines quantitative restrictions (by excluding “other than duties, taxes, or other charges”). In addition, Article XIII.2 of the GATT 1994 provides for the manner in which all quantitative restrictions are to be imposed (normal distribution of trade). Specifically, in the case of quotas, Article XIII.2 of the GATT 1994 provides for the means by which quota amounts are to be fixed both on an overall basis (Article XIII.2(a)) and by supplier (Article XIII.2(d)). There is no dispute that the term “quota” in Article XIII.2 includes both tariff-rate quotas and absolute quotas. There is no basis in the text of Article 5.2 of the SA to create a distinction between absolute quotas and tariff rate quotas.

(b) Tariff-rate quotas restrict quantities

TRQs, as a general matter, restrict the quantities imported even if they do not expressly ban imports above a certain level (straight quota). The distinction is one of degree, not one of kind. The fact that a certain level of imports is allowed at a bound rate of duty acts to restrict the amount of imports that will enter at the higher rate of duty because the market naturally prefers the “cheaper” imports and the remainder will enter only to the degree that the market is willing to absorb the higher rate of duty. Thus, the combined effects of both an increased duty of 19 per cent and 9,000-ton quota at normal duty levels must be analyzed.

When the combined effect of a quota at normal duty levels plus a tariff are analyzed, the restriction is not felt uniformly. Unlike a straight tariff, which affects each ton of imports across the board and, therefore, makes all imports equally competitive or uncompetitive, a 9,000-ton limit on each supplier creates a natural cost preference for “in-quota” imports, particularly when combined with a significant duty rate (19 per cent). In the absence of the Economic Memoranda, the actual effect of the President’s import restriction is instructive. The 9,000-ton restriction acts as a virtual limit on imports (as noted, during the first quota year ending in February 2001, imports at the 19 per cent duty rate were limited to 14,604 tons for the entire year).⁴⁷ This is due to the two attributes of a TRQ which are inextricably related: the fact that each country has a 9,000-ton limit of supply at normal rates of duty and the fact that the tariff level on the remainder is 19 per cent. The combined effects of those two elements have significantly restricted imports.

(c) Object and purpose of the “quota” provisions

It is significant for the purpose of interpreting Article 5.2 of the SA and of the meaning of “quota” that it is the common nature of absolute quotas and TRQs that “non-discrimination” must be accomplished in a different manner than for tariffs. Applying a single tariff affects all suppliers equally and complies with Article I of the GATT. In the case of absolute quotas or tariff-rate quotas, in contrast, when quotas are assigned among suppliers, the effect would be to discriminate against traditional sources of supply if the same quota were given to every supplier. This would disrupt historical trade patterns. “Equal” quotas for historic suppliers with vastly different historic shares is discriminatory. MFN therefore is respected only by ensuring that historic shares are respected.

For this reason, Article XIII.2 of the GATT 1994 requires that import restrictions preserve traditional trade patterns. Specifically, for quotas that are assigned by supplier, there are specific rules for how that is to be achieved.⁴⁸ The rationale for doing so to preserve historical shares and avoid

that can be sold below a certain price was limited and it was a restriction “other than duties, taxes, or other charges.” See GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995) at p. 321 (citing EEC – Program of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables).

⁴⁷ See Exhibit 49 (KOR-49).

⁴⁸ Article XIII:2(d) of the GATT 1994.

discrimination applies equally to absolute quotas and tariff-rate quotas and hence both are subject to the disciplines of Article XIII.2.

The same concept, prohibiting a discriminatory effect on suppliers, is contained in Article 5.2 of the SA. The conditions that must be present to depart from this requirement are specifically delineated in Article 5.2(b) and are quite strict. Finally, again, an analysis of the ITC Majority's TRQ recommendation demonstrates that the ITC understood that the requirements of Article XIII:2 of the GATT 1994 and Article 5.2(a) apply to TRQ's. The US representative at the First Substantive Meeting denied that the ITC's practice constituted the US practice. Of course, the United States also denied that the measure imposed is a TRQ. In fact, the US representative is wrong on both counts.

The United States cannot avoid the requirements of Article 5.2(b) of the SA in order to depart from Article 5.1(a) and, yet, discriminate among suppliers by calling its measure a "tariff."⁴⁹ The President's measure is discriminatory precisely because it does contain a quota element that fails to respect historic market shares.

10. In Korea – Dairy, the Appellate Body stated that it does “not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] 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.” Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is “necessary” (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Answer

The decision of the Appellate Body in *Korea – Dairy* must be placed in its proper legal context. The issue before the Appellate Body in *Korea – Dairy* was whether Article 5.1 of the SA by its terms required a specific finding that the measure, in that case (as here) a quantitative restriction, was “necessary.” The Appellate Body held that a quantitative restriction which reduced imports below the three-year representative period specified in Article 5.1 clearly had to be justified at the time of the decision and in the authority's recommendations on the application of the measure.⁵⁰ The Appellate Body then examined whether a quantitative restriction that set the level at or above the last three representative years also had to be justified. The Appellate Body concluded, “[i]n particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with ‘the average of imports in the last three representative years ...’”⁵¹

This is a logical conclusion given that Article 5.1 of the SA sets out a benchmark (the last three representative years) for what level of quantitative restriction is presumed “necessary.” No specific reaffirmation of that fact was therefore needed. Only a departure from the benchmark required the explanation that the measure was “necessary.”

While it is true that the Appellate Body rejected the broad language of the Panel with respect to the obligations of Article 5.1 of the SA, the holding did not extend past the question presented to the Appellate Body regarding the extent of the obligation to justify a quantitative restriction. The

⁴⁹ The departure provided for in Article 5.2(b) is not permitted in the case of a threat determination.

⁵⁰ See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) at para. 98.

⁵¹ See *id.* at para. 99.

Appellate Body independently observed that the first sentence of Article 5.1 imposes a very specific obligation and that this obligation applies regardless of the particular form of the safeguard measure.⁵² The legal issue concerning the obligation of the United States to provide a separate economic justification arises specifically because the President imposed a measure harsher than that justified by the ITC decision or underlying economic analysis. If the President takes action which is either the same as that recommended by the ITC or less restrictive, the underlying explanation and justification required by Articles 3.1, 4.2(c), and 5.1 of the SA might be met by the ITC analysis. That is not the case here. Where: (i) there are substantial indications that the measure taken is more restrictive than what was recommended; (ii) the ITC specifically observed what level of relief would be “excessive”; (iii) the President’s announcement of the TRQ measure as a tariff with an exemption was intentionally confusing; and (iv) no explanation or reasoning comparable to that provided by the ITC or response to the analysis provided by the ITC has been provided, the United States has an affirmative obligation to explain why the measure is “necessary” and not “excessive.”

If the United States has confidential data to demonstrate that the President’s measure would not reduce imports below the 151,124-ton level defined by the ITC as “necessary” and sufficient, it should provide it. The evidence we do have--the actual performance under the President’s remedy--confirms that the measure reduced imports to less than 80,000 tons during the first quota year, a level far below the “excessive[ly]” restrictive level of 105,124 tons.⁵³ Korea submits that, in the absence of an affirmative demonstration by the United States of its “intended level,” the actual level of imports is the best evidence of the import target level of the measure. That level is excessive under any reading of the ITC Majority or Separate Views on Injury.

In any event, Articles 3.1 and 4.2(c) of the SA require the publication of the findings and conclusions of the competent authorities on all pertinent issues of fact and law. Since the President is clearly a “competent authority” under US law, and the findings of fact and conclusions of law with respect to serious injury or threat thereof must inform the decision of what safeguard measure to impose, the basis for the President’s measure must also comply with Articles 3.1 and 4.2(c). The requirements are inextricably related.

(iv) Developing country exemption

11. At para. 181, Korea asserts that “the United States did not even attempt to determine which countries qualified for this exemption.” Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

Answer

The administering authorities must assure that the measure is not “applied” to developing countries that meet the requirements of Article 9.1 of the SA. In the past, the United States has provided a list of countries that qualify for such treatment to make their exemption administratively feasible.

(v) Causal link

12. If oil and gas prices began to improve in April 1999, causing domestic shipments to increase (as alleged at para. 258 of Korea’s first written submission), why didn’t imports also increase at that time?

⁵² See *id.* at para. 96.

⁵³ See Exhibit 49 (KOR-49).

Answer

Imports did not increase at the same time as domestic shipments in 1999, for the same reason that imports at the beginning of the market decline in 1998 did not decline as quickly as domestic shipments. Imports have a delayed reaction or a natural lag-time to changing market conditions such as a decline in demand. There is a period of months between the sales date when the material is ordered and the actual shipments and custom's entry.⁵⁴ It takes time for the "fall off" in customer orders to translate into fewer entries into the United States.

In the second half of 1998, subject imports declined, but not as rapidly as domestic shipments. In the first half of 1999, imports declined precipitously due to lower demand in the second half of 1998. As demand picked up in 1999, domestic shipments responded immediately and increased.⁵⁵ Imports lagged the recovery in the market.

13. At para. 258, Korea asserts that imports were declining as domestic shipments were increasing. At para. 272, however, Korea refers to "the coincidence in trends in imports and the domestic industry sales." If imports were declining as domestic shipments were increasing, how is there any "coincidence" in these two trends?

Answer

Korea wishes to clarify that the Panel is correct that there was no coincidence of trends between domestic shipments and imports at the end of the period in the first half of 1999. Imports continued to decline in the first half of 1999 while domestic shipments increased due to the recovery in oil and gas prices. Imports also had peaked in the first half of 1998 due to very strong demand factors.

It was unlikely given the past performance of imports that they would increase market share to the same levels since this effect was produced when the oil and gas industry's demand dropped suddenly and sharply in late 1998/1999 before imports had a chance to react. *Please see* Korea's response to the previous question regarding why imports tend to lag changes in demand conditions.

14. At para. 293, Korea states that oil prices collapsed in late 1998 and early 1999. However, at page 39 of the Japanese and Korean Respondents' Prehearing Brief, reference is made to "declines in the oil and gas market beginning in late 1997 and continuing through early 1999 ..." (KOR-22). Please reconcile these statements regarding the date when the decline in the oil and gas market began.

Answer

The reference in the Prehearing Brief at pages 39-42 was to the antidumping petition that had been filed in the United States against imported oil.⁵⁶ That petition noted that the price of oil dropped from \$19.76/barrel in October and November 1997 to \$10.95/barrel in December 1998. Thus, the description in the Prehearing Brief was to the end-point/end-point analysis.

The observation concerning the "collapse in oil prices" in late-1998/early-1999 refers to the \$10.95/barrel price in December 1998. That the nadir of oil prices occurred in December 1998 is

⁵⁴ See Posthearing Brief on Injury, at 14 (KOR-25).

⁵⁵ See US 16 February Letter.

⁵⁶ See Prehearing Brief on Injury (KOR-22).

apparent from Figure 3.⁵⁷ Finally, the correlation to subject merchandise was to the drilling rig count, which in turn was dependent on the prices of oil and natural gas.⁵⁸ During this period, the rig count reached its lowest point ever in April 1999.⁵⁹ Demand and, with it, the performance of the line pipe industry closely followed the rapid decline in the rig count in 1998.

(vi) Exclusion of Canada and Mexico

15. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Answer

We agree that the placement of Footnote 1 as a footnote to Article 2.1 of the SA rather than Article 2.2 is significant and confirms the reading of Footnote 1 as relating to the definition of a Member and to the proper modalities for safeguard investigations conducted by a Customs Union. It does not relate either to FTAs or to the MFN requirement.

16. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Answer

No. Article XI of the GATT 1994 measures and measures pursuant to Article XIX in the form of Article XI measures would have the same effect on trade. The emergency nature of safeguard measures also confirms that such measures are permitted.

⁵⁷ Normal Index of Monthly US Crude Oil and Natural Gas Prices, January 1994-June 1999, ITC Determination, Staff Report at p. II-46 (KOR-6).

⁵⁸ See, e.g., ITC Determination, Majority Views on Remedy at I-80 (concerning this correlation) (KOR-6).

⁵⁹ See Exhibit 48B (Comparison of US Rotary Rigs in Operation with Domestic Shipments of Welded Line Pipe and Welded OCTG) (KOR-48B).

ANNEX B-2

UNITED STATES' ANSWERS TO QUESTIONS FROM THE PANEL AND KOREA

(7 May 2001)

I. RESPONSES TO QUESTIONS FROM THE PANEL

Note: The United States previously provided early written responses to questions 6, 7, and 8 at the request of the Panel. This document contains a further elaboration on those earlier answers.

1a. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury?¹

Response

1. Since a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment, the nature of a safeguard measure depends primarily on the condition of the industry and its need for adjustment. The competent authorities' finding of serious injury or threat of serious injury is a legal characterization of the condition of the industry. Thus, there is likely to be a relationship between the finding of the competent authorities and the safeguard measure applied by a Member. However, it is the underlying facts describing the condition of the industry, and not the choice to label that condition as serious injury or threat of serious injury, that provide the benchmark for the application of the measure.

2. Article 4.1 of the Safeguards Agreement² 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." Article 4.2(a) requires that the competent authorities base their findings in this regard on a consideration of the absolute and relative increase in imports, import market share, changes in the level of sales, production, productivity, capacity utilization, profits and losses, employment, and any other objective and quantifiable factor having a bearing on the situation of the industry. Since the evaluation occurs on an overall basis, an industry may be in a state of serious injury or threat of serious injury even if some factors viewed in isolation would suggest a healthy condition.³ With so many factors, each of which may reveal varying degrees of negative or positive

¹ Question 1 consists of three related, but distinct questions. For clarity, we have divided the question and our response into three subsections.

² Unless otherwise specified all citations to an article using Arabic numerals reference provisions of the WTO Agreement on Safeguards ("Safeguards Agreement" or "SGA"), and all citations to an article using Roman numerals reference provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

³ The Appellate Body concluded in *Argentina – Footwear* that "An evaluation of each listed factor will not necessarily have to show that each such factor is 'declining'. In one case, for example, there may be significant declines in sales, employment and productivity that will show 'significant overall impairment' in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate 'significant overall impairment' of the industry." *Argentina – Footwear*, WT/DS121/AB/R, para. 139.

performance, there are a myriad of potential combinations that could demonstrate the existence of serious injury or threat of serious injury.

3. Similarly, safeguard measures imposed by a Member may take a variety of forms, including tariff increases, quotas, and TRQs at varying levels and for varying lengths of time. Thus, for any industry, a number of combinations of these elements could satisfy the Article 5.1 requirement not to apply a safeguard measure beyond the extent necessary.

4. In contrast to the diversity of potential industry situations and safeguard measures, the competent authorities have only three options in rendering their determination – no serious injury, current serious injury, or threat of serious injury. Fitting an industry into one of these broad categories addresses primarily the timing of the onset of serious injury – not at all, now, or imminent – and does not indicate much about the precise state of the industry. Thus, the mere fact that the competent authorities found serious injury instead of threat of serious injury, or vice versa, in their investigation does not provide the information needed to determine the extent to which a Member may or should apply a safeguard measure. That is defined by the factors measuring the industry's performance and need for adjustment.

5. There is one limited circumstance in which the characterization of the industry's condition affects how a Member may structure a safeguard measure. Article 5.2(b) allows a departure from the Article 5.2(a) requirements for allocation of a safeguard measure in the form of a quantitative restriction. A Member may not invoke that provision if it has found that increased imports cause a threat of serious injury. However, this limitation becomes relevant only if a Member is seeking to allocate a quantitative restriction on terms different than those provided under Article 5.2(a). It does not affect the requirements of Article 5.1 in any way.

6. In short, it is the condition of the industry, as delineated by various relevant factors, that provides the benchmark against which a Member determines the extent to which to apply a safeguard measure. The broad characterization of that condition as present serious injury or threat of serious injury does not by itself change those factors and, therefore, will not change the nature of the safeguard measure applied by the Member.

b. If the competent authority finds that increased imports have caused “serious injury or a threat thereof”, how does that authority ensure that the resultant safeguard measure is “necessary to prevent or remedy serious injury” within the meaning of Article 5.1 of the Safeguards Agreement?

Response

7. As an initial point, Article 5 does not require the competent authority to ensure that the resultant safeguard measure is “necessary to prevent or remedy serious injury.” Article 5 places that obligation on the Member itself. In fact, the Safeguards Agreement creates a clear division of labour. Articles 3 and 4 reference the competent authorities seven times, charging them with conducting “the investigation to determine whether increased imports have caused or are threatening to cause serious injury.” In that process, the competent authorities must conduct a hearing, evaluate relevant factors, and issue a report. In contrast, Article 5, entitled “Application of Safeguard Measures,” does not reference the competent authorities *at all*. Its obligations apply exclusively to the Member itself. Nor does any other part of the Agreement require any action from the competent authorities in the formulation and application of a safeguard measure.

8. This marked difference in terminology between Articles 3 and 4 on the one hand and Article 5 on the other can only mean that the competent authorities bear responsibility for the investigation and determination of serious injury, while the Member alone bears responsibility for

compliance with Article 5. The first sentence of Article 3 reflects this dichotomy, stating that “[a] *Member* may *apply* a safeguard measure only following an *investigation* by the *competent authorities*.”

9. Korea’s arguments demonstrate confusion about the tasks performed by the USITC and the President with regard to a US safeguard measure. The USITC is the competent authority in the United States and, as such, determines whether increased imports are a substantial cause of serious injury, or the threat thereof, to the domestic industry. The President has no role in that process, and must accept the determination of the USITC.⁴ In contrast, if the USITC makes an affirmative serious injury determination, it issues only a *recommendation* with regard to the application of a safeguard measure. The US notification under Article 12.1(b) typically identifies the majority recommendation as the proposed measure of the United States. However, the President retains complete freedom to modify that measure or disregard it completely. Thus, it is the President, and not the USITC, who bears the ultimate responsibility for ensuring that the safeguard measure is not applied beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment.

10. In deciding what remedy to apply, the President considers a large number of factors, which include:

- the determination of serious injury by the USITC;
- the recommendation and explanation of the USITC;
- the form and amount of tariff, TRQ, or quota that would prevent or remedy serious injury or the threat of serious injury;
- the extent to which industry workers benefit from other programmes;
- the industry’s plans and existing efforts to adjust to import competition;
- the likelihood that the measure will facilitate adjustment;
- short- and long-term economic and social costs of the measure, as well as other factors related to the economic interest of the United States; and
- conditions of competition in the global and domestic markets, and how those conditions may develop while the measure is in effect.⁵

The President’s consideration of these factors, especially identification of the form and amount of tariff, TRQ, or quota that would prevent or remedy serious injury or threat of serious

⁴ Section 330(d) of the Tariff Act of 1930 provides that if the Commission is evenly split, with an equal number of Commissioners issuing affirmative and negative findings with regard to serious injury or threat of serious injury, the President must decide which group represents the determination of the Commission. In making this decision, the President does not gather additional evidence or make any determination of his own. He merely decides which of the existing determinations and underlying explanations is the determination of the US competent authority.

⁵ Sections 203(a)(2) and 202(e)(5) of the Trade Act of 1974 list these factors. The USITC remedy recommendation is not part of the report of the competent authorities on the question of serious injury that is required by Article 4 of the Safeguards Agreement. Accordingly, that recommendation need not be made a part of the public report under the Safeguards Agreement, although the United States customarily includes the remedy recommendation there.

injury, ensures that the application of the safeguard measure does not exceed the extent necessary to prevent or remedy serious injury and facilitate adjustment.

c. Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Response

11. No. As we explained in segment a of this question and in paragraphs 37-42 of the US first oral statement, the benchmark for application of a safeguard measure is the condition of the domestic industry and its need for adjustment. A finding of present serious injury or threat of serious injury is merely a broad legal conclusion about that condition. By itself, that finding simply does not provide enough information about the industry to identify whether a particular measure would satisfy the requirements of Article 5.1. A Member must look instead to the underlying facts about the industry's condition and need for adjustment to delineate the extent to which it may apply a safeguard measure. Therefore, although competent authorities may choose to specify the condition of the industry as being present serious injury or threat of serious injury, such a choice is not necessary to comply with Article 5.1.

2. At para. 184 of its first written submission, the US asserts that “the only limit on the volume of imports free from the 19 per cent supplemental duty is the number of WTO Members who choose to take advantage of the 9000 ton exemption”. Would this mean that there is a limit on the volume of imports subject to the lower tariff, and that the limit will be reached if all WTO Members choose to take advantage of the 9000 short ton exemption?

Response

12. On further reflection, it would be more correct to say that the only limit is the number of customs territories that take advantage of the 9000 ton exemption. For example, China and Russia, which are not WTO Members, are still eligible for the 9000 ton exemption. On the other hand, not all countries have line pipe production facilities, so the practical limit would be less than if all customs territories took advantage of the exemption.

3. GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed “wherever practicable”. GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be “practicable”, in the context of a tariff quota, to fix a quota representing the total amount of permitted imports? If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no “overall limit on eligibility” (para. 185, US first written submission)?

Response

13. Yes. Article XIII:2(a), read together with Article XIII:5, applies to situations in which a Member considering the application of a tariff quota cannot fix a quota representing the total quantity of special-duty imports. However, the resulting measure would not constitute a tariff quota because it would not meet the ordinary meaning of tariff quota – the “[a]pplication of a higher tariff rate to imported goods after a *specified quantity* of the item has entered the country at a lower prevailing

rate.”⁶ Using the terminology of Article XIII, such a measure would be an “import restriction,” but without a specific name.

14. The text of Article XIII supports this conclusion. Paragraph 2(a) states that “[w]herever practicable, quotas representing the total amount of permitted imports ... shall be fixed.” If a quota is not “practicable,” the logical implication is that any measure that *is* practicable is not a quota. Paragraph 2(b) confirms this conclusion in stating that “[i]n cases in which quotas are not practicable, the restrictions may be applied by means of import licenses or permits *without a quota*.”⁷ Thus, any measure that is not “practicable” under Article XIII:2(a) is not a quota and, pursuant to Article XIII:5, is not a tariff quota.

4. In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does the US consider that the terms “quantitative restriction” and “quota” (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term “quota” (Article 5.2) not refer to the quota element of a TRQ?

Response

15. “Quantitative restriction” and “quota,” as used in Article 5 and elsewhere in the WTO Agreement, are not synonymous. “Quantitative restriction” is a general term covering any measure that restricts the quantity of imports into or exports from a country. “Quota” is a form of quantitative restriction that specifies the maximum quantity of imports into or exports from a country. In contrast, a TRQ is in essence a tariff. It does not restrict the quantity of imports as such because, as long as someone is willing to pay the requisite tariff, there is no limit to the quantity that they can import.

16. The use of these terms in the GATT 1994 supports this conclusion. Article XI is entitled “General Elimination of Quantitative Restrictions,” and its first paragraph states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...

Thus, this paragraph provides a definition for the type of measure – a quantitative restriction – that is eliminated by Article XI. It specifies that quotas and import licenses that prohibit or restrict imports are forms of quantitative restrictions, and that both are prohibited.

17. Since the signature of GATT 1947, Article XI has never been understood to ban TRQs. In fact, when faced with the obligation under Article 4.2 of the WTO Agreement on Agriculture to convert quantitative import restrictions into “ordinary customs duties,” many Members complied by transforming quotas into TRQs. Moreover, a number of Members (including Korea) apply TRQs, indicating a belief, both widespread and current, that such measures comply with the requirements of the WTO Agreement.

⁶ Definition of “tariff quota,” Dictionary of International Trade Terms, p. 157 (William S. Hein & Co., Inc. 1996) (emphasis added) (Exhibit USA-6). Paragraph 185 of the US first written submission provides a more detailed discussion of the ordinary meaning of “tariff quota.”

⁷ Emphasis added.

18. The established view that TRQs are not prohibited by Article XI has two important implications. First, neither a TRQ itself nor the quota element of a TRQ is a “quota” for purposes of Article XI. If they were, they would be prohibited. Second, since Article XI permits only import restrictions in the form of duties, taxes, and “other charges” (and certain types of quotas not relevant in this dispute), a TRQ must be a duty, tax or other charge for purposes of Article XI. As we explained in paragraphs 192-94 of our first written submission, Article XIII reflects the same understanding. Although the disciplines specifically reference “quantitative restrictions” and “quotas,” Article XIII:5 adds that “[t]he provisions of this Article shall apply to any tariff quota.” That addition would be unnecessary if a TRQ, or the “quota element” of a TRQ, were in fact a quota.

19. It also makes sense to view a TRQ as a duty, tax or other charge. A TRQ is nothing but a stepped tariff, with the cumulative volume of imports determining the level of tariff. It does not actually limit the quantity of imports as such.

20. This understanding extends to Article 5. The Safeguards Agreement contains nothing to suggest that longstanding GATT terms like “quota” and “quantitative restriction” as used in the Safeguards Agreement have meanings different than they do under GATT 1994. The appearance of the Article XIII:2(d) text in Article 5.2(a) suggests that it has the same meaning in the Safeguards Agreement and, thus, excludes TRQs because the Safeguards Agreement contains no equivalent to Article XIII:5.

5. In Korea – Dairy, the Appellate Body stated that it does “not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] 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”. Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is “necessary” (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Response

21. The Appellate Body did not *infer* that there is no “justification” requirement for safeguard measures other than quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years. Rather, the ordinary meaning of the terms in Article 5.1 *compels* such a conclusion.

22. In *Korea – Dairy*, the Appellate Body rejected a panel’s broad finding that Members that apply safeguard measures are required to explain in their recommendations or determinations how they considered the facts before them and why they concluded that the measure was necessary to remedy serious injury and facilitate adjustment.⁸ The Appellate Body found that Article 5.1 imposes a justification requirement *only* for safeguard measures that take the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years.⁹ Since the US safeguard measure did not take such a form, the United States was under no obligation to justify the measure. Instead, the burden is on Korea to demonstrate that the US safeguard measure was *not* applied “only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment.”

⁸ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, para. 100 (“*Korea – Dairy (AB)*”).

⁹ *Ibid.*, para. 99.

23. It is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement.¹⁰ If Korea were to meet its burden, the United States would then be obliged to bring evidence and argument to rebut Korea's *prima facie* case. In no event, however, would the United States be obliged to "justify" the US measure.

24. Korea has not begun to meet its burden on this issue. Korea's argument that the United States was required to "provide the required explanation" of its safeguard measure¹¹ is in essence an improper attempt to shift the burden of proof under Article 5.1 to the United States. Its approach in this regard is reminiscent of the Panel's conclusion in *Hormones* that the SPS Agreement allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body rejected the panel's conclusion on the grounds that:

[i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation ...¹²

25. Like Article 5.8 of the SPS Agreement, Article 5.1 "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation." Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim." Korea has not done so. Therefore, the United States has no obligation to produce evidence to establish that the line pipe safeguard is consistent with Article 5.

6. In their oral presentation the US asserted that the President's decision on the safeguard measure relied on the same data and information as the ITC recommendation. Can the US also confirm that there were no other documents prepared after the ITC's recommendation that formed the basis for the President's decision on the measure even if those documents relied on the same data and information before the ITC?

Response

26. Documents prepared after the ITC's recommendation were pre-decisional memoranda to the President from his staff, and to the US Trade Representative from her staff. The pre-decisional memoranda are privileged communications under US law, which means that they are presumptively protected from release to anyone, even in the context of domestic judicial proceedings.

¹⁰ *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April 1997) p. 16 (stating that it "was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption."). *Ibid.*, p. 17 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the presumption that the mere assertion of a claim might amount to proof ...").

¹¹ Korea's first written submission, para. 147.

¹² *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, para. 102.

27. There are several reasons that such documents are presumptively protected from release under domestic law. First, such memoranda typically provide various reasons for and against a particular outcome, which the decisionmaker might – or might not – adopt in the final decision. As such, they are part of the decision-making process, akin to rough drafts of the decision. The release of such materials could create confusion as to the actual basis for a decision, and place the decisionmaker in the position of addressing grounds for decision that he or she actually rejected as invalid.

28. Second, pre-decisional memoranda typically contain advice on the relative merits of various arguments, including arguments that might be raised against a particular conclusion. If such memoranda were available after the taking of a decision, government decision-makers and their advisors would not feel free to debate alternative approaches in complete candour in their private deliberations. Without candid discussions, the quality of the final decision would inevitably suffer.

29. Third, under US law, there is a special privilege attached to communications between the President and his advisors. The US courts have explained that this rule is necessary to guarantee the candour of presidential advisors and to provide the President and those who assist him with the freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express publicly.

30. In short, the Presidential proclamation and published memorandum form the entirety of the explanation of the decision to impose the line pipe safeguard measure. To the extent that the pre-decisional memoranda contain the same reasoning and conclusions as the proclamation and published memorandum, they are redundant. To the extent that pre-decisional memoranda contain reasoning different from that in the proclamation and published memorandum, that reasoning was considered and not adopted by the President. It forms no part of his decision.

7. At para. 267 of its first written submission, the US submits that “any problems experienced by Geneva resulted in part from the difficulties it experienced in line pipe sales ...”. What “part” or proportion, of Geneva Steel’s “difficulties” could be directly attributed to its line pipe operations? Please explain, and provide supporting documentation.

Response

31. It was not necessary for the USITC or Geneva Steel to apportion the difficulties reflected in its data because the USITC collected financial information from Geneva Steel (and 14 other US line pipe producers) *specifically regarding their line pipe operations*.¹³ As noted in the USITC Report, Geneva Steel did not produce other products in the facilities where line pipe was made.¹⁴

32. It is further clear from the record before the USITC that declines in line pipe operations had a significant overall effect on Geneva Steel’s operations and, more importantly, for the US domestic industry as a whole. At the hearing in the injury phase of the USITC investigation an executive from Geneva Steel confirmed that line pipe “is an essential part of our business from an overall margin perspective,” and that Geneva lost half of its volume of line pipe sales between 1997 and 1998.¹⁵

¹³ USITC Report, p. II-25.

¹⁴ USITC Report, p. II-25. Any allocations that had to be made by the US line pipe producers in order to report financial data specific to their line pipe operations were based on their sales of end products or on other generally accepted accounting principles. See USITC Report, p. I-31 (explaining that increases in per unit overhead and SG&A were allocated in proportion to their sales of end products or on other acceptable allocation methodologies).

¹⁵ Transcript of Injury Phase Hearing (30 September 1999), p. 52 (Ken Johnson, Geneva Steel).

8. Commissioner Crawford found that the Lone Star's allocation of extraordinary charges had a "marked impact on SG&A for the company and for the industry as a whole, reducing the level of operating income to \$10.8 million in 1998". Did the remaining Commissioners address this specific finding by Commissioner Crawford? If so, how? What would the level of operating income have been absent the allocation of this extraordinary charge?

Response

33. It is not the practice of USITC Commissioners to address factual findings made by other Commissioners. Moreover, the separate views of any dissenting Commissioner are not part of the determination of the competent authorities for purposes of either Article 3 or Article 4 of the Safeguards Agreement. Accordingly, the United States submits that such dissenting views are of no legal consequence and, therefore, irrelevant to the Panel's consideration of whether the determination of the competent authorities is consistent with the US obligations under the WTO Agreement.

34. Although the Commissioners whose views constituted those of the competent authority in this investigation thoroughly reviewed the industry financial data,¹⁶ none of them found that Lone Star's allocation of these charges was "extraordinary" or had a "marked" impact on the industry's selling, general, and administrative expenses. Indeed, those Commissioners explicitly found that the domestic producers, without exception, allocated increases in overhead and SG&A expenses on the basis of acceptable allocation methodologies.¹⁷ Furthermore, those Commissioners concluded that not any one firm, but "a significant number of firms in the industry were unable to carry out their domestic line pipe operations at a reasonable profit."¹⁸ We also note that, aside from the legal irrelevance of her finding, even Commissioner Crawford acknowledged that the first half of 1999, which did not include the mentioned Lone Star allocation, was "a difficult period" for the US industry.

35. Although we are unable to disclose the exact level of industry-wide operating income absent Lone Star's allocation of charges (because to do so would disclose confidential business information of Lone Star), we can assure the Panel that adding the Lone Star charge would not increase the industry's 1998 aggregate operating income of \$ 10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one percentage point.

9. At footnote 75 of the ITC's determination (page I-16), reference is made to data at page II-31 of the staff report. What is the equivalent reference in the non-confidential version of the staff report? In note 75, reference is also made to the "two of the largest firms". Does this reference include Geneva Steel and/or Lone Star Steel?

Response

36. The equivalent reference in the non-confidential version of the staff report is to page II-25. The two firms referred to in note 75, whose questionnaire responses (including allocations) were verified by the USITC are California Steel and Lone Star Steel.¹⁹

¹⁶ See, e.g., USITC Staff Report at I-16, n.75.

¹⁷ USITC Report, p. I-31.

¹⁸ USITC Report, p. I-19. The undisputed facts relied on by the USITC show that in 1998, ten of 14 domestic producers reported either reduced operating income as compared to 1997 or had operating losses. USITC Report, p. I-18. Five of the 14 reporting domestic producers operated at a loss in their line pipe operations in 1998. *Ibid.* In interim 1999, this number had doubled, with ten of the 14 reporting producers operating losses. *Ibid.*

The two Commissioners who found threat of serious injury likewise found it significant that in interim 1999 a majority of firms in the domestic industry sustained operating losses. Report at I-41.

¹⁹ USITC Report, p. II-25.

10. Under the US system for imposing safeguard measures, what are the “competent authorities” within the meaning of Article 3.1 of the Safeguards Agreement? Do they include the President of the United States? If not, why not? In the present case, please specify precisely where the “reasoned conclusions” – within the meaning of Article 3.1 – are to be found. Do they include conclusions of the President of the United States?

Response

37. Pursuant to Article 4.2(a) of the Safeguards Agreement, the determination of serious injury is to be made by the competent authorities. Under US law, the only competent authority for making serious injury determinations is the USITC.²⁰ Therefore, the US President is not the competent authority for purposes of either Article 3 or Article 4 of the Safeguards Agreement.²¹ Accordingly, the President’s decision concerning the measure is not part of the report to be prepared by the competent authorities pursuant to Article 3.1 of the Safeguards Agreement.

38. The last sentence of Article 3.1 provides that “[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions” This provision highlights that the competent authorities’ published report must include only the findings and conclusions reached by the competent authorities (in US cases, the USITC), and not any findings or conclusions reached by the Member (in US cases, the President). The language of the last paragraph of Article 4.2(c) likewise supports this view. It provides that:

The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

The “reasoned conclusions” of the USITC on “all pertinent issues of fact and law” in the line pipe safeguards investigation are found in the portions of the USITC Report labelled *Views on Injury of Chairman Lynn M. Bragg, Vice Chairman Marcia E. Miller, and Commissioners Jennifer A. Hillman, Stephen Koplan, and Thelma J. Askey* and *Separate Views on Injury of Chairman Lynn M. Bragg and Commissioner Thelma J. Askey*. These Views, which explain the USITC’s findings, reasoning and conclusions appear on pages I-7 through I-54 of *Circular Welded Carbon Quality Line Pipe*, Investigation No. TA-201-70, USITC Publication 3261 (December 1999). Neither these Views nor any other part of the USITC Report include the conclusions of the President of the United States.

11. With regard to note 21 of the US first written submission, what is the relevance of the US statement that “capacity and capital expenditures are not among the factors listed in Article 4.2(a) of the Safeguards Agreement ...” Does the US consider that the Panel is precluded from making any findings regarding the ITC’s treatment of capacity and capital expenditure, simply because they are not mentioned in Article 4.2(a)?

Response

39. As the United States explained in the argument section of its first written submission,²² the USITC met its obligations under SGA Article 4.2(a) to evaluate *all* relevant factors of an objective

²⁰ By comparison, US law provides for two “investigating authorities” – the USITC and the US Department of Commerce – within the context of the Antidumping and SCM Agreements.

²¹ See Section 202(b)(1)(A) of the Trade Act of 1974, which states that the USITC shall conduct safeguards investigations, and section 201(a), which describes the action which the US President is required to take if the USITC determines that the prerequisites for applying a safeguards measure have been met.

²² US first written submission, paras. 85, 119.

and quantifiable nature having a bearing on the situation of the industry. The USITC evaluated not only the enumerated factors, but various other factors, including capacity and capital expenditures. Based on its evaluation of these two particular factors, however, the USITC placed limited weight upon the data gathered about them, for independent reasons explained with respect to each.

40. With respect to capital expenditures, the USITC found that reported data did not reflect current industry conditions because capital investment projects in the industry generally involve long lead times, to allow for project approval, obtaining financing, installation, and start-up operations. As an example, the USITC noted one case where a line pipe producer bought land in 1993, began commercial discussions on a new mill in 1995, started placing equipment orders in 1997, and began commissioning the mill in mid-1999.²³

41. With respect to capacity, the data showed that the overall decline in capacity utilization far outpaced the slight increase in capacity.²⁴ In considering the weight to place on the capacity data, the USITC found that the modest increase in domestic capacity over the period investigated was considerably less than the growth in consumption, and that this slight increase in capacity was reasonable in view of the growing consumption.²⁵

42. The United States does not consider that the Panel is precluded from making any findings regarding the USITC's treatment of capacity and capital expenditures. To the contrary, the Panel should find that the USITC met its obligations under SGA Article 4.2(a) in its evaluation of these "other" industry factors.

12. Leaving aside the factual circumstances of the present case, does the US consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Response

43. No. The United States does not consider that improvements in domestic industry performance at the end of the relevant period of investigation would necessarily be inconsistent with a finding of present serious injury. Both the degree and nature of the improvement would be relevant to whether serious injury exists at the time of the injury determination. Certainly, an industry that is currently seriously injured could see improvement in certain factors and still continue to experience serious injury overall. On the other hand, there also may be circumstances in which the recovery of an industry is so significant that despite having suffered serious injury at some point during the investigatory period, such injury is no longer in evidence at the end of the period of investigation.

13. At para. 134 of its first written submission, the US asserts that "Korean respondents failed to place on the record objective and quantifiable information as to the extent to which imports from Korea of dual-stencilled line pipe were used in standard pipe applications". Did the USITC seek such information for itself?

Response

44. The USITC sought information on this question during the hearing conducted in conformity with Article 3.1 of the Safeguards Agreement. However, the source for the allegation that much dual-stencilled line pipe was used in standard pipe applications was not able to quantify the amount used. As explained below, any reliable quantitative information was for all practical purposes unobtainable

²³ USITC Report, p. I-20 n.122, I-42.

²⁴ USITC Report, p. I-17.

²⁵ USITC Report, p. I-30.

because distributors do not typically know how the pipe that is sold will be used, and even when they might be able to infer the nature of the use by the identity of the purchaser, such information is not routinely recorded.

45. It might be helpful for the Panel to understand the context in which the issue of dual-stencilled line pipe from Korea arose. The issue was first raised by the Korean and Japanese respondents in their prehearing brief in the injury investigation before the USITC. These respondents claimed that most imports of dual stencilled line pipe imported from Korea into the West Coast of the United States were sold for standard pipe applications. They based this claim in large part on an affidavit from a former executive with several West Coast distributors, who estimated that 70-80 per cent of imports of dual-stencilled line pipe imported from Korea into the West Coast were sold for standard pipe applications. These respondents also claimed that selected questionnaire responses of domestic producers and distributors supported their theory.²⁶

46. The executive who provided the affidavit testified at the USITC's injury hearing. The exchange between the USITC Commissioner and the witness on this point was as follows:²⁷

COMMISSIONER KOPLAN: Thank you, Let me ask you this, Mr. Smith. Your estimate of 70 to 80 per cent; is it possible that it could have been 60 to 70 per cent?

MR. SMITH: Absolutely.

COMMISSIONER KOPLAN: Okay. Is it possible that it could have been, possible now, that it could have been 50 to 60 per cent?

MR. SMITH: Well, there is no way of actually knowing without tabulating every sale.

COMMISSIONER KOPLAN: Right.

MR. SMITH: Most distributors don't keep track of where their material goes, and unless you're an on-hands manager reviewing the invoices daily, on a daily basis, and knowing who the customer is, where it's going, and if you have some interest, knowing what kind of a projects it's going to, can you build this type of information.

COMMISSIONER KOPLAN: And I appreciate your candour on that. What I'm hearing you say is that the figure could be substantially off the mark.

MR. SMITH: Absolutely.

47. As this exchange makes clear, there was no practical way of knowing what proportion of Korean dual-stencilled line pipe was actually sold for standard pipe applications. Such information could have been gathered only if all distributors had kept records of the intended application of the line pipe involved in each sale, and this is information which the distributors did not keep.

48. In their posthearing brief in the injury investigation before the USITC, the petitioners contested the claim that large amounts of Korean dual-stencilled line pipe were sold in the standard pipe market. They pointed out that certain questionnaire responses contradicted this claim. They also stressed that the witness for the Korean respondents had admitted at the hearing that his estimates

²⁶ Prehearing Brief of Japanese and Korean Respondents (24 Sept. 1999), pp. 66-70. Exhibit USA-23.

²⁷ Transcript of USITC Injury Hearing (30 September 1999), p. 216, Exhibit USA-24.

were not based on any concrete or quantifiable data and might well not be accurate. The petitioners also claimed that this witness was not reliable because he had no experience in the line pipe business; his experience was limited to the standard pipe market.²⁸

49. Finally, the record reflects that the greatest absolute and percentage increases in the volume of imports from Korea occurred in shipments to the Gulf Coast area of the United States, which comprises the largest US geographic market for line pipe. Shipments of Korean pipe to the Gulf Coast increased from 16,430 to 68,810 tons between 1997 and 1998 whereas total shipments of line pipe to the United States from Korea increased from 76,671 to 158,099 tons during the same period.²⁹ Korea has not claimed, and there is no record evidence suggesting, that dual-stencilled pipe was shipped to the Gulf Coast.

14. Did the ITC undertake any quantitative analysis (such as regression analysis, and/or elasticity analysis) regarding the impact of other factors such as the oil and gas crisis, and declines in the domestic industry exports?

Response

50. The USITC did not formally prepare an econometric analysis in order to quantify the exact impact of each of various factors on the domestic industry. The United States observes that there is nothing in the Safeguards Agreement that requires competent authorities to prepare or consider a quantitative analysis of that sort. Nor has the Appellate Body, in its numerous reviews of panel reports addressing Members' safeguard actions, ever suggested that such an analysis is necessary.

51. Notwithstanding the lack of any requirement for precise quantification of effects, the USITC did in many respects consider and rely on quantitative record data and economic or financial analyses in distinguishing the effects of possible other causes from the effects of increased imports. As an initial matter, USITC staff prepared a preliminary elasticity analysis for the Commission's consideration in making its injury determination.³⁰ The demand, supply and substitutability estimates provided in that analysis provided a background for the USITC's consideration of the factors affecting the conditions in the industry.

52. As appropriate to its consideration of the various factors possibly having an impact on the industry's condition, the USITC carefully scrutinized the quantitative data, and compared the indicators affected by imports to the indicators affected by other factors. Thus, in distinguishing the effects of reduced oil and natural gas drilling and production activities, the USITC compared the 1994 through June 1999 data on apparent consumption (which reflected declines in demand due to the reduction in these "gathering" activities) to the industry financial data for the same period. These data showed that the demand in interim 1999 was comparable to the level during the period 1994 through 1996; yet, after suffering slight operating losses in 1994, the industry's financial performance in 1995 and 1996 was healthy. Based on this comparison, the USITC was able to conclude that the reduction in the level of demand in 1998 and 1999 was not of a magnitude that would be expected to generate the severe financial losses suffered by the industry in 1998 and 1999.³¹

53. The USITC also looked at the market share data in relation to demand, and found that imports increased their market share at the domestic producers' expense, at the same time that oil and natural gas drilling declined. All other things being equal, the USITC found that the decline in demand for a standardized product like line pipe should impact all sources of supply in roughly proportional

²⁸ Posthearing Brief of Petitioners (6 Oct. 1999), pp. 15-19. Exhibit USA-25.

²⁹ USITC Report, Table D-2.

³⁰ USITC Report, pp. II-42-51.

³¹ USITC Report, p. I-28.

amounts.³² The USITC looked further to quantitative information to test respondents' explanation that imports have longer lead times than domestic product and therefore allegedly respond more slowly to a decrease in demand. The monthly import data examined by the USITC disproved respondents' theory because these data showed high levels of imports for the months which according to respondents' argument should have reflected orders taken in late 1998 and early 1999, when drilling activities were at their lowest.

54. Further to its analysis of the impact of the reduction in oil and gas drilling and production activities, the USITC considered the timing of that reduction in relation to the data for the various relevant industry performance indicators. The USITC found that the most significant difference in market conditions in interim 1999 as compared to the 1994 through 1996 period (when apparent consumption was at levels comparable to 1999) was the market presence of imports, which in 1999 accounted for double the market share they held during 1994-1996.³³

55. Based on its analysis of the corresponding data for the various industry performance indicators, the USITC concluded that the reduction in exploring and drilling activities mainly affected demand aspects, whereas the increases in imports and import shares correlated to price declines. The USITC also analysed the price data on a product-specific basis.³⁴ These data indicated that price declines appeared to be across the board and not to affect disproportionately those line pipe grades that are typically used in oil and gas drilling applications.

56. Finally, the USITC looked to the financial variance analysis to confirm its conclusion that the substantial decline in domestic prices caused by the increased imports, rather than reduced shipment volumes caused by the decline in demand, were mainly responsible for the industry's dismal financial performance.³⁵

57. In addition to relying on the data to address the impact of the reduction in exploration and drilling activities, the USITC likewise evaluated quantitative information where appropriate to address other possible causes of injury. In considering the impact of competition among domestic producers, the USITC compared the data on industry capacity to the data on domestic consumption, and found that the increases in capacity were reasonable in light of the growth in consumption from 1994 to 1998.³⁶

58. With respect to the impact of declines in export markets, the USITC examined the data on domestic producers' exports against domestic production and import data. Finding that the increase in imports in 1998 was considerably larger than the decline in exports, the USITC concluded that any impact on the domestic industry from a drop in exports was dwarfed by the impact of the rise in imports.³⁷

15. In para. 104 of its first submission the US responds to Korea's argument that the industry was not injured as shown by an increase in capital expenditure during the POI. Would the US also comment on Korea's argument made in Para 250 of its first submission that during the POI two new producers began operations in 1998 and 1999?

³² USITC Report, p. I-29.

³³ USITC Report, p. I-28.

³⁴ USITC Report, p. I-29.

³⁵ USITC Report, p. I-29, n.180.

³⁶ USITC Report, p. I-30.

³⁷ USITC Report, p. I-31.

Response

59. It is correct that two new line production facilities began operations, one in 1998 and the other in early 1999.³⁸ The United States does not agree with Korea's argument in paragraph 250 of its first written submission that the addition of these production facilities was inconsistent with the USITC's conclusion that the domestic industry was seriously injured or threatened with serious injury. Both the Commissioners finding serious injury and those finding a threat thereof noted that capital investments in this industry involve long lead-times.³⁹ Plants brought on-line in 1998 and early 1999 would have reflected investment decisions and commitments made well before the surge in imports in 1997 and 1998. Indeed, the USITC found that the entry of new facilities was reasonable in light of the growing consumption through 1998.

16. In para. 109 of its first submission the US explains that the \$25-\$30 price increase referred to by Korea could just as likely compensate for rising raw material costs following the imposition of anti-dumping duties on hot-rolled steel. Were all imports of hot-rolled steel affected by the anti-dumping measure? What was the coverage of the US measure or measures on hot-rolled steel? Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures? Furthermore, at para. 22 of its first written submission, the US refers to a "decline in the price of hot-rolled carbon steel." Is such a price decline consistent with the rising raw material costs referred to in para. 109 of its first written submission? Please explain.

Were all imports of hot-rolled steel affected by the anti-dumping measure?

Response

60. First, the United States must emphasize that Korea clarified at the first substantive meeting of the panel that the so-called "price increases" that it originally referenced, and that the United States consequently also characterized as price increases in its first written submission, were actually announcements of intended price increases by a US producer. There is no evidence in the record that the announced attempts to increase prices were in fact successful.

61. While not all imports of hot-rolled steel were subject to antidumping orders, all imports of hot-rolled steel, including fairly traded imports, presumably were affected by those orders. The objective of antidumping measures is, of course, to eliminate injury to the domestic industry caused by the subject imports that were found to be sold at less than normal value. The orders accomplish this by providing for the imposition of an antidumping duty in the amount of the margin of price discrimination. By increasing the price at which the subject imports are sold, the antidumping duties are intended to reduce or eliminate the market-wide price suppression or depression that had been occasioned by the dumped imports. Once the unfairly traded imports are either priced appropriately or leave the market, the prices of not only domestic hot-rolled steel, but also of fairly traded imports of hot-rolled steel would be expected to increase.

What was the coverage of the US measure or measures on hot-rolled steel?

Response

62. The antidumping duty measures imposed in July and August of 1999 covered imports of hot-rolled steel from Japan (subject to antidumping duties), and Brazil and Russia (subject to suspension agreements providing for minimum prices, in the case of Brazil, and minimum prices and quantitative

³⁸ USITC Report, p. II-11.

³⁹ USITC Report, p. I-20 n. 122 (Commissioners finding serious injury), p. I-42 (Commissioners finding threat of serious injury).

export limits, in the case of Russia). The scope of the antidumping duty order on imports from Japan and of the suspension agreements affecting imports from Brazil and Russia was as follows:

certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of these investigations.

Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free ("IF")) steels, high strength low alloy ("HSLA") steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this investigation, regardless of HTSUS definitions, are products in which: 1) iron predominates, by weight, over each of the other contained elements, 2) the carbon content is 2 per cent or less, by weight, and 3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 per cent of manganese, or
1.50 per cent of silicon, or
1.00 per cent of copper, or
0.50 per cent of aluminum, or
1.25 per cent of chromium, or
0.30 per cent of cobalt, or
0.40 per cent of lead, or
1.25 per cent of nickel, or
0.30 per cent of tungsten, or
0.012 per cent of boron, or
0.10 per cent of molybdenum, or
0.10 per cent of niobium, or
0.41 per cent of titanium, or
0.15 per cent of vanadium, or
0.15 per cent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this investigation unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this investigation:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including e.g., ASTM specifications A543, A387, A514, A517, and A506).

- SAE/AISI grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tools steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 per cent.
- ASTM specifications A710 and A736.
- USS abrasion-resistant steels (USS AR 400, USS AR 500).
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.14%; Mn, 0.90% max; P, 0.025% max; S, 0.005% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.20-0.40%; Ni, 0.20% max; Width = 44.80 inches maximum; Thickness = 0.063-0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000-88,000 psi.
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.16%; Mn, 0.70-0.90%; P, 0.025% max; S, 0.006% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.25% max; Ni, 0.20% max; Mo, 0.21% max; Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.10-0.14%; Mn, 1.30-1.80%; P, 0.025% max; S, 0.005% max; Si, 0.30-0.50%; Cr, 0.50-0.70%; Cu, 0.20-0.40%; Ni, 0.20% max; V (wt.), 0.10% max; Cb, 0.08% max; Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications: C, 0.15% max; Mn, 1.40% max; P, 0.025% max; S, 0.010% max; Si, 0.50% max; Cr, 1.00% max; Cu, 0.50% max; Ni, 0.20% max; Nb, 0.005% min; Ca, Treated; Al, 0.01-0.07%; Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤ 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.
- Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, containing 0.9% up to and including 1.5% silicon by weight, further characterized by either (i) tensile strength between 540 N/mm² and 640 N/mm² and an elongation percentage $\leq 26\%$ for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm² and 690 N/mm² and an elongation percentage of $\leq 25\%$ for thicknesses of 2mm and above.
- Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012% maximum phosphorus, 0.015% maximum sulphur, and 0.20% maximum residuals including 0.15 per cent maximum chromium.

- Grade ASTM A570-50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.⁴⁰

Were there other suppliers of hot-rolled steel that were not affected by the anti-dumping measures?

Response

63. As indicated above, no. All suppliers of hot-rolled steel were affected by the anti-dumping measures regardless of whether such imports were subject to the measures themselves. The USITC's report accompanying the 1999 investigations shows that 61 per cent (7.0 million of 11.4 million tons) of 1998 imports of hot-rolled steel were from Brazil, Russia and Japan, and therefore became subject to the antidumping duty orders or suspension agreements.⁴¹

Furthermore, at para. 22 of its first written submission, the US refers to a "decline in the price of hot-rolled carbon steel." Is such a price decline consistent with the rising raw material costs referred to in para. 109 of its first written submission? Please explain.

Response

64. Paragraphs 22 and 109 of the US first written submission discuss prices in the domestic market at different times during the period of investigation. Paragraph 22 explains that the USITC considered (pp. I-31-32 of the USITC Report) whether declines in raw material costs accounted for the decline in line pipe prices, in particular *the 1998 and interim (January-June) 1999 decline in the price of hot-rolled carbon steel*. (The USITC found that the line pipe price declines could not be attributed to a decline in raw material costs.) Paragraph 109 refers to *announced* price increases, and to the imposition of antidumping measures, in August 1999. With respect to these later events, the USITC stated:

We are persuaded that, to the extent any such announced price increases may have "stuck" in the marketplace, they are attributable in significant part to anticipated increases in raw material costs by domestic producers.⁴²

65. Moreover, the record of the USITC injury investigation closed before the announced effective date of anticipated increases, and therefore there is no evidence in the record that the price increases occurred.

17. According to the US, the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Why does the US consider that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

⁴⁰ *Antidumping Duty Order; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 34778 (US Dept. of Commerce, 29 June 1999), Exhibit USA-26.

⁴¹ Exhibit USA-27.

⁴² USITC Report, p. I-48 n. 88. (*Views of Chairman Bragg and Commissioner Askey*).

Response

66. The degree to which FTA partners must eliminate safeguard measures among themselves depends on the overall package of trade liberalization that accompanies the formation of the FTA. If that package meets the requirements of Article XXIV:8(b) without the elimination of safeguard measures, the FTA partners have the option of eliminating safeguard measures, but are not required to do so. However, if the elimination of safeguard measures is necessary to meet the requirements of Article XXIV:8(b), the FTA partners *must* do so. In this regard, the authority to apply safeguard measures to FTA partners is no different from any other restrictive regulation of commerce that applies on an MFN basis.

67. To create an FTA consistent with Article XXIV, the parties must satisfy the Article XXIV:8(b) definition of an FTA as:

a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

This text does not require the elimination of *all* duties and other restrictive regulations of commerce. Some restrictive regulations, if they fall within the enumerated exceptions, may be applied “where necessary.” The remaining restrictive regulations must be eliminated on *substantially* all trade. As the Appellate Body explained in *Turkey – Textiles*,

Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term “substantially” in this provision. It is clear, though, that “substantially all the trade” is not the same as *all* the trade, and also that “substantially all the trade” is something considerably more than merely *some* of the trade.⁴³

68. Therefore, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties, while retaining some duties and restrictive regulations of commerce, can still achieve the Article XXIV:8 threshold (covering “substantially all trade”), they may retain those regulations. If the elimination of other restrictive regulations covers substantially all trade, the parties *may* also eliminate safeguard measures. This is by far the most likely scenario. We included the possibility that safeguard measures “must” be eliminated to cover all eventualities. For example, if the elimination of duties and other restrictive regulations that the FTA parties accept does not cover substantially all trade, they *must* eliminate restrictive regulations that they had intended to retain, which could include safeguard measures. However, this is not a likely scenario.

18. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions? Please explain.

Response

69. A treaty, and especially a multilateral agreement, reflects a series of compromises and trade-offs. No one signatory’s “logic” will necessarily prevail in this process. Under customary rules of

⁴³ *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, para. 48 (22 October 1999).

interpretation of international law, the text of the treaty determines the rights and obligations of the signatories. Whether a later interpreter can derive an underlying “logic” from the text does not change the explicit rights and obligations. In this case, the text of Article XXIV:8 differentiates between Article XI measures and Article XIX measures, thereby authorizing differential treatment of the two.

70. It is always speculative to attempt to reconstruct the logic of the negotiators of a treaty. In this case, we can conclude that the difference in treatment is logical because Articles XI and XIX permit the imposition of quantitative restrictions for different reasons. Article XI permits three types of quantitative restriction: temporary export prohibitions to prevent critical shortages of food or other products; import or export prohibitions necessary for classification, grading, or marketing of commodities in international trade; and import restrictions on agricultural and fisheries products necessary to enforce domestic controls on the production of agricultural and fisheries products. And of these, some are no longer permitted as a result of the Agreement on Agriculture. Article XIX allows the suspension of obligations (which could include imposition of a quantitative restriction otherwise inconsistent with Article XI) to the extent necessary to remedy serious injury caused by increased imports. Accordingly, the drafters agreed that FTA partners could retain the quantitative restrictions permitted under Article XI where those measures were necessary, but did not make the same provision for quantitative restrictions permitted under Article XIX.

71. One logical conclusion is that the basis for a quantitative restriction affects its permissibility in the context of an FTA. FTA parties have an unqualified right to apply those quantitative restrictions permitted under Article XI among themselves where necessary. One might view the GATT 1994 as allowing the application among FTA partners of measures permitted under Article XI because they may be necessary for implementation of particularly important national policies or programmes. In contrast, an FTA party’s authority to include FTA partners in quantitative restrictions under Article XIX must be balanced against other restrictive measures of trade in meeting the Article XXIV:8 threshold. Presumably, this treatment evinces the importance of achieving the elimination of restrictive regulations on substantially all trade.

72. We note that there is nothing unusual in this treatment. Articles XI and XIX both permit the maintenance of quantitative restrictions that would otherwise be prohibited, but under different conditions. Article XXIV:8 follows the same approach, placing different prerequisites on application of an Article XI quantitative restriction in the context of an FTA than on application of an Article XIX quantitative restriction.

19. In Turkey – Textiles (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) “the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue”.⁴⁴

- (a) In this regard, please explain how the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act.**

⁴⁴ This question consists of two related, but distinct questions. For clarity, we have divided the question and our response into two subsections.

Response

73. Under the North American Free Trade Agreement (“NAFTA”), the parties introduced a multitude of rights and obligations removing many restrictive regulations of commerce – tariffs, customs fees, safeguards laws, and others. These rights and obligations, including the safeguard exemption, were conceived as a package and introduced as a package. Together they resulted in the elimination of restrictive regulations of commerce on substantially all trade among the three NAFTA parties, thus forming the basis for the creation of a free trade area. Failure to accept these rights and obligations would have meant inability to become a party to the NAFTA, preventing the NAFTA from entering into force, and thus would have prevented the formation of the free-trade area created by the NAFTA.

74. In *Turkey – Textiles*, the Appellate Body interpreted the chapeau to Article XXIV:5 to determine the conditions under which a Member could assert Article XXIV as a defense for a WTO-inconsistent measure affecting the rights of third parties that is introduced as part of the creation of a customs union:

we note that the chapeau states that the provisions of the GATT 1994 “*shall not prevent*” the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union.⁴⁵

The Appellate Body found further that the chapeau “indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions ... only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.” It noted that this text “cannot be interpreted without reference to the definition of a ‘customs union.’”⁴⁶

75. However, *Turkey – Textiles* dealt primarily with a measure applied to non-members of the customs union. The Appellate Body did not indicate the conditions under which a Party could assert Article XXIV as a defense with regard to a measure liberalizing *internal trade* among customs union members. Thus, its reasoning is not germane in this dispute, which involves a measure – the exclusion from safeguard measures – that was part of the NAFTA trade liberalization package.

76. In any event, the *Turkey – Textiles* analysis establishes that Article XXIV invalidates Korea’s claim that the NAFTA safeguard exemption is inconsistent with Articles I, XIII, and XIX.⁴⁷ In line with the Appellate Body’s reasoning, the analysis begins with the definition of an FTA, which Article XXIV:8(b) describes as an area in which “duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade among the parties.” Article XXIV:8(a)(i) contains similar language with regard to customs unions. The *Turkey – Textiles* report indicated that the terms “offer ‘some flexibility’ to the constituent members of a customs union when liberalizing their internal trade in accordance with this sub-paragraph.”⁴⁸

77. The ordinary meaning of Article XXIV:8(b) provides the necessary guidance. The text contains a direct object (duties and other restrictive regulations), a verb (eliminate), 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*. The text does not contain language indicating that the obligation applies separately to each duty or

⁴⁵ *Turkey – Textiles*, para. 45.

⁴⁶ *Ibid.*, paras. 46-47.

⁴⁷ Korea’s first written submission, para. 168.

⁴⁸ *Turkey – Textiles*, para. 48.

restrictive regulation. Thus, compliance with Article XXIV:8(b) is determined with reference to the entire package of the duties and restrictive regulations of commerce that are eliminated.

78. In light of this definition, the parties will be prevented from forming a free trade area if they cannot accept the elimination of the group of duties and restrictive regulations of commerce on substantially all trade that they have agreed upon. This would occur if they were not allowed to accept the elimination of any one of the duties or regulations.

79. The NAFTA parties conceived of the various types of duties and restrictive regulations of commerce that they would eliminate as a group and negotiated over them at the same time. At no point did the parties indicate that failure to accept any particular obligation would prevent the formation of the free trade area. As part of the package of trade liberalization, they agreed to NAFTA Article 802, which eliminated each party's authority to apply safeguard measures on imports from the other party that did not contribute importantly to serious injury. Section 311 of the NAFTA Implementation Act effectuated this obligation as a matter of US law.

80. If the GATT 1994 were interpreted to prohibit the Article 802 safeguard exemption, it would unravel the package of trade liberalizing rights and obligations agreed upon by the NAFTA parties. Therefore, Article XXIV permits the exclusion of Canada and Mexico from the line pipe safeguard notwithstanding Article II.

(b) If the formation of NAFTA would have been prevented but for the safeguards exemption, why are NAFTA members not automatically excluded from safeguard measures imposed by other NAFTA members?

81. Under the NAFTA, the Article 802 conditional exemption from safeguards measures formed part of the final balance of concessions and obligations to which the parties agreed. That package went well beyond liberalizing substantially all trade, so a partial exemption was permissible. If that particular package were not accepted, the formation of the free-trade area created by the NAFTA would have been prevented.

82. During negotiations, the parties did not agree to completely eliminate their authority to take safeguard measures against each other. If they had, it is possible that they would have changed other elements of the liberalization package to maintain the balance of concessions and other obligations. On the other hand, they may not have achieved agreement on that basis. It is the view of the United States that the possibility of a different outcome to the NAFTA negotiations is too speculative to form the basis for any conclusions with regard to the measures that the parties actually adopted.

20. The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in Argentina – Footwear (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the US consider that the Appellate Body's finding does not apply to the last sentence of footnote 1? Please explain.

Response

83. The Appellate Body's 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.”⁴⁹

It reached this conclusion in response to a panel’s analysis based on the *first* and *third* sentences of footnote 1.⁵⁰ At no point did either the panel or the Appellate Body address the fourth (and last) sentence of the footnote, or how that sentence might affect the meaning of the entire footnote. Consequently, the Appellate Body’s finding does not provide any guidance for the Panel’s interpretation of the last sentence.

21. If footnote 1 to the Safeguards Agreement was relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Response

84. The fact that footnote 1 appears in Article 2.1 is relevant in that it establishes a context for the footnote. However, Korea was wrong in asserting that the footnote is applicable to Article 2.1 alone. By its terms, the footnote says that “Nothing in this *Agreement* ...” (emphasis added). If the footnote applied only to Article 2.1, it would have said “Nothing in this paragraph ...” Therefore, the insertion of footnote 1 into Article 2.1 instead of Article 2.2 has no effect on the interpretation of the relevant text – the last sentence of footnote 1. In fact, it is equally relevant that paragraph 2.1 forms part of Article 2, which includes Article 2.2. Thus, any relevance ascribed to the location of footnote 1 would suggest that it applies equally to all of Article 2, and not just the paragraph within which it appears.

85. Under the customary rules of interpretation of international law, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁵¹ Thus, the ordinary meaning of the terms is the primary basis for interpreting a treaty, with context and object and purpose informing the application of the ordinary meaning. The location of a provision within a particular paragraph (such as paragraph 1 of Article 2) may be relevant in providing context, but the article in which the provision is located and other articles in the agreement and other agreements may also provide context for the provision.⁵²

86. Paragraphs 221-225 of the US first written submission discuss the ordinary meaning of the last sentence of footnote 1 – that nothing in the Safeguards Agreement affects a WTO Member’s right to exclude FTA partners from safeguard measures. The location of the footnote 1 in Article 2.1, which specifies the prerequisites for a Member to apply a safeguard measure, does not change that meaning. Specifically, footnote 1 is appended to the word “Member,” suggesting that it amplifies the meaning of that word. The first three sentences of footnote 1 serve this role, defining the terms in which a customs union, acting as a WTO Member, may take a safeguard measure on its own behalf or on behalf of a member of the customs union.

⁴⁹ *Argentina – Footwear*, WT/DS121/AB/R, para. 106 (emphasis added).

⁵⁰ *Ibid.*, para. 102.

⁵¹ These customary rules of interpretation are reflected in Article 31 of the *Vienna Convention on the Law of Treaties*.

⁵² For example, in *EC – Bed Linen*, the Appellate Body treated Article 2.4 of the Antidumping Agreement as context for the interpretation of Article 2.4.2. In *US – Wheat Gluten*, the Appellate Body treated Article 3.1 SGA as context for the interpretation of Article 4.2(b). *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, 1 March 2001, para. 59; *United States – Definitive Safeguard Measures on Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, paras. 52-53 (“*US – Wheat Gluten (AB)*”).

87. However, the text of the last sentence of footnote 1 indicates that it has a broader reach than the first three sentences. It opens with the phrase “[n]othing in this Agreement,” thus setting out an interpretation applicable to every other provision in the Agreement, and not just the word “Member” in Article 2.1. 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.” Having dealt with one particular aspect concerning customs unions, it made sense to speak to the overall issue of the effect of the Safeguards Agreement on customs unions and the clearly related issue of FTAs. The last sentence is a clarification that neither the preceding sentence nor any other language in the Safeguards Agreement disturbs the relationship between safeguard measures and customs unions or FTAs that is set out in GATT 1994. This was a controversial subject that the negotiators never sought to resolve in the Safeguards Agreement.⁵³

88. The location of footnote 1 within Article 2.1 is not the sole context for its terms. Articles 2.1 and 2.2 together form Article 2, which is entitled “Conditions.” Article 2.2 states that “[s]afeguard measures shall be applied to a product being imported irrespective of its source.” This text establishes that Article 2 addresses not just the identity of the Member applying a safeguard measure and the conditions for doing so, but also the identity of the Members *subject* to the measure. This context reinforces the conclusion that footnote 1, like the Article in which it appears, provides the basis for determining what Members are subject to a safeguard measure.

89. In short, it is relevant that footnote 1 is inserted into Article 2.1. It is also relevant that Article 2.1 is paired with Article 2.2 in a single article addressing the conditions for application of a safeguard measure. The ordinary meaning of the text of the footnote is dispositive. For the reasons discussed above and in the US first written submission, these interpretative guides together establish that nothing in the Safeguards Agreement affects a Member’s ability to exclude FTA partners from safeguard measures.

22. At para. 230 of its first written submission, the US asserts that the collapse in oil prices was not expected. At what point in time is the US referring to in making this statement? In other words, when was the collapse in oil prices not expected, or unforeseen?

Response

90. The relevant point of inquiry for unforeseen developments is the time at which the Member undertook an obligation, including a tariff concession. In *Felt Hats*, a GATT 1947 working group found that the United States had demonstrated that it met the unforeseen developments requirement because “the effect of the circumstances indicated above,” (a marked change in hat fashions) “and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947,” when the United States made a tariff concession on hats.⁵⁴ There is no question that the decrease in oil prices that occurred in the latter part of the investigation period in *Line Pipe* was not foreseen at the time that the United States entered into its Uruguay Round tariff reduction commitments, and certainly not at the time of preceding tariff concessions. Indeed, the decrease in oil prices was unexpected almost up to the time it began.⁵⁵

⁵³ *Guide to GATT Law and Practice*, vol. 2, pp. 838-840 (WTO 1995).

⁵⁴ *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, 27 March 1951, para. 12.

⁵⁵ US first written submission, para. 230.

(v) Causal link

23. Did the ITC demonstrate that the oil and gas crisis was not a more important cause of injury than increased imports, as it claimed, or did the ITC simply demonstrate that the oil and gas crisis did not account for the totality of the injury suffered by the domestic industry? In other words, did the US simply demonstrate that the industry would still have suffered injury, irrespective of the crisis in the oil and gas industry? If so, is this sufficient to distinguish the injurious effects of the increased imports from the injurious effects of the oil and gas crisis? Please explain.

Response

91. In its Report, the USITC provided a detailed and meaningful explanation of its finding that the oil and gas crisis was not a more important cause than increased imports.⁵⁶ In its causation analysis, the USITC first undertook a thorough analysis of the relationship between the increased imports and the factors bearing on the situation of the industry.⁵⁷ As explained in the United States first and second written submissions, the USITC found that imports had significant adverse price effects on the domestic industry. In turn, these adverse price effects resulted in a significant loss of sales, market share and revenue on the part of the domestic industry, as well as a decline in other key indicators of the industry's health, such as capacity utilization and employment.⁵⁸ The USITC concluded that imports were an important cause of injury, *i.e.*, that there was a causal link between the imports and the serious injury.

92. As a second step in its causation analysis, the USITC examined other possible causes for the purposes of addressing the "substantial cause" requirements of the US statute. It conducted its examination of the effects of other possible causes, including mainly the oil and gas crisis, against the background of its finding in the first instance of a causal link between the increased imports and the serious injury the domestic industry was suffering. The USITC did not merely determine that there was at least some injury being caused to the industry by factors other than the oil and gas crisis. Rather, the USITC compared the effects of the changes in demand caused by the oil and gas crisis to the effects caused by the imports. It found that, of the two principal factors affecting the industry, the increased imports were more responsible for the serious injury. In so doing, the USITC assured itself that any effects caused by the changes in demand did not sever the causal link between the increased imports and the serious injury.

93. Accordingly, the USITC examined the effects of reductions in oil and gas drilling on line pipe demand and compared such effects to those of the increased imports.⁵⁹ As an initial matter, the USITC found that it was not clear that line pipe demand was as closely tied to oil and gas drilling activities as respondents had contended.⁶⁰

94. To the extent line pipe demand was tied to drilling activities, the USITC found that the trends in apparent consumption (which reflects demand), unlike the import trends, did not track the financial experience of the domestic industry.⁶¹ Consumption in interim 1999, when the industry was at a financial low point, was comparable to consumption in the period 1994 through 1996, when the industry's financial performance was healthy. The USITC explained that the most significant

⁵⁶ USITC Report, pp. I-27-30.

⁵⁷ USITC Report, pp. 23-26.

⁵⁸ USITC Report, p. I-26.

⁵⁹ The United States has already set out some of the quantitative details of this comparison in our response to the Panel's question number 14.

⁶⁰ USITC Report, p. I-27.

⁶¹ USITC Report, p. I-28.

difference in market conditions between interim 1999 and the 1994 through 1996 period was the import market presence and in particular the doubling of import market share.

95. Further, the USITC explained that the substantial price declines in 1998 and interim 1999, which correlated to increases in imports, could not be attributed to declines in oil and gas drilling and production activities.⁶² The USITC noted that the decrease in line pipe prices that occurred during the post-1998 period was across the board.⁶³ It was not limited to those line pipe grades used for drilling, as would be expected if the industry slowdown had been caused by a reduction in demand from the oil and gas industry.⁶⁴ The USITC further found that the questionnaire responses supported the conclusion that imports, and not reduction in demand, played the major role in the decline in domestic line pipe prices in 1998 and interim 1999.⁶⁵ Thus, the USITC found that as the imports played as or more important a role in the domestic industry's poor performance than the reduced oil and gas drilling. As such, the oil and gas crisis did not sever the causal link between the increased imports and the serious injury.

24. Is a determination that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry sufficient to demonstrate a genuine and substantial relationship of cause and effect between the increased imports and the serious injury suffered by the domestic industry? Does such a determination ensure that none of the injurious effects caused by the crisis in the oil and gas industry have been attributed to increased imports? Please explain.

Response

96. As discussed above, the USITC did not merely find that the crisis in the oil and gas industry could not have accounted for the totality of the serious injury experienced by the domestic industry. Rather, the USITC found that there was a direct, *i.e.* "genuine and substantial," causal link between the significant increase in imports, the prevalent price depression that followed this increase, and the consequent deterioration in the industry's financial condition. In confirming this causal relationship, it found that of the two principal factors affecting the industry, the increased imports played a larger role.

97. Since the USITC did not base its causation conclusion on a finding that the injury field was not completely occupied by the oil and gas crisis, the US response must consider this question to be a hypothetical one. Under SGA Article 4.2(b), a competent authority would always have to find, as an affirmative matter, that there was a causal link between increased imports and serious injury. Merely eliminating other possible causes without independently confirming this causal relationship would not appear to be sufficient to meet this requirement. Assuming that this link is established, there could be some factual circumstances, such as where there is only one possible cause of injury other than the imports, in which a finding that the alternative cause was not responsible for all injury would be sufficient to meet the SGA's causation requirements. In other circumstances, this approach might not suffice.

⁶² USITC Report, pp. I-29-30.

⁶³ USITC Report, p. I-29. Domestic producers were steadily losing market share for all types of line pipe products to foreign producers.

⁶⁴ USITC Report, p. I-29.

⁶⁵ USITC Report, p. I-30 and n. 186.

98. The United States notes that the Appellate Body has emphasized that the method and approach WTO Members choose to carry out the non-attribution process is not specified by the Safeguards Agreement.⁶⁶

25. Did the ITC find that injury was caused by “other factors” in addition to the decline in the oil and gas industry? If so, how did the ITC ascertain that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury?

Response

99. As explained in response to Panel question number 23, the USITC’s conclusion that there was a genuine and substantial causal link between the increased imports and the serious injury starts with its analysis of the adverse effects the imports had on the industry’s condition. In particular, in this case, the USITC found that the increased imports caused significant price depression, which in turn resulted in lost sales, market share and revenues for domestic producers and lost jobs for their workers. Thus, the USITC established that there was a causal link between the increased imports and the industry’s poor performance. The USITC then examined other actual or alleged causes of injury to the industry. In comparing the weight of those causes to that of the imports, the USITC distinguished the effects of each alternative cause from the effects caused by the imports. The USITC explained that it did not attribute injury caused by other factors to the imports.⁶⁷

100. In addition to the reduction in oil and gas drilling, the USITC examined five other possible causes of injury alleged by respondents. It found that the evidence did not bear out respondents’ allegations that the increases in the domestic producers’ per-unit overhead and SG&A were caused by misallocation of declines in production of other pipe products. As explained in the United States written submissions and response to Panel question 8, the USITC concluded that the domestic producers had not mistakenly or disproportionately attributed their overall per-unit allocated overhead and SG&A expenses.⁶⁸

101. The USITC also examined whether a decline in interim 1999 prices for the main raw material – hot-rolled carbon steel – caused the line pipe price declines which had triggered the domestic industry’s financial downturn. It determined that declining costs did not cause the price declines,⁶⁹ and that with respect to costs, it was not misattributing the price effects caused by the imports. In its Report, the USITC explained that the questionnaire data showed that overall raw material costs remained stable through 1998, and therefore declines in raw material costs could not have been an alternative cause of the 1998 price declines. Although the data showed declines in raw material costs in interim 1999, these lower costs were for the most part (all but 5 per cent) offset by increased labour and other factor costs, thereby balancing the cost of goods sold. In addition, the USITC noted that there were indications of increases in raw material costs, particularly for hot-rolled steel, in the latter half of 1999. Based on this reasoned examination of the evidence, the USITC found that the decline in raw material costs in interim 1999 was not causing injury to the domestic industry, and certainly was not causing the price declines found to be attributable to the increased imports.

⁶⁶ *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, para. 180 (“US – Lamb Meat (AB)”).

⁶⁷ USITC Report, p. I-30.

⁶⁸ USITC Report, p. I-31.

⁶⁹ USITC Report, pp. I-31-32.

102. The USITC examined the effects of each of the other four possible alternative causes, and did not attribute injury caused by any of them to the imports.⁷⁰ Addressing competition among domestic producers, the USITC found that such competition had always been a factor in the market, and that it did not explain the severe decline in domestic prices and shipments that occurred toward the end of the period investigated. The USITC further found that although the addition of two new facilities in 1998 added to capacity, the 8 per cent increase in capacity was reasonable and moderate in comparison to the 23 per cent growth in consumption from 1994 through 1998.

103. The USITC also examined the effects of changes in the oil country tubular goods (“OCTG”) market that caused domestic producers to shift production out of OCTG to line pipe. The USITC found that this factor was actually another form of increased intra-industry competition because its effect would be to increase production, and therefore supply, of line pipe.⁷¹ As noted, the USITC found that domestic competition had always been a factor but had not caused prices depression and shipment declines such as those caused by the imports. Furthermore, the USITC found that any switch from OCTG to line pipe would have been in relatively small quantities.

104. The USITC next examined the decline in export markets in 1998 and interim 1999. It found that although this decline worsened the serious injury caused by the increased imports, the increase in imports was far larger than the decline in exports. Thus, although the modest declines in exports may have also affected the producers’ bottom line, those effects were not attributed to imports because, as the USITC found, the impact of the increased imports dwarfed the decline in exports.⁷²

105. Thus, the USITC distinguished the effects of each of the alternative causes and found that none of the other factors severed the causal link it had found to exist between the increased imports and the serious injury. The USITC’s thorough explanation of this analysis in its Report demonstrates that the USITC based its serious injury determination upon the existence of a genuine and substantial relationship of cause and effect between the increased imports and the serious injury.

26. Does the Line Pipe measure “appl[y]” (within the meaning of Article 9.1 of the Safeguards Agreement) to developing countries?

Response

106. The line pipe safeguard does not apply to any developing country Members that account for less than three per cent of total imports. Article 9.1 of the Safeguards Agreement states that safeguard measures shall not “be applied” against imports from a developing country Member under the circumstances set forth in that article. The ordinary meaning of the terms provides no guidance on how a Member may meet the Article 9.1 requirement, thus leaving the decision to the Member. In the present case, the United States met the requirements of Article 9.1 by permitting the first 9,000 short tons from any supplier country to enter the United States free of additional duty. Since the US measure permits the first 9,000 short tons of imports from each supplier country to enter free of additional duty, the measure is not “applied” against any developing country Member’s imports unless and until the 19 per cent additional tariff takes effect. This would occur only if imports from a particular developing country Member exceeded 9,000 short tons in a given remedy year.

107. When the United States constructed its remedy, historical import patterns indicated that permitting each supplier country to enter 9,000 short tons of line pipe free of additional duty would ensure that the remedy would not apply to any developing country Member with a 3 per cent or lower

⁷⁰ See USITC Report, p. I-30.

⁷¹ USITC Report, pp. I-30-31 & n.190.

⁷² USITC Report, p. I-31.

share of total imports.⁷³ Accordingly, the US measure would not “be applied” to the imports of any developing country Member eligible for exclusion under the terms of Article 9.1. If the US expectations were to prove mistaken, the affected developing country Member would be fully within its rights to raise its concerns with the United States directly or under the auspices of the WTO. They do not need Korea to enforce their rights for them.

108. It is important to recall that Korea, as the complaining Member, has the burden of demonstrating a lack of compliance with Article 9.1. Notably, while Korea makes generalized assertions about the US approach to this issue,⁷⁴ it has failed to identify a single developing country Member whose imports are being subjected to the 19 per cent additional tariff. Korea’s claim on this issue is purely speculative.

27. With regard to para. 227 of the US first written submission, does the 9,000 short ton exemption guarantee that developing country Members accounting for 3 per cent or less of total subject line pipe imports into the US will not be subject to the Line Pipe measure? What if the volume of subject line pipe imports (especially from Canada and Mexico) increases to such an extent that a developing country Member could export more than 9,000 short tons to the US, and still remain at or below the 3 per cent threshold?

Response

109. The Panel’s question appears to be based upon the erroneous premise that the United States is under an obligation to “guarantee” at the time of imposition that the measure will never – under any hypothetical eventuality – apply to a developing country Member with less than a 3 per cent share of imports. In actuality, Article 9.1 states that a safeguard measure shall not be “applied” against a developing country Member’s imports “as long as” the Member’s import share does not exceed 3 per cent. Korea has pointed to no evidence suggesting that the United States is applying (or will apply) the safeguard measure to any particular developing country Member in contravention of Article 9.1.

110. Moreover, as the United States noted above, historical import patterns demonstrate the unlikelihood that any developing country Member would export more than 9,000 short tons of line pipe to the United States in a single year and yet remain below a three per cent share of total imports. The Panel’s question appears to assume – without basis – that the United States would take no action to address such a situation in the extremely unlikely event that it were to occur. If the Panel’s hypothetical does occur, and if the United States takes no action, then the affected developing country Member will be able to exercise its rights as it chooses.

111. Finally, the Panel’s question anticipates a surge in the volume of imports from Canada and Mexico. US law protects against the possibility that imports from excluded free trade agreement partners will surge to fill demand previously filled by third country imports. If the President were to determine that a “surge” in imports of Canadian or Mexican line pipe was undermining the effectiveness of the line pipe safeguard measure, he could include those imports within the measure.⁷⁵ US law defines the term “surge” as “a significant increase in imports over the trend for a recent

⁷³ Only in the surge year of 1998 did imports rise to a level at which 9000 short tons would represent less than 3 per cent of total imports, and only by a small degree. Since the imposition of the measure was expected to lead to a reduction in overall imports, the exemption for the first 9000 short tons will always represent more than 3 per cent of total imports.

⁷⁴ See Korea’s First Written Submission at paras. 180-183.

⁷⁵ 19 U.S.C. § 3372(c) (attached as US Exhibit-28).

representative base period.”⁷⁶ Thus, any appreciable increase in imports of Mexican or Canadian line pipe could subject those imports to inclusion in the US safeguard measure.

(vii) Increased imports

28. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia “recent enough.” How “recent” should the increase in imports be, relative to the date of the competent authority’s decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Response

How “recent” should the increase in imports be, relative to the date of the competent authority’s decision to impose a safeguard measure?

112. The United States submits that this question cannot be answered in the abstract as the answer may depend on the industry involved, including any relevant business cycle, as well as other considerations peculiar to the circumstances of a particular safeguard investigation. Accordingly, the United States will address this question in the context of the current dispute.

113. As earlier indicated, an increase in the absolute volume of imports as well as an increase in the volume of imports relative to domestic production occurred in 1998, the last full year of the five year investigatory period established by the USITC in its line pipe safeguard investigation. Indeed, the annual increase in both the absolute volume of imports as well as the increase relative to domestic production was the greatest in 1998. A comparison of data for interim 1999 with those for the comparable period of 1998 indicates a continuation of the increase in imports relative to domestic production. Since the increase in import volume occurred in the last full year of the investigatory period as well as (in the case of relative import levels) in the last partial year for which the USITC had data prior to its determination of serious injury, there can be no question that the increase in imports was sufficiently recent to satisfy the requirements of the Safeguards Agreement.

What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports?

114. The Safeguards Agreement does not contain any requirements for the timing of a petition. The amount of time that a domestic industry might reasonably need to file a petition following a sudden increase in imports could vary greatly, depending upon factors such as the resources of the domestic industry and the complexity of the potential case. An industry that is faced with a sudden increase in imports might also decide to wait to see whether the situation improves. In light of the many variables involved in the timing of the filing of a petition, we do not believe it would be appropriate to provide a generalized answer as to the minimum period of time that an industry would need to file a petition.

In the present case, could the US line pipe industry have filed a petition before it did?

115. We are not in a position to speculate regarding the circumstances surrounding the domestic line pipe industry’s decision to file its petition, and the preparation of its petition.

⁷⁶ 19 U.S.C. § 3372(c)(3).

Could the ITC have reached its determination before it did?

116. By statute, the USITC makes its injury determination within 120 days after a safeguards investigation has been initiated. This time is required for: the collection of data from industry participants, the analysis of this data by the USITC staff, the submission of briefs by parties, a hearing, and the evaluation of the case by the USITC Commissioners.

29. The US argues in para. 66 of its first submission that a comparison of “mismatched” interim period could create distortions because of seasonal changes in market conditions. Does the US therefore, believe that line pipe is a seasonal product? If line pipe is not a seasonal product why is it necessary to compare “matched” interim periods, as opposed to the immediately preceding interim period?

Response

117. The USITC traditionally examines a five- year time period, unless circumstances peculiar to a specific industry warrant otherwise, and collects annual data for each year in the investigatory period. In addition, the USITC routinely gathers partial year data for any interim period occurring at the end of the investigatory period. Collection of data for this interim period allows the USITC to have information available to it on the most current period possible. The USITC’s approach is entirely reasonable and certainly not inconsistent with the Safeguards Agreement.⁷⁷ Indeed, the Agreement is silent regarding the period of investigation to be used in evaluating the impact of increased imports and does not require that import trends be analysed in time increments of any particular duration (*e.g.*, monthly, quarterly, annually.)

118. The availability of data for the latest interim period is useful for analysis, however, only if the USITC also has available data of a comparable kind for a comparable earlier period. To ensure the availability of such data, information is also collected by the USITC for the same calendar year segment in the last full year of the investigatory period that corresponds to the calendar segment included in the interim period, *e.g.* one, two, or three calendar quarters as the timing of the investigation permits. The selection and consideration of data for these corresponding interim periods is predicated on two reasonable principles. First, the use of a uniform analytical approach in all investigations establishes an objective and predictable methodology that is not susceptible to manipulation or distortion. Recognizing the efficacy of a general rule, the Commission also chose a rule which served a second function. The reliance on comparable time periods in each year ensures to the extent possible that any variation in industry data that might be occasioned by sales or production cycles, or other conditions unique to a particular industry, not result in a distortion in the analysis conducted by the competent authorities. Thus, this general approach is undertaken by the USITC regardless of whether there are seasonal or other issues involved. While production of line pipe does not appear to follow any particular seasonal cycles, industries using line pipe may sometimes be affected by weather conditions and be less likely to conduct pipe laying and other activities in those seasons of the year that are less conducive to their operations.

119. Thus, in its line pipe investigation, the USITC followed its long-standing methodology of examining imports on a calendar year basis with additional data collected for interim periods (in this case the first six months of 1999 compared to the first six months of 1998).

⁷⁷ The United States notes that its practice in this regard appears to be similar to Korea's practice. See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, paras. 7.62, 7.64, 7.65, 7.67, 7.78, 7.84 (“*Korea – Dairy (Panel)*”).

II. US RESPONSES TO ADDITIONAL ORAL QUESTIONS POSED BY THE PANEL AT THE FIRST SUBSTANTIVE MEETING

Response

Did imports increase by a greater percentage from 1996-1997 than 1997-1998?

120. In absolute quantities, the increase in imports was greater between 1997-1998 than between 1996-1997 (110,000 vs. 95,000 tons). In percentage terms, the rate of increase in imports was greater in the 1996-1997 period than in the 1997-1998 period. On an absolute basis imports increased by 67 per cent from 1996 to 1997, and by an additional 44 per cent from 1997 to 1998.⁷⁸ Imports relative to US production rose from more than 17.2 per cent in 1996, to more than 23.2 per cent in 1997, to more than 42 per cent in 1998.⁷⁹ Thus, the relative level of imports as a percentage of US production increased by the greatest rate between 1997-1998.

121. Whether viewed on an absolute basis or relative to domestic production, the increase in imports was greater between 1997-1998 than between 1996-1997. The Safeguards Agreement requires only that the imports have increased either in absolute terms or relative to domestic production. Line pipe imports increased both relative to domestic production as well as in absolute terms, and the rate at which imports increased greatest was between 1997 and 1998.

Does the Safeguards Agreement distinguish serious injury and threat of serious injury for any purpose?

122. Articles 4.1(a) and (b) of the Safeguards Agreement provide separate definitions for “*serious injury*” and “*threat of serious injury*.” Other than this, the Safeguards Agreement does not distinguish between serious injury and threat. The *injury* component of the two definitions is the same, with the differences between the two being a matter of timing: *threat* is defined as *serious injury* that is “*clearly imminent*.” Under the Safeguards Agreement, competent authorities must evaluate the same enumerated factors set out in Article 4.2(a) in all injury investigations. Unlike the Antidumping and SCM Agreements, the Safeguards Agreement does not specifically list additional factors that competent authorities must consider in addressing threat.⁸⁰

123. The only specific legal consequence that flows from the fact that a safeguard measure is predicated on serious injury as opposed to a threat of serious injury is found in Article 5.2.⁸¹ In addition, any difference in condition of the industry that may be reflected in the individual determinations, however, is to be considered in the decision regarding the safeguard measure itself.

⁷⁸ See Table 1 to the letter from United States Re: Panel’s Request for Information (16 February 2001) (“February 16th Letter”).

⁷⁹ See USITC Report, p. II-20, Table 4. The percentages of imports relative to domestic production given above are derived by subtracting the percentage for “US Imports from Japan” from the “Total US Imports” percentage in Table 4. Because imports from Japan did not consist entirely of Arctic grade or alloy line pipe, this adjustment overcompensates for the exclusion of these two types of pipe. Accordingly, the percentages of imports relative to domestic production shown above are understated.

⁸⁰ Antidumping Agreement Article 3.7, SCM Agreement Article 15.7. See *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report WT/DS132/R, 28 January 2000 at ¶ 7.131.

⁸¹ Article 5.2(a) specifies that a Member who allocates a quota among supplying countries shall seek agreement as to the allocation from other Members having a substantial interest in the supplying the product concerned, or a lot the quota based upon the proportions supplied by the Members during a previous representative period. Article 5.2(b) permits members to depart from the provisions of subparagraph (a) under certain conditions, but provides that such a departure “shall not be permitted in the case of threat of serious injury.”

Is it possible to find serious injury and threat of serious injury at the same time?

124. Under US law each USITC Commissioner who makes an affirmative determination must base that determination on either serious injury or threat thereof. An affirmative determination of the USITC (*i.e.*, of the competent authority) may be based on serious injury or threat thereof and there certainly are circumstances in which it would be possible to reach a conclusion either that the industry was either currently seriously injured or threatened by serious injury. Since a finding of threat of serious injury requires that the injury be imminent, the temporal difference between current serious injury and threat of serious injury is not likely to be substantial.

III. RESPONSES TO QUESTIONS FROM KOREA

1. The United States argues that the Agreement on Safeguards (“SA”) contains no requirement for a Member to use economic analysis to determine the level of a safeguard measure (US Submission at para. 178). The United States also argues that import volume after the safeguard measure is inadmissible in the panel proceedings (Id. at para. 176). If neither *ex ante* nor *ex post* analysis is allowed as the United States argues, then, in the US view, how could a Panel analyse a Member’s compliance with its obligations under Article 5.1 of the SA?

Response

125. As the Appellate Body explained in *Korea – Dairy*, except in the limited circumstances described in Article 5.1, the Safeguards Agreement does not require a Member to adopt a justification for a safeguard measure at the time it takes the measure.⁸² By the same token, it is not precluded from providing a justification of the measure at that time. If the measure becomes subject to dispute under the DSU, the Member may issue a justification in those proceedings or elaborate upon an earlier justification. In short, the Safeguards Agreement is silent as to *when* a Member needs to justify its safeguard measure. In this regard, safeguard measures are like any other measure taken by a Member in that there is no need to explain consistency with the WTO Agreement unless another Member presents a *prima facie* case that the measure is inconsistent.

126. As we explain above, the Safeguards Agreement does require that the measure be based on *information* available at the time of the decision to take the measure. Therefore, regardless of when a Member justifies a measure, it must rely on the body of information available at the time of the decision to take the measure. Similarly, a Member claiming that the decision is inconsistent with GATT 1994 and the Safeguards Agreement must base its claim on that body of information, as must a Panel evaluating the measure in the context of a dispute.

127. The United States also notes that Korea’s question distorts the US position. The US observation that the Article 5 does not *require* an economic analysis does imply that an *ex ante* analysis is “not allowed.” The Safeguards Agreement does not require an explanation of the basis for a safeguard measure in general, or the use of economic analysis in that explanation. Therefore, a Member retains the discretion to explain a safeguard measure whenever it considers appropriate, using whatever type of analysis it considers appropriate.

128. By the same token, the US view that the Panel may not consider post-decision *evidence* in evaluating the decision to take a safeguard measure does not imply that *ex post* analysis is “not allowed.” As we have stated in response to this question, the Panel may not consider after-the-fact evidence (such as import statistics for the period after application of the line pipe safeguard). It is required to consider *ex post* explanations and argumentation.

⁸² *Korea – Dairy (Panel)*, WT/DS98/AB/R, para. 103.

2. Did NAFTA “eliminate” safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

Response

129. The NAFTA requires parties to exclude each other from safeguard measures under certain conditions. Parties may include each other in safeguard measures only under the conditions specified in Article 802 of the NAFTA. The United States also wishes to call Korea’s attention to its response to question 17 from the Panel.

3. Is it the position of the United States that the provisions of Article XXIV of the GATT 1994 apply to its exemption of Mexico and Canada from the safeguard measure on line pipe independently of whether Footnote 1 of the SA applies to US safeguards actions under NAFTA?

Response

130. In its first written submission, Korea claimed that the exclusion of Canada and Mexico from the line pipe safeguard was inconsistent with Articles I, XIII:1, and XIX of the GATT 1994.⁸³ Article XXIV:5 states that “the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a ... free-trade area” Thus, Article XXIV prevents the alleged inconsistencies with all the referenced provisions of the GATT 1994. Footnote 1 simply makes clear that the Safeguards Agreement does not alter this.

4. Is it the position of the United States that Article XIX measures, and thus Article 5 safeguard measures, are permitted between free trade members and thus do not prevent the formation of a free trade area under Article XXIV?

Response

131. The United States wishes to direct Korea’s attention to its response to questions 17-21 from the Panel.

5. The United States states that the indexed data provided in its February 16th letter can be used to calculate relative import trends (Id. at para. 261). Therefore, using the indexed data, please calculate the percentage of imports relative to production for the following period:

| 1997 | 1998 | 1st half of 1998 | 2nd half of 1998 | 1st half of 1999 |
|------|------|------------------|------------------|------------------|
|------|------|------------------|------------------|------------------|

Response

132. What the United States said in paragraph 261 of its first written submission is that “the panel can analyse the relationship between production and subject imports based on non-confidential production data in the USITC Report and the indexed data in the February 16th Letter.” This can be done in the following manner:

⁸³ Korea’s first written submission, paras. 167-173 and 179.

| | 1994 | 1995 | 1996 | 1997 | 1998 | Interim 1998 | Interim 1999 |
|--|---------|---------|---------|---------|---------|-----------------|-----------------|
| US production (absolute data) ⁸⁴ | 635,815 | 770,011 | 694,663 | 881,946 | 669,876 | 412,872 | 282,247 |
| US production (indexed data) ⁸⁵ | 100.0 | 121.1 | 109.3 | 138.7 | 105.4 | 100.0 | 68.4 |
| Total imports (indexed data) ⁸⁶ | 100.0 | 64.5 | 70.4 | 96.4 | 142.0 | 100.0 | 81.3 |

133. The United States explained at the first panel meeting that it has no objection to the Panel relying on the data showing the ratios of total US imports to US production in Table 4 on p. II-20 of the USITC Report, adjusted to exclude all imports from Japan. These adjusted ratios were provided in the United States' letter to the Panel dated April 23, 2001. As the United States explained in that letter, because not all imports from Japan consisted of Arctic-grade or alloy line pipe, such an adjustment understates the true levels of relative imports.

6. The United States repeatedly asserts that imports relative to production reached “their highest level of the entire five-and-a-half year period of investigation” in interim 1999. Id., at para. 54; see id., also at paras 8.75. 117. Isn’t it correct that imports reached their highest level relative to production in the period July-December 1998? If the United States disagrees that imports relative to production were higher in the second half of 1998 than the first half of 1999, please explain with specific reference to the actual figures for those periods.

Response

134. Imports relative to domestic production reached their highest level in interim 1999, *out of all periods for which data were collected* in the period of investigation. The USITC did not collect segregated data for the second half of 1998. Indeed, doing so would have been inconsistent with its longstanding practice. Following that practice, the USITC in this investigation collected data for each calendar year for the past five full years – 1994 through 1998 – and through the most recent quarter of the year in progress, in this case January through June 1999.⁸⁷ Also consistent with this practice, the USITC asked questionnaire respondents to provide segregated 1998 data for the comparable period to interim 1999. Again consistent with its routine and unbiased approach used in virtually all investigations, the USITC, in evaluating the data (including import data), compared the interim periods to confirm trends that were otherwise indicated from the data.⁸⁸ Thus, the USITC collected and evaluated the data in a neutral and objective manner, consistent with Article 4.2(a) of the Safeguards Agreement.

135. Notwithstanding the objective approach taken by the USITC, Korea suggests that the Safeguards Agreement somehow required the competent authority to deviate from its usual practice in this particular investigation. Korea's preferred methodology is no more mandatory than a comparison of quarterly import data. Korea's suggested approach, and not that taken by the USITC, is result-oriented and inconsistent with the SGA's objectivity requirements.

⁸⁴ USITC Report, p. II-20, Table 4.

⁸⁵ USITC Report, p. II-20, Table 4.

⁸⁶ United States' 16 February 2001 letter to the Panel, Table 1.

⁸⁷ See, e.g., USITC Report, pp. C-3-4, Table C-1.

⁸⁸ The United States has explained in both its first and second written submissions the reasons for its long-standing practice of comparing the latest interim period (in this case, January-June 1999) to the same calendar segment of the preceding year (in this case, January -June 1998).

7. Please confirm whether the United States continues to maintain that the public import data and the confidential import data follow the same trends, with specific reference to imports in the periods January-June 1998, July-December 1998, and January-June 1999.

Response

136. The USITC stated that “the adjusted data follow similar trends as the unadjusted data presented in Table C-1 of the report.”⁸⁹ As explained in response to Question 6 above, the USITC did not collect data for the July-December 1998 period. Therefore, the USITC and the United States were not referring to any comparisons involving the July-December 1998 period, when they stated that public and confidential data followed similar trends.

8. Is it the position of the United States that it does not have to explain and distinguish whether imports increased absolute or relative to production? Doesn't Article 8.3 of the SA apply only in cases in which the increase in imports is absolute? If so, how can it be that a Member can be exempt from explaining the basis of its finding?

Response

137. The United States has not taken any position on whether a Member must “explain and distinguish whether imports increased absolute or relative to production.” The question is not relevant in this case, because imports increased on both an absolute and a relative basis.

(Serious Injury)

9. Korea notes that the Majority ITC Opinion frequently makes reference to the industry performance by distinguishing between the periods of the first and second half of 1998 (see, e.g., ITC Determination. Majority Views on Injury at I-22). Yet, the United States maintains in its submission that the United States only looks at “full years.” Is it the US position that import data should be looked at only on a yearly basis but that factors of injury can be looked at on the basis of half-year periods? What is the basis in the SA for this distinction?

Response

138. Korea's characterization notwithstanding, the USITC looked at the injury factors for the purposes of addressing serious injury solely based on a year-by-year analysis. This is apparent from a review of the USITC's discussion of the serious injury factors on pages I-16 through I-20 of its Report. In its findings and conclusions about both the general overview of the line pipe industry and each individual factor, the USITC focused its analysis on year-by-year comparisons starting with 1994 and ending with interim 1999.

139. In addressing increased imports and the existence of a causal link between the increased imports and the serious injury, the USITC conducted an analysis parallel to that described above. That is, the USITC evaluated the absolute volume, ratio of imports to domestic production and imports' market share, and average unit values on a year-to-year basis and by comparison of interim 1999 with interim 1998.⁹⁰

⁸⁹ USITC Report, p. I-14 n.62; *see also* US first written submission, para. 4.

⁹⁰ USITC Report, pp. I-14-15, I-23-24. As is also its usual practice, the USITC evaluated price comparison data on a quarterly basis, which examination showed similar trends to those found for average unit values. USITC Report, p. I-25.

140. The United States is puzzled by Korea's statement the USITC majority "frequently" makes references to the industry's performance by distinguishing between the first half of 1998 and the second half of 1999. In fact, Korea's reference apparently is to two statements the USITC made in its Report in which it noted that the industry's poor health began in particular in the second half of 1998. The USITC made this point in response to arguments raised by the respondents. The Korean and Japanese respondents argued that "the effect of the oil and natural gas price declines on the gathering segment was sufficiently powerful to produce an overall decline in the apparent consumption of line pipe in the second half of 1998."⁹¹ Upon consideration of this argument, the USITC found that both the substantial increase in low-priced imports, as well as decreases in demand for line pipe resulting from the oil and gas crisis, contributed to the domestic industry's poor health beginning in the second half of 1998.⁹² In explaining why the imports were the greater contributing factor of the two, the USITC stated that the patterns of correlation between apparent consumption and the industry's financial condition indicated that the reduced level of demand in the second half of 1998 "would not be expected to generate the severe financial losses suffered by the industry in the second half of 1998 and first half of 1999, and that other factors therefore must account for this very different level of industry performance."⁹³

141. Thus, the USITC referred to the conditions in the second half of 1998 in response to respondents' arguments concerning conditions during that period. The USITC did not base its injury determination upon a comparison of half year data, as Korea urges the USITC should have been required to do with respect to import data.

10. For purposes of its remedy recommendation, the United States relies on the fact that the domestic industry admitted that demand for line pipe was growing by the time of the ITC determination (Id. at para. 175) Does the United States agree that this fact should have been considered by the ITC in its injury determination as well? If not, why not?

Response

142. The statement relied on for the comment in paragraph 175 was not on the record of the USITC injury investigation.⁹⁴ As discussed in the US second written submission, the USITC can base its serious injury determination only on evidence that was before it during the injury investigation. Consistent with the DSU Article 11 standard of review and Articles 3 and 4 of the Safeguards Agreement, the Panel likewise cannot consider extra-record evidence in reviewing the competent authority's injury determination. In fact, the evidence in the record of the injury investigation showed that apparent consumption declined during the first half of 1999.⁹⁵ We also note that the referenced statement in the US submission does not say that the demand was growing "by the time of the ITC determination," and that the actual reference is to a prediction that line pipe consumption would grow in 2000.

(Threat of Serious Injury)

11. The United States argues in para. 56 that the difference between a finding of serious injury and one of threat thereof is a matter of degree and timing. The United States also argues that the SA does not require the competent authorities to choose between serious injury or the

⁹¹ USITC Report, pp. I-21-22 (emphasis added), *citing* Japanese and Korean Respondents' Posthearing Brief at 29.

⁹² USITC Report, p. I-22.

⁹³ USITC Report, p. I-28.

⁹⁴ The comment cites to USITC remedy recommendation at I-77, which in turn cites to Petitioners' Posthearing Brief on Remedy.

⁹⁵ *See* USITC Report, p. I-23.

threat thereof (Id. at para. 57) Does the United States argue here that the SA does not establish the different conditions and the different legal effect for serious injury on the one hand and the threat thereof on the other hand? For example, could the United States have applied the provisions of Article 5.2(b) of the SA on the basis of a “serious injury or threat of serious injury” finding?

Response

143. The United States has addressed the first question in its response to the oral questions posed by the Panel at the first substantive meeting. As to the second question, the United States has not taken action pursuant to Article 5.2(b), and therefore the question is not relevant to this dispute.

(Causation)

12. The ITC record shows that it was fully aware that the situation in the oil and gas industry was a major cause of decline in the US line pipe industry. In the questionnaire prepared by the ITC (ITC Determination at II-66-68), why did the ITC not include the situation in the oil and gas industry as a choice of answers?

Response

144. Korea’s question presumes that the USITC was fully aware, *before* it gathered information in this investigation of the causes of any declines in the US industry.⁹⁶ In the *Line Pipe* investigation, the USITC asked producers to rate the factors other than imports that were adversely affecting the domestic industry and similarly asked importers and purchasers to rate factors that were affecting prices. Accompanying the questions, the USITC provided an objective list of factors derived from the USITC’s generic questionnaire as well as an opportunity to identify other factors. Thus, the USITC asked these questions in unbiased terms rather than by prompting the questionnaire recipients with prejudged answers, as Korea would have preferred. In this way, the USITC assured that its investigation was objective and therefore in compliance with the SGA Article 4.2(b) requirement that the competent authority base its injury determination on *objective* evidence.

145. What is more, many firms that responded to the questionnaires in fact took the opportunity to mention “other” factors. In fact, the responses indicated that a number of purchasers were aware of the overall importance of the oil and gas drilling and production activities, but, as the USITC found, the purchasers consistently identified *imports* as the major cause of the sharp decline in line pipe prices.⁹⁷ Further, the USITC did not ignore the importance of the oil and gas crisis as a cause of injury, and in fact exhaustively discussed that factor in its determination.

13. In para. 114, the United States argues that the ITC ensures “that injury caused by any or all other factors together, is not sufficient to sever the causal link.” (Emphasis added). The US standard is that an increase in imports is a cause which is “important and not less than any other cause.” How does this standard ensure that “all other factors together” are not sufficient to sever the causal link? Doesn’t US law require comparison of imports to other causes singly, not together?

⁹⁶ The United States notes that the Korea’s statement exaggerates the findings the USITC reached even at the end of the investigation: the USITC did not find that the oil and gas crisis was the major cause of the decline in the US pipe line industry, and particularly did not find a causal relationship between the oil and crisis and the price declines in the domestic line pipe market.

⁹⁷ USITC Report, pp. I-26 & n.163, I-30 & n.186.

Response

146. As an initial point, the United States notes that the consistency of the US statute with the Safeguards Agreement is not within the terms of reference in this dispute. Accordingly, insofar as Korea is asking this question to challenge the standards set by US law, the question is not relevant to this dispute.

147. What is relevant to this dispute is that the United States has shown that the USITC's *Line Pipe* causation analysis meets the requirements of the Safeguards Agreement. Both in its written submissions and in its responses to Panel questions numbers 23 and 25, the United States has explained how the USITC's causation analysis assured that there was a substantial and genuine causal relationship between the increased imports of line pipe and the serious injury, and that the effects of other factors were not attributed to the imports and did not sever the causal link. The United States has also shown in its written submissions and responses to Panel questions that it meaningfully explained this analysis in its Report.

148. As demonstrated in this case, the USITC conducted a multi-step causation analysis. First, it determined that the increased imports were an important cause of serious injury, *i.e.*, that there was a definite causal link between the imports and the injury. Only after having found this causal link in the first instance did it proceed to test the genuineness and substantiality of this causal relationship and in doing so ensured that it was not attributing the effects of other causes to the imports. It makes no difference under the Safeguards Agreement whether the USITC examined one other possible cause or numerous other possible causes, so long as it found that the causal relationship between the increased imports and the serious injury remained intact (or, in terms of the US statute was a substantial cause) when evaluated against any other cause.

149. The Appellate Body has twice held that Article 4.2(a) of the Safeguards Agreement does not require that increased imports "alone", "in and of themselves", or "per se" must be capable of causing injury.⁹⁸ Rather, the Appellate Body has recognized that other factors may be contributing "at the same time" to the situation of the domestic industry.⁹⁹ Further, "where there are several causal factors," the competent authority meets the causation requirements and assures non-attribution by separating and identifying the effects of the different factors.¹⁰⁰ As described above and in our response to Panel questions 23-25, the USITC met these requirements. The Safeguards Agreement requires no more, and any suggestion by Korea to the contrary is not supported by the Agreement or by the Appellate Body reports interpreting the safeguards causation standard. Indeed, the Appellate Body has emphasized that the method and approach Members use to carry out the process of separating out the effects of other causal factors is not specified by the Agreement.¹⁰¹

14. In paragraphs 238-239, Korea characterized Commissioner Crawford's views concerning the impact of Lone Star on the performance of the industry in 1998 as follows:

238. In the case of Lone Star Steel, Commissioner Crawford observed that the company allocated to line pipe certain production-specific costs for items which appear to have been unrelated to the production and sales of line pipe. The description of these items is treated confidentially by the ITC so their exact nature or overall effect is not known to Korea.

⁹⁸ *US – Lamb Meat (AB)*, paras. 169-171; *Wheat Gluten (AB)*, para. 79.

⁹⁹ *US – Lamb Meat (AB)*, para. 166; *US – Wheat Gluten (AB)*, para. 67, n.19..

¹⁰⁰ *US – Lamb Meat (AB)*, paras. 183-184.

¹⁰¹ *US – Lamb Meat (AB)*, para. 181.

239. Commissioner Crawford, however, concludes that this misallocation resulted in a substantial reduction in the level of operating income in the industry as a whole, particularly for the second half of 1998, and for reasons wholly unrelated to the conditions of competition in the pipe industry, much less imports of line pipe.

At paragraph 101, the United States claims that Korea “Misquotes” Commissioner Crawford. According to the United States:

In connection with charges incurred by Lone Star Steel, Commissioner Crawford stated that the domestic industry’s operating income “may be somewhat misleading.” Commissioner Crawford did not conclude that Lone Star had “misallocated” charges, or that this resulted in “a substantial reduction in the level of operating income in the industry as a whole,” as Korea claims.

What Commissioner Crawford actually said, in full, was as follows:

I note that the 1998 operating income on the record may be somewhat misleading. In 1998, Lone Star allocated *** of charges for *** (primarily a reduction in operating its *** in favour of ***). The results of this decision appear to have been felt most keenly in the second half of 1998. This decision had a marked impact on SG&A for the company and for the industry as a whole, reducing the industry’s level of operating income to \$10.8 million in 1998. ITC Determination at I-13 (emphasis added).

With specific reference to paragraphs 238 and 239 of Korea’s written submission, please indicate where Korea “misquoted” Commissioner Crawford. Secondly, since Commissioner Crawford appears to suggest that these charges should not have been allocated to line pipe, and that the result of the allocation was to lower the operating income of both Lone Star and the industry as a whole for reasons having nothing to do with imported line pipe, please provide the confidential version of her statement or explain how paragraphs 238 and 239 of Korea’s written submission are not accurate representation of her statement.

Response

150. The United States used the term *misquoted* to avoid using the more accurate term *misrepresented*. Korea did so in two ways in paragraph 239 of its first written submission. First, Commissioner Crawford nowhere concluded that Lone Star had “misallocated” charges, as Korea asserts. Second, Commissioner Crawford nowhere concluded that this resulted in “a substantial reduction in the level of operating income in the industry as a whole,” as Korea asserts.

151. In its response to Panel question number 8, the United States has explained that adding the Lone Star charge at issue would not increase the industry’s 1998 aggregate operating income of \$10.8 million by more than 20 per cent, or increase the ratio of operating income to net sales for 1998 of 2.9 per cent by more than one percentage point. Thus, contrary to Korea’s assertion in paragraph 239 of its first written submission, the Lone Star charge did not result in a “substantial reduction in the level of operating income in the industry as a whole.” This can be seen by comparing the industry operating income in 1997 to what it would have been in 1998 if the Lone Star charge were reversed to the full extent of the parameters identified above:

| | 1997 | 1998 | 1998 (adjusted by reversing Lone Star charge to full extent of parameters given) |
|-------------------------------|--------------|--------------|--|
| Operating Income | \$34,662,000 | \$10,768,000 | \$12,922,000 |
| Operating Income Ratio | 8.1% | 2.9% | 3.9% |

Source: 1997 and 1998 data are from USITC Report, P. II-27, Table 9.

152. As this chart makes clear, if the Lone Star charge were reversed to the full extent of the 20 per cent/one percentage point parameters, the domestic industry's operating income and operating income ratio would still have declined precipitously (by 63 per cent) from 1997 to 1998. Finally, it should be noted that the five Commissioners finding serious injury and threat thereof did not conclude that the Lone Star charge was improperly allocated to line pipe production.

153. Further, we note again that no matter how often Korea quotes from Commissioner Crawford's views, they have no legal consequence to this dispute because they do not constitute the findings of the competent authority.

15. The United States argues that Korea "received notice of the measure" on 11 February 17 days before the date the measure was scheduled to take effect (US Submission at para. 234). Korea learned of the measure through a press release on February 11. There was no other separate prior notification. The United States also argues that Korea could have had Article 12.3 consultations after the press release and before the effective date of the measure (Id. at para 238). Is there any record that the US Government has ever modified a trade defense measure after the measure was announced through a press release issued by the President of the United States and before the effective date?

Response

154. Prior to the *Line Pipe* case, the United States had imposed safeguard measures under the WTO Agreement three times. In none of those cases did the United States change the announced measure prior to its implementation.

155. The United States questions the relevance of Korea's question. This dispute involves the US decision with regard to the line pipe safeguard. We are not aware that the President's actions with regard to earlier safeguard measures indicated his potential response to consultations in the *Line Pipe* case. In this regard, it is highly relevant that another Member did engage in consultations between the announcement and implementation of the line pipe safeguard.¹⁰²

156. Insofar as Korea considers that the President's past practice might support its view that it "had no meaningful ability to discuss the actual remedy proposed before it was imposed," that argument is irrelevant. Article 12.3 obligates the United States to "provide an adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned ... " *Korea's* opinion that consultations would not be "meaningful" does not affect the question of whether the *United States* met this obligation. Indeed, it is hard to see how a Member could comply with Article 12.3 if another Member's pessimism about a successful outcome of consultations by itself established an inconsistency with that provision.

¹⁰² US first written submission, para. 238, n. 265.

Table X-1

Welded line pipe: Weighted-average f.o.b. prices and quantities of domestic and imported products 1-2, by quarters, January 1994 – June 1999

| Period | Product 1 | | | | Product 2 | | | |
|---------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| | United States | | Imports | | United States | | Imports | |
| | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) |
| 1994: Jan.-Mar. | \$478 | 5,158 | --- | --- | \$472 | 4,304 | *** | *** |
| Apr.-June | 485 | 5,730 | *** | *** | 472 | 5,405 | *** | *** |
| July-Sept. | 496 | 5,038 | *** | *** | 477 | 4,654 | *** | *** |
| Oct.-Dec. | 517 | 4,854 | 377 | 160 | 488 | 4,469 | *** | *** |
| 1995: Jan.-Mar. | 536 | 4,824 | 371 | 716 | 512 | 4,072 | *** | *** |
| Apr.-June | 522 | 5,475 | *** | *** | 514 | 4,247 | *** | *** |
| July-Sept. | 503 | 4,005 | --- | --- | 511 | 4,062 | *** | *** |
| Oct.-Dec. | 493 | 4,004 | *** | *** | 506 | 5,052 | *** | *** |
| 1996: Jan.-Mar. | 471 | 3,505 | --- | --- | 487 | 4,240 | *** | *** |
| Apr.-June | 482 | 6,149 | *** | *** | 489 | 6,841 | *** | *** |
| July-Sept. | 494 | 4,454 | 407 | 594 | 499 | 5,403 | 456 | 1,765 |
| Oct.-Dec. | 507 | 5,370 | *** | *** | 500 | 6,151 | 455 | 1,862 |
| 1997: Jan.-Mar. | 528 | 4,866 | 432 | 379 | 532 | 4,187 | 470 | 1,806 |
| Apr.-June | 545 | 4,479 | *** | *** | 547 | 5,220 | 429 | 2,312 |
| July-Sept. | 549 | 7,449 | 469 | 929 | 547 | 2,514 | 470 | 2,317 |
| Oct.-Dec. | 552 | 5,016 | *** | *** | 560 | 2,928 | 457 | 2,809 |
| 1998: Jan.-Mar. | 543 | 4,507 | *** | *** | 558 | 4,427 | 475 | 1,741 |
| Apr.-June | 533 | 6,795 | *** | *** | 528 | 2,756 | 440 | 2,186 |
| July-Sept. | 509 | 2,333 | 443 | 900 | 490 | 1,970 | 421 | 1,638 |
| Oct.-Dec. | 480 | 2,618 | *** | *** | 455 | 2,022 | 402 | 3,718 |
| 1999: Jan.-Mar. | 422 | 2,426 | *** | *** | 440 | 3,364 | 376 | 2,068 |
| Apr.-June | 394 | 3,977 | *** | *** | 414 | 3,008 | 339 | 3,650 |

Note: “---” indicates that no reported data and “***” indicates the data is withheld to protect business confidential information when 75 per cent or more of the data is provided by one firm or when 90 per cent or more of the data is provided by two firms.

Source: Compiled from data submitted in response to Commission questionnaires.

Table X-2

Welded line pipe: Weighted-average f.o.b. prices and quantities of domestic and imported products 3-4, by quarters, January 1994 – June 1999

| Period | Product 3 | | | | Product 4 | | | |
|---------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| | United States | | Imports | | United States | | Imports | |
| | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) |
| 1994: Jan.-Mar. | \$457 | 6,254 | \$424 | 2,089 | \$466 | 3,576 | \$426 | 181 |
| Apr.-June | 463 | 7,699 | 436 | 620 | 477 | 4,120 | 453 | 503 |
| July-Sept. | 473 | 5,589 | *** | *** | 485 | 6,976 | 461 | 538 |
| Oct.-Dec. | 482 | 5,598 | 444 | 2,036 | 506 | 6,702 | 465 | 1,143 |
| 1995: Jan.-Mar. | 509 | 6,354 | 439 | 2,830 | 511 | 4,290 | 470 | 824 |
| Apr.-June | 510 | 5,984 | 471 | 3,710 | 515 | 2,716 | *** | *** |
| July-Sept. | 531 | 6,555 | 481 | 1,338 | 503 | 4,385 | 495 | 498 |
| Oct.-Dec. | 497 | 5,472 | *** | *** | 489 | 3,929 | *** | *** |
| 1996: Jan.-Mar. | 531 | 6,882 | *** | *** | 478 | 4,709 | *** | *** |
| Apr.-June | 519 | 8,208 | 484 | 854 | 491 | 8,066 | *** | *** |
| July-Sept. | 536 | 7,418 | 445 | 1,401 | 483 | 7,529 | *** | *** |
| Oct.-Dec. | 535 | 6,932 | 465 | 2,370 | 490 | 5,328 | *** | *** |
| 1997: Jan.-Mar. | 519 | 3,797 | 463 | 1,524 | 504 | 6,943 | *** | *** |
| Apr.-June | 536 | 5,528 | 444 | 2,059 | 507 | 6,678 | *** | *** |
| July-Sept. | 548 | 3,026 | 457 | 2,661 | 551 | 9,569 | *** | *** |
| Oct.-Dec. | 535 | 5,185 | 466 | 2,548 | 516 | 4,878 | 486 | 242 |
| 1998: Jan.-Mar. | 544 | 4,169 | 474 | 1,370 | 530 | 6,339 | *** | *** |
| Apr.-June | 504 | 6,663 | 456 | 2,822 | 506 | 4,536 | 426 | 528 |
| July-Sept. | 496 | 4,605 | 416 | 2,650 | 441 | 1,920 | *** | *** |
| Oct.-Dec. | 448 | 2,383 | 417 | 4,243 | 466 | 1,929 | 407 | 678 |
| 1999: Jan.-Mar. | 398 | 3,617 | 370 | 1,772 | 399 | 2,418 | *** | *** |
| Apr.-June | 383 | 4,828 | 339 | 2,889 | 375 | 2,706 | 377 | 468 |

Note: “---” indicates that no reported data and “***” indicates the data is withheld to protect business confidential information when 75 per cent or more of the data is provided by one firm or when 90 per cent or more of the data is provided by two firms.

Source: Compiled from data submitted in response to Commission questionnaires.

Table X-3

Welded line pipe: Weighted-average f.o.b. prices and quantities of domestic and imported products 5-6, by quarters, January 1994 – June 1999

| Period | Product 5 | | | | Product 6 | | | |
|---------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| | United States | | Imports | | United States | | Imports | |
| | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) | Price (per ton) | Quantity (tons) |
| 1994: Jan.-Mar. | \$460 | 2,018 | \$435 | 588 | \$494 | 3,276 | --- | --- |
| Apr.-June | 452 | 5,942 | 415 | 620 | 494 | 3,736 | --- | --- |
| July-Sept. | 460 | 4,990 | 438 | 614 | 504 | 2,616 | --- | --- |
| Oct.-Dec. | 477 | 3,158 | 438 | 1,967 | 511 | 4,444 | \$*** | *** |
| 1995: Jan.-Mar. | 516 | 4,104 | *** | *** | 500 | 4,090 | --- | --- |
| Apr.-June | 508 | 5,232 | 499 | 1,994 | 497 | 3,092 | --- | --- |
| July-Sept. | 507 | 5,618 | 497 | 377 | 497 | 3,032 | *** | *** |
| Oct.-Dec. | 516 | 4,350 | 490 | 353 | 497 | 3,008 | --- | --- |
| 1996: Jan.-Mar. | 482 | 5,991 | 458 | 230 | 480 | 1,578 | --- | --- |
| Apr.-June | 484 | 6,059 | 473 | 566 | 487 | 5,312 | --- | --- |
| July-Sept. | 445 | 9,999 | 445 | 1,232 | 494 | 5,372 | --- | --- |
| Oct.-Dec. | 481 | 7,127 | 467 | 950 | 516 | 2,500 | *** | *** |
| 1997: Jan.-Mar. | 476 | 2,301 | 502 | 1,396 | 522 | 3,576 | *** | *** |
| Apr.-June | 442 | 8,986 | 440 | 866 | 510 | 4,448 | --- | --- |
| July-Sept. | 468 | 6,578 | 468 | 418 | 513 | 4,754 | --- | --- |
| Oct.-Dec. | 455 | 12,843 | 453 | 1,039 | 507 | 6,326 | *** | *** |
| 1998: Jan.-Mar. | 459 | 12,661 | 491 | 1,447 | 525 | 8,527 | *** | *** |
| Apr.-June | 449 | 17,285 | 448 | 1,468 | 530 | 5,423 | --- | --- |
| July-Sept. | 429 | 11,239 | 450 | 2,008 | 498 | 2,749 | --- | --- |
| Oct.-Dec. | 404 | 3,140 | 393 | 1,392 | 483 | 2,544 | *** | *** |
| 1999: Jan.-Mar. | 385 | 1,886 | 393 | 1,273 | 382 | 2,648 | --- | --- |
| Apr.-June | 347 | 10,174 | 317 | 1,111 | 379 | 4,732 | *** | *** |

Note: “---” indicates that no reported data and “***” indicates the data is withheld to protect business confidential information when 75 per cent or more of the data is provided by one firm or when 90 per cent or more of the data is provided by two firms.

Source: Compiled from data submitted in response to Commission questionnaires.

ANNEX B-3

CANADA'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

I. QUESTIONS TO CANADA

(i) *Exclusion of Canada and Mexico*

Q1. [CANADA ONLY] Canada argues (para. 9) that "safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other". If that is the case, why does the NAFTA allow for the imposition of safeguard measures between NAFTA members if certain conditions are met?

Reply

1. Canada agrees with the position of the United States that the fact that XIX is not among the enumerated articles in Article XXIV:8(b) means, by implication, that safeguard measures generally must be made part of the elimination of "restrictive regulations of commerce" under an FTA. This does not mean, however, that safeguard measures between members of an FTA are prohibited. The manner in which the NAFTA safeguard exclusion operates is consistent with this position because Article 802 provides, as the general rule, that such measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA.

Q2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

Reply

2. Although potentially a different argument than that put forward by Canada, the fact that both Article XIX safeguard measures and Article XI measures can take the form of quantitative restrictions may provide another basis for the conclusion that in certain circumstances safeguard measures may be allowed between members of an FTA.

Q3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue". Would the formation of the NAFTA have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act? Please explain. If so, why are NAFTA parties not automatically excluded from safeguard measures imposed by other NAFTA members?

Reply

3. NAFTA reflects a complex balancing of many elements, including its safeguards provisions, which were part of NAFTA at the time of its entry into force, that make up the substantive obligations that are found in the final text of the agreement. As noted above, Article 802 provides, as the general rule, that safeguard measures are not to be taken against another NAFTA party. However, consistent with Article XXIV:8(b), Article 802 allows for such measures in limited circumstances.

Q4. [ALL] Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures “may or must be made part of the general elimination of ‘restrictive regulations of commerce’ under any FTA (para. 216, US first written submission). Is it possible that safeguard measures “may” (as opposed to “must”) be made part of the general elimination of “restrictive regulations of commerce” under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Reply

4. As stated in answer to question #1, Canada agrees with the position of the United States that the fact that XIX is not among the enumerated articles in Article XXIV:8(b) means, by implication, that safeguard measures generally must be made part of the elimination of “restrictive regulations of commerce” under an FTA. This does not mean, however, that safeguard measures between members of an FTA are prohibited. The manner in which the NAFTA safeguard exclusion operates is consistent with this position because it provides, as the general rule, that these measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA.

Q5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that “issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles” (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in *Argentina – Footwear* (para. 106) that “the footnote only applies when a customs union applies a safeguard measure ‘as a single unit or on behalf of a member State’”. Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Reply

5- In Canada’s view, the Appellate Body’s comments found at paragraph 106 of its report in *Argentina-Footwear* apply only to the first three sentences of footnote 1, which specifically refer to customs unions and the actions taken by member State of a customs union. The last sentence in footnote 1 does not specifically mention customs unions and thus properly understood applies to both customs unions and free trade areas.

Q6. [ALL] If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Reply

6. With respect to the last sentence of Footnote 1, Canada notes that by its wording this sentence applies to the whole of the *Agreement on Safeguards*. Thus its placement has no bearing on the its interpretation and the fact that it is meant to inform the interpretation of the whole of the Agreement.

7. Canada's submissions in this matter addressed the issue of Canada's exclusion from the safeguard measure in question. Therefore Canada has no comment at this time with respect to questions 7-13 posed by the Panel.

II. QUESTION FOR MEXICO AND CANADA FROM KOREA

Q14. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

Reply

8. As indicated in Canada's answers to the Panel's first three questions above, consistent with NAFTA Member's WTO obligations, NAFTA Article 802 provides, as a general rule, safeguard measures are not to be taken against another NAFTA party. The extent to which safeguard measures can be taken against another NAFTA Party is limited to the circumstances set out in Article 802 of NAFTA, which are determined on a case-by-case basis.

ANNEX B-4

EUROPEAN COMMUNITIES' ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

**THESE QUESTIONS ARE INTENDED TO FACILITATE THE WORK OF THE PANEL,
AND DO NOT IN ANY WAY PREJUDGE THE PANEL'S FINDINGS ON THE MATTER
BEFORE IT**

(i) Exclusion of Canada and Mexico

1. [CANADA ONLY] Canada argues (para. 9) that “safeguard measures applied pursuant to Article XIX are not among the measures that Article XXIV:8 specifically authorizes participants in an FTA to maintain against each other”. If that is the case, why does the NAFTA allow for the imposition of safeguard measures between NAFTA members if certain conditions are met?

2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

Reply

1. See further discussion in the reply to question 4.

3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) “the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue”. Would the formation of the NAFTA have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act? Please explain. If so, why are NAFTA parties not automatically excluded from safeguard measures imposed by other NAFTA members?

4. [ALL] Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures “may or must be made part of the general elimination of ‘restrictive regulations of commerce’ under any FTA (para. 216, US first written submission). Is it possible that safeguard measures “may” (as opposed to “must”) be made part of the general elimination of “restrictive regulations of commerce” under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

General remarks

2. The EC would reiterate what it has already submitted to the Panel in its Oral Statement, i.e. that it is not necessary for the Panel to decide in this proceeding about the relationship between Article XXIV and Article XIX of *GATT 1994*.¹ The point in dispute in these proceedings is whether in the Line Pipe investigation the ITC exclusion of imports from Canada and Mexico from the scope of the safeguard measure was correct. The EC would also urge the Panel not to decide in general terms on the relationship between Article XXIV and Article XIX because the question raises complex issues that cannot be fully debated in the course of these proceedings.

3. The Panel's decision on this point does not however require a decision on the issue of principle of whether an FTA member may or must, under Article XXIV of GATT, legitimately exclude its FTA partners from the scope of a safeguard measure.

4. Indeed, the facts of the case are such that they allow the Panel to decide on the basis of the previous Appellate Body reports, notably the report in *Argentina – Footwear*.² In that case, the investigating authorities had included imports from customs union partners in the investigation, and had even made a “serious injury” finding based i.a. on those imports. Notwithstanding this, they had eventually excluded those imports from the reach of the measure.

5. Confronted with that factual situation, the Appellate Body in *Argentina – Footwear* recognized that there must be a “parallelism” between the product scope of an investigation and on the other hand the product scope of a safeguard measure. Moreover, it found that, since this parallelism had been broken by Argentina, then this was also contrary to the requirement of Article 2.2 of the *Agreement on Safeguards*:

“112. While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard *investigation*, these provisions do not resolve the matter of the scope of *application* of a safeguard measure. In that context, Article 2.2 of the *Agreement on Safeguards* provides:

Safeguard measures shall be applied to a product being imported
irrespective of its source.

As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States.³ [underlined added]

¹ EC Oral Statement, paras. 9-27.

² For a recent example where the similarity with a previously reviewed case led the Appellate Body to decide in the same way see *United States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia* (“US – Lamb”), WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, para. 170. The Appellate Body also reviewed a case of breach of parallelism between the scope of the investigation and the scope of a safeguard measure in *United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities* (“US – Wheat Gluten”), WT/DS166/AB/R, 22 December 2000.

³ Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (“Argentina – Footwear”), WT/DS121/AB/R, 14 December 1999, para. 112.

6. Thus, the Appellate Body has clearly indicated that the parallelism, and notably the inclusion of investigated imports from all sources within the scope of the measure, is also required by Article 2.2 of the *Agreement on Safeguards*. Therefore, *a contrario*, at least whenever this parallelism is not respected, Article 2.2 will also be violated.

7. As pointed out by the EC in its Oral Statement⁴, in the case under review the ITC investigated imports from i.a. Canada and Mexico and even took account of these imports to arrive at the general determination of “serious injury”. Nevertheless, it eventually excluded Canadian and Mexican imports from the scope of the safeguard measure.

8. Given the close similarity between the situations in the *Argentina – Footwear* and *US – Line Pipe* investigations, the same conclusions drawn by the Appellate Body in *Argentina – Footwear* apply in the present case. Accordingly, already on that basis, and without entering into the general issue of the relationship between Article XXIV and Article XIX of *GATT 1994*, the Panel should find in favour of Korea and conclude that the US, by failing to respect the parallelism between investigation and measure, has breached Article 2.2 of the *Agreement on Safeguards*.

Reply to questions 2 and 4

9. The EC does not believe that the imposition of safeguard measures between FTA partners is inconsistent with the concept of an FTA. The EC further considers that the US argument that the absence of a reference to Article XIX in Article XXIV:8(b) entails that WTO Members must exclude their FTA partners from the scope of safeguard measures they take is flawed in two fundamental ways.

10. In the first place, the US defence is not relevant to the present case. Article XXIV:8 of *GATT 1994* is by nature a definitional provision, which sets out the conditions to qualify as an FTA, and does not, by itself impose obligations on WTO Members:⁵ in particular, it does not impose an obligation to exclude FTA partners from protective measures nor the hypothetical conditions under which such exclusions may be granted. Moreover, the express mention in Article XXIV:8(b) of the maintenance of certain restrictive measures between FTA partners refers to restrictions which are WTO-compatible (since that provision refers to measures “permitted under Articles XI, XII, XIII, XIV, XV and XX”).

11. The legal basis for the prohibition of (and thus the obligation to eliminate) WTO-inconsistent restrictive measures is found (even for FTA partners), not in Article XXIV:8(b), but in all the relevant provisions of *GATT 1994*. In other words, there is no specific need to regulate in Article XXIV:8(b) the elimination of WTO-inconsistent measures between FTA partners, as this obligation is already laid down with effect for the whole WTO membership in other GATT provisions.

12. An analysis under Article XXIV:8(b) therefore assumes that the restrictive measure under review is WTO-consistent. Thus, an analysis of whether the exclusion of FTA partners from a safeguard measure is legitimate should be conducted by the Panel only after it has reviewed the other claims against the US investigation and measure on Line Pipe and only if the Panel has concluded that the other claims are unfounded (that is, the Panel has concluded that the ITC investigation and measure are consistent with all the requirements for imposition of safeguard measures, both in Article XIX of *GATT 1994* and in the *Agreement on Safeguards*, claimed by Korea to have been

⁴ EC Oral Statement, paras. 12-19.

⁵ The same distinction is drawn by the Appellate Body in *US – Lamb*, para. 133.

violated). In the EC's view, since the US safeguard action against line pipe imports is WTO incompatible in different respects, such an analysis is clearly not allowed in the present case.⁶

13. Even assuming, *arguendo*, that the US safeguard measure on Line Pipe were otherwise WTO-compatible, and thus the US argument were relevant, the second flaw in such argument is that it is both unsupported and not compatible with the general purpose and design of the relevant provisions of *GATT 1994*.

14. Perhaps the most appropriate approach to the issue is to start by addressing the definition of FTAs in *GATT 1994*. That definition is found in para. 8 (b) of Article XXIV, pursuant to which:

“(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.” [emphasis added]

15. One could recall what the Appellate Body observed in *Turkey – Textiles*:⁷

“Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a “customs union”. It requires the constituent members of a customs union to eliminate “duties and other restrictive regulations of commerce” with respect to “substantially all the trade” between them.”

Similarly, Article XXIV:8(b) lays down the standard for internal trade between members of an FTA and requires that an FTA (a) eliminate restrictive trade regulations and (b) that elimination covers substantially all trade between members.

16. One can further refer to what the Appellate Body observed in respect of the “substantially all the trade” clause when appearing in Article XXIV:8(a):

“Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term “substantially” in this provision.¹⁴ It is clear, though, that “substantially all the trade” is not the same as *all* the trade”.⁸

¹⁴ Panel Report, para. 9.148.”

17. Thus, the clause “substantially all the trade” as interpreted by the Appellate Body already entails that an absolute obligation to eliminate all restrictive measures is not imposed by Article XXIV:8(b) of *GATT 1994*. Therefore, inasmuch as an FTA remains within the outer limit of

⁶ The EC is aware that in *Turkey – Textiles* the Appellate Body found that WTO-inconsistent measures may be maintained by a customs union in respect of trade with third parties if certain conditions are met (Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (“*Turkey – Textiles*”), WT/DS34/AB/R, 22 October 1999, para. 58). In the EC's view, to the extent that these findings can be applied to the present case, the conditions dictated by the Appellate Body are not fulfilled by the US measure since it was neither taken upon the formation of NAFTA nor has it been shown to have been necessary for such formation.

⁷ Appellate Body Report, *Turkey – Textiles*, para. 48.

⁸ Appellate Body Report, *Turkey – Textiles*, para. 48.

“liberalization of substantially all the trade”, the remaining trade which is not liberalized may arguably remain so as a result of the application of safeguard measures.

18. This conclusion is further corroborated, under the circumstances of the present case, by the fact that the contracting parties to NAFTA themselves have not made the mutual exclusion from safeguard measures an absolute obligation. Instead, in Sec. 802(1) of the NAFTA Agreement they have provided for the possibility of inclusion in certain circumstances.⁹ If there were an absolute obligation to exclude partners (*quod non*), then whenever this provision is applied NAFTA partners would themselves violate Article XXIV.¹⁰

19. Likewise, if the US argument was taken literally and all safeguards were to be eliminated between FTA partners as a condition for the establishment of the FTA, then also bilateral safeguard clauses, such as that laid down in Sec. 801 of the NAFTA Agreement, would be prohibited.

20. There are further reasons why the US argument that safeguard measures must not be applied between FTA partners because Article XIX of *GATT 1994* is not expressly mentioned in Article XXIV:8 is unconvincing.

21. In the first place, Article XIX is not the only provision allowing trade restrictive measures that is not referred to in Article XXIV:8(b). If the US reasoning was correct, then also measures under e.g. Article VI of *GATT 1994* (as supplemented, clarified and modified by the *Anti-Dumping Agreement* and the *SCM Agreement*), could never be imposed against FTA partners. Perhaps even more obviously, the omission of any reference to Article XXI of *GATT 1994* (security exceptions) in Article XXIV:8(b), in stark contrast with the reference to Article XX (general exceptions), can hardly be understood to mean that FTA partners would be precluded from relying upon such provision in case of a situation calling for national security protection involving *inter alia* FTA partners.

22. Another unreasonable result of espousing the US interpretation is hinted to in Panel’s question 2. The EC’s view in that respect is that, given the fact that safeguard measures adopted consistently with Article XIX may take the form of quantitative restrictions covered by Article XI of *GATT 1994*, it is not logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are.

23. If quantitative restrictions can be maintained on a permanent basis (such as when they are based on Article XI:2) *a fortiori* it must be possible to apply them on “emergency” grounds.

24. The same can be said for, at the very least, all the measures based on the *GATT* provisions listed in Article XXIV:8(b), as well as for those which take the form of increased duties: whether or not adopted on safeguard grounds, there should be no obligation to exclude FTA partners.

⁹ Section 802(1) of the NAFTA Agreement reads, in pertinent part:

“Any party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless (1) (a) imports from a Party, considered individually, account for a substantial share of total imports; and (b) imports from a party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.”

¹⁰ This is even more the case because, if the two conditions in Sec. 802(1) are met, a NAFTA Party is entitled to include its partners’ imports irrespective of whether this result in reducing liberalization below the “substantially all trade” threshold. It is not plausible that the NAFTA partners would have agreed on such a text if they were convinced that there is an absolute obligation in Article XXIV to exclude FTA partners from safeguard measures.

25. It is therefore unconvincing to conclude that the list of trade restrictive measures whose continuation between FTA partners is expressly permitted by Article XXIV:8(b) is meant to be exhaustive.

26. More fundamentally, it is not clear that the adoption of safeguard measures, by their nature temporary and extraordinary remedies aimed at facing an exceptional emergency situation,¹¹ amounts to re-introducing trade restrictions relevant under Article XXIV:8 of *GATT 1994*, and therefore runs counter the obligation to liberalize trade between FTA partners. As clarified by Article XIX:1 of *GATT 1994*, the adoption of a (GATT-consistent) safeguard measure in a form other than a modification of a tariff concession amounts to “temporarily to ‘suspend the obligation in whole or in part’”¹² “to the extent and for such time as may be necessary to prevent or remedy [serious] injury.”

27. It is not to be excluded that among the obligations which can temporarily be suspended on safeguards grounds is also the obligation in Article XXIV:8(b) to eliminate restrictions between FTA partners. This however is not tantamount to saying that such an obligation is violated.

28. It follows from the foregoing that, even taking Article XXIV:8(b) of *GATT 1994* in isolation, that is without relating it to the *Agreement on Safeguards*, there is no absolute obligation for an FTA Member to exclude FTA partners from the scope of its safeguard measures.

5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that “issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles” (para. 220, US first written submission). In this regard, please comment on the Appellate Body’s finding in *Argentina – Footwear* (para. 106) that “the footnote only applies when a customs union applies a safeguard measure ‘as a single unit or on behalf of a member State’”. Does the Appellate Body’s finding apply to the last sentence of footnote 1? Please explain.

6. [ALL] If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Reply to questions 5-6

29. In the EC’s view the US argument is unwarranted. Footnote 1 to the *Agreement on Safeguards* is not relevant to decide on whether an FTA member is entitled to derogate from MFN by excluding FTA partners from safeguard measures it takes.

30. The fact that footnote 1 is not relevant to decide the matter before the Panel results from both its textual and contextual interpretation.

31. As to the ordinary meaning of footnote 1 to the *Agreement on Safeguards*, its first three sentences are expressly and exclusively concerned with the situation of customs unions. In the EC’s view this is a first indication that the note is intended to deal with customs unions, and with a specific issue arising in the application of safeguard measures when customs unions are involved.

¹¹ Appellate Body Report, *Argentina – Footwear*, paras. 93-94.

¹² Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (“*Korea – Dairy Products*”), WT/DS98/AB/R, 14 December 1999, paras. 86, 88; Appellate Body Report, *Argentina – Footwear*, para. 93.

32. The fact that the last sentence of footnote 1 refers in general terms to the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994, which remains unaffected, has to be related to the rest of the text of the footnote, and is not modifying the general scope of the footnote.

33. This is confirmed i.a. by the Appellate Body's finding in para. 106 of *Argentina – Footwear*, which is unqualified and applies to the whole content of footnote 1. That paragraph, along with the passage of the Panel Report that the Appellate Body criticized in the previous paragraph, is worth being quoted in full:

“105. Finally, the Panel concluded as follows:

in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union.⁹⁴

“⁹⁴ Panel Report, para. 8.102.”

106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. 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 On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentine authorities of the effects of imports from all sources on the Argentine domestic industry.” [emphasis added]

“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.”

34. Thus, in paragraph 106 of its Report the Appellate Body understood the first sentence of footnote 1 to determine the scope of the whole footnote and drew from that first sentence a conclusion in respect of the whole footnote.

Specifically, the Appellate Body identified the subject matter of the footnote as being safeguard actions taken by customs unions (as opposed to action taken by one of their constituent members).

35. The Appellate Body's conclusion was that the whole footnote was irrelevant to the case under review, which was concerned with whether Argentina, rather than the customs union of which it is a member, could rely on the last sentence of the footnote to justify exclusion of its customs union partners from the application of the measure.

The Appellate Body considered that the fact that the safeguard action under review was not attributable to a customs union was sufficient to exclude the relevance of the footnote.

36. The issue before the Panel in the present proceedings mirrors the one before the Appellate Body in *Argentina – Footwear* and addressed in para. 106 of the Appellate Body report. As recalled, in that case, at issue was the possibility for Argentina, as a customs union member, of relying on footnote 1, to exclude a customs union partner from the reach of a safeguard measure. Similarly, in the present case the issue is whether a member of an FTA, rather than the FTA itself, can rely on the last sentence of the footnote to exclude its partners from the application of its safeguard measure.

37. If the footnote, even if referring to customs unions, was held by the Appellate Body not to be relevant to actions taken by members of customs unions, a fortiori it cannot be relevant to actions taken by members of FTAs, which are not even mentioned in that footnote.¹³

38. Furthermore, if the last sentence of footnote 1 had the general scope and meaning that the US suggests, then it would have allowed the Appellate Body to apply it to the case at issue in *Argentina – Footwear* as well.

39. That footnote 1 is not relevant to decide the matter before the Panel is further confirmed by the fact that it has been inserted in Article 2.1 of the *Agreement on Safeguards*, rather than Article 2.2, as recalled in the text of question 6.

40. The text of the footnote is, moreover, attached to a specific term in Article 2.1, notably the word “Member”, as also pointed out by the Appellate Body in *Argentina – Footwear*.¹⁴ The footnote is thus aimed at regulating a specific instance, which can only concern actions taken by some of the Members. FTAs do not have a single customs territory and a single tariff schedule, and thus cannot become a WTO Member in their own right.

41. The EC would recall that still in *Argentina – Footwear* the Appellate Body expressly recognized that the requirement in Article 2.2 of the *Agreement on Safeguards* applies to actions taken by a customs union member when it has included imports from its customs unions partners in its safeguards investigation.¹⁵

42. Given that the Appellate Body’s conclusion in para. 112 of the *Argentina – Footwear* Report was based on the facts of Argentina’s investigation, not on Argentina’s membership in a customs union, it equally applies to other cases, like the one in dispute, where the parallelism between the scope of an investigation and the scope of a measure is not observed.

(ii) The measure

7. [ALL] Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury?

If the competent authority finds that increased imports have caused “serious injury or a threat thereof”, how does that authority ensure that the resultant safeguard measure is “necessary to prevent or remedy serious injury” within the meaning of Article 5.1 of the Safeguards Agreement?

¹³ That FTAs are not concerned by footnote 1 is not surprising. Unlike customs unions, FTAs do not require the establishment of a uniform external trade regime; therefore, the specific issue that is regulated in footnote 1 in respect of customs unions would unlikely arise for FTAs.

¹⁴ As also pointed out by the Appellate Body in *Argentina – Footwear*, para. 106, footnote 95.

¹⁵ Appellate Body Report, *Argentina – Footwear*, para. 112, supra, reply to questions 4 and 2, general remarks.

Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Reply

43. The “nature” of a safeguard measure as an extraordinary remedy against fair trade does not change depending on the conditions that must be present for its adoption to be WTO-compliant. This also applies to the specific condition of the existence of “serious injury” or of “threat of serious injury”.

44. The fact that a measure is based on a finding of “serious injury” or of “threat of serious injury” can however affect the features of the measure (such as level, type or duration). In fact, each measure must be based on the specific facts of the case, and what is “necessary” to remedy *actual* “serious injury” may not be equally “necessary” to prevent “*threat* of serious injury”. Likewise, the necessary “adjustment” of the domestic industry to changes may be different in cases of actual serious injury and in cases of threatened serious injury.

45. As regards the way of ensuring that a safeguard measure is “necessary” within the meaning of Article 5.1, the assessment of the “necessity” calls for a comparison between, on the one hand, the serious injury/threat thereof caused by increased imports and the adjustment required in either case, and, on the other hand, the anticipated effects of the proposed measure on import flows and on adjustment.

46. It has to be recalled that in order to make a finding of “serious injury” or of “threat of serious injury” domestic authorities must determine the relevant “serious injury” or “threat thereof” caused by increased imports – a step that is only completed after i.a. “non-attribution” to imports of injury caused by other factors is ensured.¹⁶

47. The determination of the “necessary” remedy is thus the determination of a remedy that will neutralize the serious injury or threat thereof caused by increased imports, as well as facilitate adjustment, and that will not exceed that objective.

48. Furthermore, concerning the question of whether choosing between a finding of present serious injury and a finding of threat of serious injury is necessary to comply with the necessity requirement contained in the first sentence of Article 5.1, in the EC’s view this choice is necessary. The reason for this is, first of all, that from a logical point of view these two notions appear to be mutually exclusive. The same situation cannot at the same time constitute threat and actual serious injury.

49. More importantly, choosing between the two findings is necessary in that the safeguard response is measured by the problem to be remedied. Because a “threat of serious injury” is not as immediately detrimental as actual serious injury, the remedy sufficient and not excessive to prevent serious injury from materializing will likely be less restrictive on trade than a remedy to redress a situation of actual “serious injury”. Like for diseases, preventing is better than treating and normally comes at a lower cost.

50. The different consequences between a “serious injury” and “threat of serious injury” finding were also clear to the ITC in this very case. The ITC Report accounts for the different views on injury of the various commissioners, and those who had found threat of serious injury recommended a

¹⁶ Appellate Body Report, US – Lamb, para. 180.

different and less restrictive measure from that recommended by the commissioners who had found serious injury.¹⁷

51. The fact that the level and type of remedy is likely to be different in the case of serious injury and of threat of serious injury does not, however, entail that the measure changes in nature, as explained above.

8. [ALL] GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed “wherever practicable”. GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be “practicable”, in the context of a tariff quota, to fix a quota representing the total amount of permitted imports?

Reply

52. Yes.

If not, why not? If yes, would this also suggest that a measure may constitute a tariff quota even if there is no “overall limit on eligibility” (para. 185, US first written submission)?

Reply

53. Yes, the very presence of this clause (“wherever practicable”) suggests the *a contrario* inference that in the case of a tariff quota fixing a quota representing the total amount of permitted imports may not always be “practicable”. This is however without prejudice to the question of whether in the present case fixing such a total amount was or was not “practicable”.

9. [ALL] In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does your delegation consider that the terms “quantitative restriction” and “quota” (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term “quota” (Article 5.2) not refer to the quota element of a TRQ?

Reply

54. The EC does not consider that the terms “quantitative restriction” and “quota” are synonymous. This seems to be consistent with use of those two terms elsewhere in the legal texts resulting from the Uruguay Round.

55. For example, the two terms already appear in GATT Article XI. That provision, while prohibiting any form of quantitative restriction, specifies that quotas are but one of the possible ways to effect such restrictions.

56. Furthermore, Article XIII of GATT 1994 makes clear in para. 5 that “quotas” can also be “tariff quotas”, as it states that Article XIII provisions also cover tariff quotas.

57. Since tariff quotas are also covered, the reference in e.g. Article XIII:2(d) to the allocation of a “quota” must be a reference to the allocation of the “quota” part of a TRQ.

¹⁷ ITC Report, pp. I-75 and I-87 respectively.

58. The EC would also recall that, as clarified by the Appellate Body, the various texts resulting from the Uruguay Round negotiations constitute an inseparable package of rights and obligations. Those obligations apply together. Therefore, Article XIII of GATT 1994 applies together with the Agreement on Safeguards unless it is demonstrated that there is a conflict or that it is derogated from the latter text.¹⁸

10. [ALL] In Korea – Dairy, the Appellate Body stated that it does “not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] 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”. Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is “necessary” (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Reply

59. In the paragraph of the Report referred to by the Panel,¹⁹ the Appellate Body contrasted the obligation in the first sentence of Article 5.1 of the *Agreement on Safeguards* with the one laid down in the second sentence. In respect of the second sentence, it had just observed

“This sentence requires a “clear justification” if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this “clear 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.*”²⁰

60. Therefore, by noting in paragraph 99 of the Report that there is not

“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”,

the Appellate Body simply considered that only the second sentence of Article 5.1 requires a clear justification, at the time of the adoption of the measure, as to why a quantitative restriction below a certain threshold is necessary. Not requiring a “clear justification” in other cases does not, however, amount to say that no justification at all is required, nor that it need not be provided at the time of the decision on the application of a safeguard measure.

61. As explained above,²¹ the assessment of the “necessity” of a given safeguard measure is made by comparing the “serious injury” or “threat of serious injury” found and the requirements for an orderly adjustment with the expected effect of the measure envisaged. Therefore, the necessity (or lack of necessity) of a measure may be already be evaluated by referring to the injury findings of the investigating authorities, if consistent with Article 4 of the *Agreement on Safeguards* and if

¹⁸ Appellate Body Report, *Korea – Dairy Products*, para. 81; Appellate Body Report, *Argentina – Footwear*, para. 89; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* (“*Guatemala – Cement*”), WT/DS60/AB/R, 2 November 1998, paras. 65, 75.

¹⁹ Appellate Body Report, *Korea – Dairy Products*, para. 99.

²⁰ Appellate Body Report, *Korea – Dairy Products*, para. 98.

²¹ *Supra*, reply to question 7.

appropriately reported in the domestic measure, and to the reasoning concerning the details (including level, type, duration) of the measure.

62. Most recently in *US – Lamb*, the Appellate Body confirmed that fulfilment of the requirements of the *Agreement on Safeguards* must be reviewed by looking at the domestic measure in the following terms:

“we observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on “all pertinent issues of fact and law” in their published report. As Article XIX:1(a) of the GATT 1994 requires that “unforeseen developments” must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of “unforeseen developments” is, in our view, a “pertinent issue[] of fact and law”, under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a “finding” or “reasoned conclusion” on “unforeseen developments”.” [emphasis added]²²

63. Since this conclusion is based on the general language of Article 3.1 of the *Agreement on Safeguards*, it logically applies to all the “pertinent issues of fact and law”, including compliance with the obligation in the first sentence of Article 5.1.

(iii) **Serious injury**

11. [ALL] Leaving aside the factual circumstances of the present case, does your delegation consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Reply

64. No, they would not be always and per se inconsistent. However, they are particularly relevant in safeguard investigations, in view of the emergency nature of safeguard action.

(iv) **Increased imports**

12. [ALL] In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia “recent enough”. How “recent” should the increase in imports be, relative to the date of the competent authority’s decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Reply

65. There is not a predetermined benchmark for deciding if imports are recent enough, but in view of the emergency nature of safeguard measures the exceptional situation justifying safeguard action must be as close as possible to the decision of such action.

²² Appellate Body Report, *US – Lamb*, para. 76. Still in *Korea – Dairy Products* the Appellate Body upheld the Panel’s finding of a violation of Article 4 of the *Agreement on Safeguards* which was based on examination of whether certain “relevant factors” in Article 4.2(a) had or had not been reviewed in the OAI Report (Appellate Body Report, *Korea – Dairy Products*, paras. 138, 141).

66. Likewise, there is no minimum predetermined period to wait before a petition for safeguard relief may be filed with the competent authorities.

(v) Developing country exemption

13. [ALL] At para. 181, Korea asserts that “the United States did not even attempt to determine which countries qualified for this exemption”. Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

Reply

67. In the EC’s view Members imposing safeguard measures are required to determine in advance which developing countries should be excluded by reason of Article 9.1. In fact before imposing a measure they are required to assess import trends and to conduct a full investigation. This also applies to imports from developing countries, so that data concerning their individual and aggregate share in the trade in the investigated product also need to be available and be reviewed before the adoption of a measure.

ANNEX B-5

JAPAN'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

2. Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

4. Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures “may or must be made part of the general elimination of ‘restrictive regulations of commerce’ under any FTA (para. 216, US first written submission). Is it possible that safeguard measures “may” (as opposed to “must”) be made part of the general elimination of “restrictive regulations of commerce” under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Answers to Questions 2/4

The GATT Contracting Parties and WTO Members have addressed the scope and meaning of GATT Article XXIV:8(b) a number of times, without developing a consensus.¹ In this type of situation, the Panel should be cautious in making a ruling regarding the provision based solely on deduction from its text.

This being said, Japan has argued in the Committee on Regional Trade Agreements, citing the absence of Article XXI from the list, that the exceptions listed in Article XXIV:8(b) are illustrative so as not to negate the purpose of an RTA stipulated in Article XXIV(to facilitate trade).²

In reference to the specific case before the Panel, Japan draws the attention of the Panel to the following. The United States relies on Article XXIV:8(b) to assert that the North American Free Trade Agreement (NAFTA) is an FTA as defined at GATT Article XXIV:8(b) and that this, in turn, justifies the US exclusion of Mexico and Canada from its safeguard measure. Yet under such an interpretation, the United States also would be prohibited from imposing anti-dumping and countervailing duties on Mexico and Canada, because, like GATT Article XIX (providing for safeguard measure), GATT Articles VI and XVI (providing for antidumping and countervailing duties) are excluded from the list of measures excepted at GATT Article XXIV:8(b). But the United States does not do so³ and has not provided a logical explanation of this obvious contradiction.

¹ See, e.g., WT/REG/W/37.

² Id.

³ See, e.g., Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, South Korea, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, 65 *Fed. Reg.* 78467-70

5. The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that “issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles” (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in *Argentina – Footwear* (para. 106) that “the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State’”. Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Answer to Question 5

No, it does not. In *Argentina – Footwear*, the Appellate Body was concerned only with issues in the context of customs unions. The Appellate Body's finding does not address the last sentence of footnote 1.

6. If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Answer to Question 6

Article 2.2 of the Safeguards Agreement applies to Members implementing safeguard measures, whether or not the Member is a party to an FTA (as is the United States here) or to a customs union. Footnote 1 stipulates additional conditions applicable to customs unions acting as a single unit or on behalf of a member State. Thus, it is placed appropriately under the first paragraph that sets general conditions for safeguard measures, namely paragraph 1 of Article 2. Moreover, it is placed after “Member” because it qualifies “Member” in the context of customs unions.

(i) The measure

7. Are there circumstances in which the nature of a safeguard measure may change, depending on whether the competent authority makes a finding of present serious injury, or a finding of threat of serious injury? If the competent authority finds that increased imports have caused “serious injury or a threat thereof”, how does that authority ensure that the resultant safeguard measure is “necessary to prevent or remedy serious injury” within the meaning of Article 5.1 of the Safeguards Agreement? Is it necessary to choose between a finding of present serious injury and a finding of threat of serious injury in order to comply with the necessity requirement contained in the first sentence of Article 5.1? Please explain.

Answer to Question 7

Article 4 of the Safeguards Agreement defines “serious injury” and “threat of serious injury.” Circumstances relevant to either finding would vary from case to case, but the Agreement sets forth no specific criteria.

8. GATT Article XIII.2(a) provides that quotas representing the total amount of permitted imports shall be fixed “wherever practicable”. GATT Article XIII.5 states that Article XIII.2(a) shall apply to tariff quota. Would this suggest that there may be situations in which it may not be “practicable”, in the context of a tariff quota, to fix a quota representing the total amount of permitted imports? If not, why not? If yes, would this also suggest that a measure may

(15 December 2000); Continuation of Antidumping Duty Order and Countervailing Duty Order: New Steel Rail from Canada, 65 Fed. Reg. 6358 (9 February 2000) (attached as ROK Exh. 1).

constitute a tariff quota even if there is no “overall limit on eligibility” (para. 185, US first written submission)?

Answer to Question 8

The phrase “whenever practicable” in GATT Article XIII:2(a) suggests that there may be situations in which fixing the quota representing the total amount of permitted imports is not practicable. However, in such a situation, Article XIII:2(b) restricts the measures that a Member may impose to “import licenses or permits without a quota.”

In direct violation of these provisions, the United States applied a tariff rate quota (TRQ) measure with no overall limit on eligibility. The US TRQ applies a higher tariff rate of 19 per cent to imports above a specific quantity of imports (9,000 short tons for each exporting country).

The provisions of Articles XIII:2(a) and XIII:5 require an “overall limit on eligibility” for any TRQ. In this regard, the US argument that the measure is not a TRQ because it lacks an overall limit on eligibility is flawed. The United States confuses the legal requirements that apply to a TRQ with the definition of TRQ. If the US argument were accepted, a Member’s failure to fix the total amount of a TRQ quota automatically would convert a TRQ into a non-TRQ measure and allow the Member to escape the requirements of Articles XIII:2(a) and XIII:5.

9. In Section F.2.b of its first written submission, the US argues that the rules in Article 5 of the Safeguards Agreement for quantitative restrictions and quotas do not apply because the Line Pipe measure is not a quantitative restriction. Does your delegation consider that the terms “quantitative restriction” and “quota” (in Article 5 of the Safeguards Agreement) are synonymous? Please explain. In particular, and considering the US argument that a measure is only a TRQ if it includes an overall limit on eligibility, why should the term “quota” (Article 5.2) not refer to the quota element of a TRQ?

Answer to Question 9

“Quota” and “quantitative restriction” are not synonymous. As a review of GATT Article XIII indicates, “quota” allocation is one of the methods for implementing a “quantitative restriction” or a “TRQ.” A quantitative restriction also may be implemented through “import licenses or permits without a quota” (GATT Article XIII:2(b)) and a TRQ may be implemented without quota allocation. Article 5.2 applies to a “quantitative restriction” and a “TRQ” if quota allocation is used.

10. In Korea – Dairy, the Appellate Body stated that it does “not see anything in Article 5.1 that establishes such an obligation [to justify the necessity of a safeguard measure] 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”. Could the Appellate Body have inferred that there is no obligation on a Member to explain that its safeguard measure is “necessary” (within the meaning of Article 5.1) unless that safeguard measure is a quantitative restriction which reduces the level of imports below the average level of the last three representative years? Please explain.

Answer to Question 10

The text of the second sentence of Article 5.1 of the Safeguards Agreement indicates that it relates only to a “quantitative restriction.” The Appellate Body in *Korea – Dairy* did not agree with the Panel’s finding that Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why

they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment within the meaning of Article 5.1.

(ii) Serious injury

11. Leaving aside the factual circumstances of the present case, does your delegation consider, as a matter of principle, that improvements in domestic industry performance at the end of the relevant period of investigation would be inconsistent with a finding of present serious injury?

Answer to Question 11

In general, improvements at the end of a period of investigation would detract from a finding of current injury. However, one must consider the characteristics of the market, such as seasonal ups and downs, and elasticity of demand relative to price. Therefore, the determination must account for all relevant product-specific variables.

(iii) Increased imports

12. In Argentina – Footwear, the Appellate Body found that the increase in imports must be inter alia “recent enough”. How “recent” should the increase in imports be, relative to the date of the competent authority’s decision to impose a safeguard measure? What is the minimum period of time that a domestic industry would need in order to file a petition following a sudden increase in imports? In the present case, could the US line pipe industry have filed a petition before it did? Please explain. Could the ITC have reached its determination before it did? Please explain.

Answer to Question 12

In *Argentina – Footwear*, the Appellate Body held that “the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause ‘serious injury,’” taking into account the many characteristics of each industry.⁴ Thus, a case-by-case analysis is required to evaluate whether or not an increase in imports is “recent enough.” But, although as this analysis suggests, it may be difficult to set a period that in all cases is “recent enough,” in *Argentina – Footwear*, the Appellate Body found that a period of several years was not sufficiently recent.⁵

(iv) Developing country exemption

13. At para. 181, Korea asserts that “the United States did not even attempt to determine which countries qualified for this exemption”. Does the Safeguards Agreement require Members imposing safeguard measures to determine in advance which developing countries should be excluded from those safeguard measures under Article 9.1?

⁴ Argentina – Safeguard Measures on Imports of Footwear, *WT/DS121/AB/R* (14 December 1999) at para. 131.

⁵ *Id.* at para. 130.

Answer to Question 13

Article 9.1 of Agreement on Safeguards provides that “Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent.” Because Article 9.1 says “shall not be applied,” the competent authority must determine before implementing a safeguard if any developing countries should be excluded from the measure per Article 9.1 of Safeguards Agreement.

ANNEX B-6

MEXICO'S ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

(7 May 2001)

Before replying to the panel's questions, Mexico respectfully points out that, since our arguments refer exclusively to the right to exclude free-trade area partners from the application of the safeguard measure, our replies will deal exclusively with this issue.

Q2. [ALL] Is it logical that Article XIX safeguard measures are not permitted between FTA partners, while Article XI measures are, given the fact that Article XIX safeguard measures may take the form of (Article XI) quantitative restrictions?

Reply

Firstly, we must point out that the fact that Article XIX is not included in the list of exceptions in Article XXIV:8(b) of the GATT 1994 does not mean that its application is prohibited among members of a free-trade area, in the same way as we believe that, for example the imposition of measures under Article XXI of the GATT 1994 is likewise not prohibited.

GATT Article XXIV:8(b) provides for the elimination of duties and other restrictive regulations of commerce on substantially all – and not the entirety of – trade between the partners of a free-trade area. The general exclusion of the application of safeguard measures among NAFTA partners is in keeping with such elimination, while Article 802 of the Treaty lays down the limited circumstances in which the exclusion does not apply.

Furthermore, we believe that it is wrong to equate Article XI and Article XIX of the GATT, since they are very different in nature. Although in both cases the result could be the imposition of a quantitative restriction, the causes giving rise to them as well as the requirements established for imposing them are different. In addition, the wording of Article XIX, unlike Articles XI¹, XII², XIII³, XIV⁴, XV⁵ and XX⁶, does not refer to the imposition of restrictions but rather to the ability to deal with emergency situations through the total or partial suspension of an obligation or modification of a concession. In the case of free-trade areas, the level of obligations and of concessions granted among members of the area is different (and normally greater) than the level of concessions and obligations acquired in the multilateral context. Therefore, Article XXIV does not prejudice the rights of Members in that context, but confines itself to establishing the parameters to be complied with by free-trade areas. The partners of a free-trade area are free to decide how they will achieve their trade liberalization objectives, provided they comply with the conditions laid down in Article XXIV.

¹ Paragraphs 1 and 2.

² Paragraphs 2, 3 and 4.

³ Paragraphs 1, 2, 3, 4 and 5.

⁴ Paragraphs 1, 2, 3, 4 and 5.

⁵ Paragraphs 1, 5 and 9.

⁶ Introductory paragraph and sub-paragraphs (g), (i) and (h).

Q3. [CANADA AND MEXICO] In *Turkey – Textiles* (WT/DS34), the Appellate Body stated that a GATT Article XXIV defence may be available in the context of a customs union if two conditions are met: (1) the measure at issue is introduced upon the formation of the customs union, and (2) "the formation of [the] customs union would be prevented if it were not allowed to introduce the measure at issue". Would the formation of the NAFTA have been prevented if the NAFTA parties had not been allowed to introduce the safeguards exemption provided for in section 311(a) of the NAFTA Implementation Act? Please explain. If so, why are NAFTA parties not automatically excluded from safeguard measures imposed by other NAFTA members?

Reply

The exclusion power provided for in Article 802 of the NAFTA is a fundamental element of the set of concessions and obligations designed to facilitate trade between Canada, the United States and Mexico, as it ensures that, in the absence of very specific conditions, market access is guaranteed. Hence, it may be affirmed that if the manner in which market access would be guaranteed had not been clearly established, it would have prevented the establishment of the free-trade area.

Notwithstanding the above, we wish to point out the following: the criterion established in "*Turkey – textiles*", in establishing the obligation to "demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue" is in fact an obligation to demonstrate a hypothetical situation, which is impossible. Moreover, this criterion cannot be applied separately to each of the constituent elements of a free-trade area. The language of the chapeau to Article XXIV:5 provides that "the provisions of this Agreement shall not prevent ... the formation ... of a free-trade area". This means that what is protected is the set of provisions forming the area and not each of them separately. The establishment of a free-trade area is a delicate balance among an infinite number of economic, trade, legal, political and other factors. Accordingly, it is impossible to demonstrate that each and every one of the elements making up the free-trade area is such that if it had not been introduced, the establishment of the free-trade area would have been prevented. It is important to recall that, given the nature of free-trade areas, the benefits granted are not extended on a most-favoured-nation basis. Obviously, a Member cannot demonstrate that each and every one of the concessions therein granted is so important that its absence would have made it impossible to conclude such an agreement. Any other interpretation would impose on partners of a free-trade area additional obligations besides those laid down in GATT Article XXIV, contrary to Articles 3.2 and 19.2 of the DSU. It could also give rise to endless disputes concerning different constituent elements making up the area.

Lastly, we wish to point out that Article 802 of the North American Free Trade Agreement (NAFTA) is the Article which governs relations among the partners to the Agreement, whereas the NAFTA Implementation Act is United States domestic legislation.

Q4. [ALL] Please comment on the US argument that the absence of any reference to GATT Article XIX in Article XXIV:8(b) means that Article XIX safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA (para. 216, US first written submission). Is it possible that safeguard measures "may" (as opposed to "must") be made part of the general elimination of "restrictive regulations of commerce" under any FTA? Would an a contrario reading of Article XXIV:8(b) mean that the imposition of a safeguard measure between FTA partners is inconsistent with the concept of an FTA? Please explain.

Reply

As stated in the reply to question 2, the partners in a free-trade area are free to decide how they will attain the objective of facilitating trade amongst themselves. Thus, Article XXIV should be interpreted in the light of the objective of "trade facilitation". In the case under consideration, the NAFTA partners agreed that they would ensure access to their markets and established very clear provisions governing the limited circumstances in which such market access could not be guaranteed.

Q5. [ALL] The US argues, on the basis of the last sentence of note 1 to the Safeguards Agreement, that "issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles" (para. 220, US first written submission). In this regard, please comment on the Appellate Body's finding in *Argentina – Footwear* (para. 106) that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'". Does the Appellate Body's finding apply to the last sentence of footnote 1? Please explain.

Reply

No. The language of paragraph 106 of the Appellate Body's report states " ... 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' ... " (footnote omitted). There is no reference to the last sentence of footnote 1.

Furthermore, in the "Argentina – footwear" case the Appellate Body found that Argentina had not invoked GATT Article XXIV as a defence⁷, and therefore did not take up the discussion of that Article.

In addition, as Mexico pointed out in its oral statement, the last sentence of the footnote is not confined to Article XXIV:8(a) of the GATT (customs unions), but covers the entire paragraph (including free-trade areas). Maintaining a contrary interpretation would be tantamount to reducing Mexico's rights under the Safeguards Agreement.

Q6. [ALL] If footnote 1 to the Safeguards Agreement were relevant in some way to the issue of which Members could be subject to a safeguard measure, is it relevant that footnote 1 has been inserted in Article 2.1 of the Safeguards Agreement, rather than Article 2.2? Please explain.

Reply

The answer is no. The last sentence of footnote 1 states that " ... nothing in this Agreement prejudices ... ". This means that neither Article 2.1 nor Article 2.2 nor any other article of the Agreement on Safeguards prejudices the relationship between GATT Articles XIX and XXIV:8.

QUESTION FOR MEXICO AND CANADA FROM KOREA

Q14. Did NAFTA "eliminate" safeguard measures among its Members or is this a decision to be reached on a case-by-case, product-by-product basis?

⁷ WT/DS121/AB/R, paragraph 110.

Reply

NAFTA contains the general principle that the NAFTA partners will not apply safeguard measures to each other. This general principle, and the exceptions to it, are laid down in Article 802 of the NAFTA.

ANNEX B-7

KOREA'S ANSWERS TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

(15 June 2001)

I. BOTH PARTIES

A. EXCLUSION OF CANADA AND MEXICO

Q1. Are safeguard measures taken under GATT Article XIX and the Safeguards Agreement “duties” or “other restrictive regulations of commerce” within the meaning of GATT Article XXIV:8(b)? Please explain.

Reply

1. It appears that the parenthetical list in Article XXIV:8(b) is not exhaustive of what constitutes “duties or other restrictive regulations of commerce”.¹ Even if this phrase is broadly defined to include safeguards measures, the United States has admitted in this case that it eliminated restrictions for “substantially all” trade irrespective of its treatment of individual safeguards measures. Whether it did or not, the fact remains that the United States is not maintaining as an affirmative defence that Article XXIV prevents safeguard measures between FTA members. Following the reasoning of the Appellate Body in *Argentina – Footwear*, the Panel does not need to reach this issue if it finds that Footnote 1 does not apply.

2. Article XIX measures adopted in conformity with Article XIII, including the non-discrimination provisions, are expressly permitted under Article XXIV:8(b). There is an agreement between Korea and the United States in this particular case that the provision permits the application of a safeguard measure.

B. NATURE OF THE MEASURE/ARTICLE XIII

Q2. Article XIII:5 provides:

The provisions of this Article shall apply to any tariff quota instituted or maintained by any [Member], and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

¹ See *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body, WT/DS34/AB/R (22 October 1999). See also discussion regarding the difference between fiscal measures (revenue duties) and other “protective” measures and the question of whether “quantitative restrictions” are included within “other restrictive regulation of commerce.” *Guide to GATT Law and Practice*, World Trade Organization and Bernan Press, 6th ed. (1995) at 820-22.

What, in your opinion, is the basis for the distinction between (1) “apply[ing] the “provisions” of Article XIII to tariff quotas, and (2) “extend[ing]” the “principles” of Article XIII to export restrictions? Does the fact that Article XIII:5 does not state that the provisions of Article XIII “shall apply” to “export restrictions” suggest that such provisions already apply to “export restrictions”?

Reply

3. Clearly, Article XIII:5 is recognizing that the nature and effect of “quotas”, whether they be in the form of quotas or tariff-rate quotas (“TRQs”), are the same and require the same treatment to ensure that they are “non-discriminatory”. In the case of export restrictions, since their nature is distinct, the provisions of Article XIII may not apply in their entirety, but rather “extend to” export restrictions to the extent that they are applicable. “Extend to” implies something less than “apply to”. This distinction is confirmed by the use of the term “principles” with respect to export restrictions rather than the term “provisions” which “shall apply” to TRQs. One can “apply” the “provisions” to TRQs, but only the “principles” of Article XIII can be “extended” to export restrictions.

4. No, see above. Korea also notes that Article XIII serves to clarify exactly the manner in which various “permissible” quantitative restrictions under Article XI are to be applied. For this reason, it is necessary to identify there the various “forms” or “types” of quantitative restrictions and how Article XIII applies or only extends to each, including TRQs and export restrictions.

Q3. Are all quantitative restrictions quotas? If not, what is the difference between a quantitative restriction and a quota? Please explain. Are all tariff quotas quotas? Please explain.

Reply

5. All quantitative restrictions are not quotas. Article XI defines “prohibitions or restrictions” by excluding “duties, taxes or other charges”. TRQs are not excluded by that definition. Article XI is very clear that “quantitative restrictions” are “quotas, import or export licences or *other measures*”. Therefore, quantitative restrictions are broader than quotas, but include quotas.

6. All TRQs have a quota component. As Korea explained in its initial answer to Panel questions, “quotas” must be subject to the same non-discriminatory discipline, whether they are absolute quotas or TRQs, to avoid distorting traditional trade patterns. For tariff measures, non-discrimination can only be ensured through MFN. For quotas, non-discrimination can be ensured through the application of proportional shares.

7. For this reason, it is Article XIII that is most relevant to the interpretation of Article 5 of the Agreement on Safeguards (“SA”) because both provisions regulate the non-discriminatory application of the quota portion of TRQs.

C. ARTICLE 5

Q4. At paras. 53 - 57 of its rebuttal submission, Korea claims that the US violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to demonstrate that the Line Pipe measure was in conformity with the requirements of Article 5.1. Is this Article 3.1 / 4.2(c) claim within the Panel’s terms of reference? Please explain.

Reply

8. Paragraph 3 of the terms of reference in Korea's Panel Request objects to the failure of the United States to justify the measure under Article 5 of the SA. Yes, Korea submits that it has maintained that Article 5 claims are integrally linked to Articles 3.1 and 4.2(c).² Paragraph 9 of Korea's Panel Request states specifically that Articles 3 and 4 of the SA have been violated because "critical confidential information" relied on in the decision-making of the United States has not been provided (*inter alia*, the basis for the President's decision-making documents or any information at all with respect to the justification of the safeguard measure). The obligation to sufficiently explain why the measure was "necessary" by reference to the evidence that existed at the time that the Presidential decision was taken is a "pertinent issue of fact and law." It also relates to the serious injury finding and the "detailed analysis of the case" required by Article 4. (As the United States noted in its response to the Panel, the Article 3 and Article 4 claims with respect to the ITC proceeding were made in Paragraph 1.)

9. Therefore, as demonstrated, Korea has properly set out its "claims" by referencing Article 3 and Article 4 of the SA.³ Korea also elaborated that critical information, which the United States claimed was of a confidential nature, had not been provided in violation of Article 3 and Article 4 requirements.

10. Furthermore, we note that the United States has not made any claims of prejudice prior to the Panel's question, and the United States has fully responded to Korea's claims regarding Article 3.1 as they related to Article 5 since the First Substantive Meeting with the Panel.

11. As the Appellate Body held in *Thailand – Antidumping Duties on Angles*, the question of whether the claims were adequately made is in essence a requirement of due process. The question is whether the party "suffer[ed] any prejudice on account of any lack of clarity in the panel request".⁴ None has been shown.

II. KOREA

A. EXCLUSION OF CANADA AND MEXICO

Q1. At note 21 of its first oral statement, Korea states that "NAFTA is not in compliance with Article XXIV:8 of the GATT 1994". Please explain precisely why, in Korea's view, NAFTA is not "in compliance with" GATT Article XXIV:8.

Reply

12. Korea's position that NAFTA has not been demonstrated to be in compliance with Article XXIV:8 is based on the preliminary analysis of the Committee on Regional Trade Agreements

² See *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Request for the Establishment of a Panel by Korea, WT/DS202/4 (15 September 2000) ("Korea's Panel Request") at paras. 3, 9.

³ See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (14 December 1999) ("*Korea – Dairy (AB)*") at para. 123; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (9 September 1997) at para. 141-43 ("Article 6.2 of the DSU requires that *claims*, but not the *arguments*, must all be specified sufficiently . . . in order to allow the defending party . . . to know the legal basis of the complaint.")

⁴ *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R (12 March 2001) at para. 95.

which is still considering the question and has not yet issued a final decision on the matter. As the Panel observed, the United States has not presented any evidence that NAFTA qualifies as an FTA under Article XXIV:8(b).

13. Regardless of the Panel's conclusion as to whether Article XXIV could hypothetically apply to NAFTA, Korea maintains that this issue is not relevant to the legal issue before the Panel because the United States cannot invoke the applicability of Article XXIV to NAFTA without Footnote 1 of the SA. As discussed extensively throughout this proceeding, Footnote 1 does not apply to the US safeguard action.⁵

B. INCREASED IMPORTS

Q2. At para 62 of its rebuttal submission, Korea asserts that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury decision." In support, Korea cites (in note 69) certain parts of the ITC Determination, Majority Views on Injury. Please indicate precisely, by quoting the relevant text, which parts of the ITC Determination Korea is referring to.

Reply

14. We apologize to the Panel because the citation in footnote 69 of the Rebuttal Submission is not correct. The correct citation is provided in Korea's Second Oral Statement at footnote 75 and at footnote 5 of the US Second Oral Statement. The pages, with the quotations, are as follows:

I-19 (Dealing with Injury):

The much stronger financial performance . . . declined sharply in the second half of 1998, indicating that the very depressed financial condition of the domestic industry evident from the interim 1999 data extends back into mid-1998. (emphasis added)

I-22 (Dealing with Causation):

Finding. There are two principal causes of injury in this case: . . . increase[d]...imports in 1998-99, and . . . decrease[d] . . . demand in 1998-99 Both factors significantly contributed to the domestic industry's poor health beginning in the second half of 1998. . . . Consequently, we find the statute's causation criterion is met. (emphasis added)

I-28:

This prior experience suggests that the reduced level of demand would not be expected to generate the severe financial losses suffered by the industry in the second half of 1998 and the first half of 1999, and that the other factors therefore must account for this very different level of industry performance.

15. Finally, as noted in footnote 75 of the Second Oral Statement, the Separate Views on Injury specifically reference the second half of 1998 at pages I-38-41, I-43-44, and I-46. The quotations are numerous. The ITC Report is littered with these citations specifically because the period identified for threat of injury was the period beginning in the second half of 1998.

⁵ See *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R (14 December 1999) at para. 106.

16. We recall that the United States argued in the Second Substantive Meeting with the Parties (“Second Substantive Meeting”) that all references to the condition of the US industry beginning in the second half of 1998--in both the Majority and Separate Views--were solely in response to arguments made by Respondents. As Korea noted in its reply, it is difficult to reconcile this interpretation with the fact that the Majority specifically included this analysis in their “findings” on causation. Furthermore, the basis of the threat finding was conditions beginning in the second half of 1998.

17. Again, we sincerely apologize for any inconvenience that we may have caused the Panel, and we thank the Panel for the opportunity to make corrections.

Q3. During the ITC’s investigation, did the Korean respondents ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998?

Reply

18. First of all, Korean respondents argued throughout the ITC proceeding that the most recent period demonstrated a decline in imports.⁶ However, until the Japanese arctic-grade imports were excluded in the final decision of the ITC, the import trends did not show an absolute decline commencing in the last half of 1998 (only in the first half of 1999). (This is the reason that public and confidential data trends do not match.) Therefore, this issue arose late in the proceeding. Nonetheless, the Respondents did argue that imports declined at the end of the period and Respondents argued for the exclusion of arctic pipe.

19. Second, the US legal standard for increased imports would not take into account a decline in the latter half of 1998 since under the US legal standard, a “simple increase” over the 5-year investigation period is sufficient. Moreover, as the United States repeatedly states, the ITC does not evaluate second-half 1998 data as distinguished from first-half data for purposes of examining increased imports. They only examine full-year data and compare interim period to interim period.

20. In this connection, we further note that, as the Appellate Body reasoned in *US – Lamb Meat*, “Arguments before national competent authorities may be influenced by . . . the requirements of the national laws. . . .”⁷ For this reason, “a WTO member is not confined merely to rehearsing arguments that were made to the competent authorities.”⁸

21. The ITC has admitted throughout this proceeding that it does not consider such arguments as relevant under US law and practice.

Q4. Regarding para. 73 of Korea’s rebuttal submission, would Korea accept that there was an absolute increase in imports for the purpose of Article 2.1 if the “monthly import data” regarding the end of interim 1999 did relate to subject merchandise? Please explain.

⁶ See *Prehearing Brief of Japanese and Korean Respondents on Injury* (27 September 1999) at 8, 52 (KOR-22) and *Posthearing Brief on Injury of Japanese and Korean Respondents* (7 October 1999) at 13, 40 (KOR-25).

⁷ *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand*, Report of the Appellate Body, WT/DS177/AB/R (1 May 2001) (“*US – Lamb Meat (AB)*”) at para. 113.

⁸ *Id.*

Reply

22. No. First of all, the United States did not consider this data in the increased imports analysis it conducted.⁹ The only US analysis of May and June imports trends occurs at page I-29 of the ITC Determination and relates to causation and whether imports were responding to demand conditions in the oil and gas sector. Therefore, this data was not used to show increased imports. There also was no method to demonstrate that “such” increased quantities as to cause serious injury under Article 2.1, since clearly there was no injury during the period in question. As Commissioner Crawford observed, domestic shipments increased sharply between the months of May and August 1999.¹⁰

23. Finally, Korea notes that the United States never cites to the source of its conclusion that Japan did not export any arctic-grade material during 1999. Korea questions why this data is not confidential, and if it is not, why isn’t all the data on arctic-grade imports non-confidential as well? At the Second Substantive Meeting, the United States explained that the fact that “no imports” of arctic-grade material entered in the first half of 1999 is contained in a confidential letter which, apparently, cannot be provided to the Panel or Korea and for which no public summary was ever provided to the ITC.

24. The only party involved in this proceeding which has complete access to the confidential record--and has the ability to pick and choose between what data to provide this Panel and how it can be provided--is the United States. Put simply, if the United States is unwilling to put all data concerning imports of arctic-grade line pipe on the record, then the selective reference to import levels in one period of the investigation should be rejected.

25. Korea reiterates its concern that the disclosure of, or rather the refusal to disclose, confidential record information can be a tactical decision by a party to limit the scope and nature of the Panel’s findings regarding errors. It is for this reason that Korea believes that the United States should resolve its chronic “systemic issue” concerning the treatment of confidential information. The United States has yet to satisfactorily explain why WTO Panels should be treated differently from US courts or NAFTA Panels with respect to access to confidential information. The full and complete record should be reviewable by WTO Panels just as it is reviewable by these other bodies.

⁹ *Circular Welded Carbon-Quality Line Pipe*, USITC Pub. 3261, Inv. No. TA-201-70 (December 1999) (“*ITC Determination*”) at I-1-6 (KOR-6); *ITC Determination, Views on Injury of Chairman Lynn M. Bragg, Vice Chairman Marcia E. Miller, and Commissioners Jennifer A. Hillman, Stephen Koplan, and Thelma J. Askey* at I-7-15 (KOR-6).

¹⁰ *ITC Determination, Crawford Dissenting Views on Injury and Addendum* at I-65, n. 44 (KOR-6).

ANNEX B-8

UNITED STATES ANSWERS TO QUESTIONS FROM THE PANEL AT THE SECOND MEETING WITH THE PARTIES

(15 June 2001)

I. BOTH PARTIES

A. EXCLUSION OF CANADA AND MEXICO

Q1. Are safeguard measures taken under GATT Article XIX and the Safeguards Agreement "duties" or "other restrictive regulations of commerce" within the meaning of GATT Article XXIV:8(b)? Please explain.

Reply

1. Safeguard measures can be restrictive regulations of commerce. A safeguard measure can take multiple forms. If the safeguard measure is a tariff or tariff-rate quota, it is a "duty". If the safeguard measure is a quantitative restriction, it is an "other restrictive regulation of commerce."

2. A safeguard measure need not be a duty or a restrictive regulation of commerce. While this is not an issue in this dispute, Article 5.1 of the WTO *Agreement on Safeguards* ("Safeguards Agreement" or "SGA") does not limit safeguard measures to duties (including tariff-rate quotas ("TRQs")) and quantitative restrictions. SGA Article 1 defines safeguard measures as "those measures provided for in Article XIX of GATT 1994."¹ Article XIX:1(a), in turn, authorizes a Member "to suspend the obligation in whole or in part or to withdraw or modify the concession". Thus, a Member that satisfied the prerequisites for imposition of a safeguard measure could suspend any obligation or withdraw any concession. For example, it could impose an internal tax that would otherwise be inconsistent with Article III:2.

B. NATURE OF THE MEASURE /ARTICLE XIII

Q2. (a) Article XIII:5 provides:²

The provisions of this Article shall apply to any tariff quota instituted or maintained by any [Member], and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

¹ Unless indicated otherwise, references to Articles numbered with Roman numerals are to GATT 1994, while references to Articles with Arabic numerals are to the Safeguards Agreement.

² For clarity, we have divided this question and our response into two subsections.

What, in your opinion, is the basis for the distinction between (1) "apply[ing] the "provisions" of Article XIII to tariff quotas, and (2) "extend[ing]" the "principles" of Article XIII to export restrictions?

Reply

3. The distinction arises from the nature of the provisions in question. Paragraphs 2, 3, and 4 of Article XIII address "import restrictions" and "import licences . . . issued in connection with import restrictions." Since a TRQ is a form of import restriction, those provisions can "apply" directly to TRQs by, for example, determining how to fix the overall amount subject to a lower tariff rate and allocating that amount among supplying countries.

4. However, since paragraphs 2, 3, and 4 by their terms refer to "import restrictions" or "import licences," they cannot "apply" directly to "export restrictions," which fall into an entirely different class of measures. In addition, the provisions of paragraph 2(d) dealing with Members who have a substantial interest in *supplying* the product to the imposing Member could not "apply" to an export restriction. Therefore, only the "principles" of these paragraphs, and not their literal obligations, can be "extended" to export restrictions, and then only so far as "applicable" – for example, if the restriction took the form of an export quota allocated among *consuming* Members.

(b) Does the fact that Article XIII:5 does not state that the provisions of Article XIII "shall apply" to "export restrictions" suggest that such provisions already apply to "export restrictions"?

Reply

5. No, just the contrary. The fact that Article XIII:5 states that only the "principles" of Article XIII shall be extended "so far as applicable" indicates that, except as specifically provided, all of the provisions of Article XIII do *not* apply directly to export restrictions. Article XIII:1 is one such specific provision. It explicitly refers to export restrictions and, therefore, applies to them. Article XIII:5 does not change this conclusion. In contrast, as we noted above, the paragraphs 2, 3, and 4 of Article XIII "apply" only to *import* restrictions and, therefore, not to export restrictions. Furthermore, if these provisions could somehow be interpreted to "apply" directly to export restrictions, their "principles" would already "extend" to export restrictions, and the export restriction language in Article XIII:5 would become superfluous. In accordance with the principle of effectiveness in treaty interpretation, the Panel should accordingly avoid the interpretation suggested in this segment of the question.³

Q3. Are all quantitative restrictions quotas? If not, what is the difference between a quantitative restriction and a quota? Please explain. Are all tariff quotas quotas? Please explain.

Reply

6. No. Article XI:1 indicates that quantitative restrictions may take the form of import licensing or "other measures". "Quantitative restriction" is a general term covering any measure that restricts the quantity of imports into or exports from a country. "Quota" is a subset of the class of quantitative restrictions, one that specifies the maximum quantity of imports into or exports from a country.

³ *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").

7. Tariff quotas are never quotas. They are contingent tariffs, with different rates applicable depending on the total amount of imports during a specified period. They are not the only form of contingent tariffs. Some members impose seasonal tariffs, with the rates differing depending on the date of entry of imported goods.

C. ARTICLE 5

Q4. At paras. 53 – 57 of its rebuttal submission, Korea claims that the US violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to demonstrate that the Line Pipe measure was in conformity with the requirements of Article 5.1. Is this Article 3.1 / 4.2(c) claim within the Panel’s terms of reference? Please explain.

Reply

8. No, it is not. Korea’s request for the establishment of a panel (WT/DS202/4) does not make this claim. The only references to Articles 3 or 4 appear in paragraphs 1, 2, 7, and 9 of that request, which do not provide a basis for the claim in question

- Para. 1 deals with alleged flaws in the investigation regarding increased imports, injury, threat of injury and causation. It does not claim that these flaws exist with regard to the US application of Article 5.1.
- Para. 2 deals with issues of “emergency action” and “unforeseen developments”. These issues are not relevant to the requirements of Article 5.1.
- Para. 7 claims that the United States acted improperly in excluding Canada and Mexico from application of the safeguard measure. This is a substantive claim, and does not reach the procedural question of whether the United States failed to demonstrate conformity with Article 5.1 at the time it applied the measure.
- Para. 9 deals with access to confidential information and the sufficiency of public summaries. It does not refer to the requirements of Article 5.

9. At the meeting with the Panel, Korea suggested that paragraph 3 of its request constituted the basis for a claim that the United States violated Articles 3.1 and 4.2(c) of the Safeguards Agreement by failing to demonstrate that the Line Pipe measure conformed with the requirements of Article 5.1. However, in its first written submission, Korea did not raise this issue as a claim under Articles 3.1 or 4.2(c). Instead, it based its claim that the United States “did not provide the required explanation” of the safeguard measure on Article 5 of the Safeguards Agreement.⁴

10. Korea itself has recognized that its claims under Article 5 do not encompass inconsistencies with Articles 3.1 and 4.2(c). Its second written submission states:

Whether or not Article 5.1 requires an explicit finding or holding regarding the necessity of the measure under Article 5.1, Article 3.1 of the SA imposes an *independent obligation* that the investigation itself and the findings and conclusions of the competent authorities resulting from such investigation must demonstrate that the legal and factual basis for the measure.⁵

⁴ First Submission of the Republic of Korea, paras. 147-151.

⁵ Written Rebuttal of the Republic of Korea, para. 53 (emphasis added).

That is exactly the point. Whatever obligations arise under Articles 3.1 and 4.2(c), they are independent of Article 5 and, therefore, a claim under Article 5 in a party's panel request does not equate with a claim under Articles 3.1 or 4.2(c).⁶

11. On a related matter, questions arose at the second panel meeting as to whether Article 5.1 imposes an ongoing requirement for a Member to ensure that a measure was not applied beyond the extent necessary. The United States explained why this is not a valid interpretation of the Agreement. We would note further that Korea phrased both of its claims under Article 5 in the past tense, and addressed only the terms under which the United States imposed the measure. Therefore, any claim that actions or events subsequent to the imposition of the safeguard measure demonstrate an inconsistency with the WTO Agreement is outside the Panel's terms of reference.

II. KOREA

A. EXCLUSION OF CANADA AND MEXICO

Q1. At note 21 of its first oral statement, Korea states that "NAFTA is not in compliance with Article XXIV:8 of the GATT 1994". Please explain precisely why, in Korea's view, NAFTA is not "in compliance with" GATT Article XXIV:8.

Reply

12. The United States addresses this issue in its response to question 2 of section III.

B. INCREASED IMPORTS

Q2. At para. 62 of its rebuttal submission, Korea asserts that "the ITC itself looked at 1998 as two six-month periods with very distinct trends for purposes of its injury decision". In support, Korea cites (in note 69) certain parts of the ITC Determination, Majority Views on Injury. Please indicate precisely, by quoting the relevant text, which parts of the ITC Determination Korea is referring to.

Reply

13. At the second panel meeting Korea corrected the citations in footnote 69 of its rebuttal submission, and stated that the USITC looked at 1998 as two six month periods at three points in its opinion: at pages I-19, I-22 and I-28.

14. The United States notes that the USITC was not examining 1998 as two six-month periods (as Korea asserts) at any of these three points in its opinion. Korea has merely identified the only three times in the determination that the Commissioners finding serious injury referred to either of those six-month periods for any purpose whatsoever. On page I-19 of the USITC Report, the USITC was

⁶ We note that Korea took this same position in *Korea – Dairy*:

Article 4.2(c) states that the competent authority must publish, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examine. Article 5, however, contains no similar provision. The drafters must have intended to exclude the requirement to give a reasoned explanation, and such intention must be given effect.

Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, 14 December 1999, para. 20.

explaining why the financial performance of the domestic industry was much stronger in interim 1998 than in full year 1998 – that is, because the financial performance declined sharply in the second half of 1998. On page I-22 the USITC was responding to arguments raised by respondents, which were couched in terms of developments in the second half of 1998. On page I-28 the USITC merely referred to “the second half of 1998 and the first half of 1999” to pinpoint when the financial performance of the domestic industry declined; the USITC was not analyzing 1998 in two separate six-month periods. The USITC Commissioners who found serious injury were not comparing the second half of 1998 with either the first half of 1998 or the first half of 1999, as Korea repeatedly asserts. Rather, these Commissioners were discussing a continuous period beginning in mid-1998, during which the condition of the domestic industry was in decline.

15. The Commissioners finding threat of serious injury also were not comparing the second half of 1998 with either the first half of 1998 or the first half of 1999. Rather, the references cited by Korea at the second Panel meeting⁷ show that these Commissioners also examined a continuous period from 1994 through mid-1999, and, based on this examination, found dramatic increases in imports and a precipitous worsening of the industry’s financial condition beginning in mid-1998 and extending through interim 1999.

16. The USITC, following its standard procedure, collected and examined data on the basis of full years and comparable interim periods – and not for the first and second halves of 1998. This is clear from a review of the overall discussion of the serious injury factors in the USITC Report, and from an examination of virtually every table with numerical data in the entire USITC Report.

Q3. During the ITC's investigation, did the Korean respondents ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998?

Reply

17. Korea conceded at the second panel meeting that it did not ask the ITC to compare the volume of imports in the first half of 1999 against the volume of imports in the second half of 1998. The United States notes that the Korean respondents compared imports in interim 1999 with imports in interim 1998 when they discussed the issue of increased imports in their briefs to the USITC.⁸

Q4. Regarding para. 73 of Korea's rebuttal submission, would Korea accept that there was an absolute increase in imports for the purpose of Article 2.1 if the "monthly import data" regarding the end of interim 1999 did relate to subject merchandise? Please explain.

Reply

18. The United States has no comment on this question.

⁷ USITC Report, pp. I-38-41, I-43-44, and I-46.

⁸ *E.g.*, Prehearing Brief of the Japanese and Korean Respondents, p. 8 (attached as US Exhibit 31).

III. UNITED STATES

A. ARTICLE 5

Q1. Please explain exactly how the United States ensured, at the time of application, that the Line Pipe measure would be commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment? Please provide any supporting documentation.

Reply

19. As a preliminary matter, the United States notes that the word “commensurate” does not appear in the text of Article 5.1, but instead derives from the Appellate Body’s description in *Korea – Dairy* of the obligations under that Article. That description may be useful in evaluating compliance with Article 5.1, but it is the text of the Agreement and not subsequent glosses in panel or Appellate Body reports, that define the obligations of the Members.

20. We also note that Article 5.1 obligates Members to “apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment”. Thus, it is the extent of the *application* of the measure – its duration, level, and other attributes – and not the measure itself, that determines conformity with Article 5.1.

21. Proclamation 7274 of 18 February 2000 states that the President imposed the line pipe safeguard “after taking into account the considerations specified in section 203(a)(2). Those include “the recommendation and report of the Commission,” “the probable effectiveness of the actions . . . to facilitate positive adjustment to import competition,” and “the form and amount of action . . . that would prevent or remedy the injury or threat thereof.”⁹ The memorandum issued in tandem with Proclamation 7274 repeats this statement, and states further that the President took the safeguard measure “in order to facilitate efforts by the domestic industry to make a positive adjustment to import competition.” Thus, the President considered each of the criteria listed in Article 5.1.¹⁰

22. Under the cited statutory provisions, the President takes into account several additional considerations, including the short- and long-term economic and social costs of any safeguard measure, the national economic interest of the United States, and national security interests. All of these considerations could lead to a decision to apply a measure less than the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Through the President’s consideration of all of these factors, the United States ensured that the line pipe safeguard would comply with the requirements of Article 5.1.

23. As stated in our earlier submissions, there is no other documentation demonstrating how, at the time it applied the line pipe safeguard, the United States ensured its compliance with the obligations of Article 5.1. Nor, as we have demonstrated in previous submissions, was there any requirement to produce such documentation.

B. EXCLUSION OF CANADA/MEXICO

Q2. The United States asserts that “to the extent that Articles I, XIII, or XIX can be interpreted to contemplate the application of safeguard measures from all sources,

⁹ See section 203(a)(2)(A), (D), and (J) of the Trade Act of 1974, which include a cross-reference to section 202(e)(5)(i).

¹⁰ We also note, that section 203(e)(2) of the Trade Act requires that a tariff, TRQ, or quota imposed as a safeguard measure “may be taken . . . only to the extent the cumulative impact of such action does not exceed the amount necessary to prevent or remedy the serious injury”.

Article XXIV creates a limited exception" (para, 217, US first written submission). What are the conditions governing the application of the alleged "limited exception"? Please explain how the United States complied with those conditions in respect of the Line Pipe measure.

Reply

24. The conditions are those laid out in Article XXIV:

- (1) The party applying the exception and the party subject to exception must be parties to an FTA that satisfies the Article XXIV:8 definition of an FTA, and
- (2) The exclusion from safeguard measures must have been implemented as part of the elimination of duties and restrictive regulations of trade among the FTA parties.

The United States complied with these conditions in this case by entering into an FTA with Canada and Mexico that satisfies the definition under of Article XXIV:8. As part of the package of trade liberalizing measures under the North American Free Trade Agreement ("NAFTA"), the United States undertook the obligation to exclude Canada and Mexico from safeguard measures under certain pre-specified conditions. Since these conditions existed with regard to the line pipe safeguard, the United States excluded Canada and Mexico.

25. The Panel also asked that the United States indicate the basis for its belief that NAFTA complies with the requirements of Article XXIV. NAFTA provided for the elimination within ten years of all duties on 97 per cent of the Parties' tariff lines, representing more than 99 per cent of the trade among them in terms of volume. This is the basis for our belief that, wherever the threshold established under Article XXIV:8 for elimination of duties on substantially all trade, NAFTA exceeds that threshold.

26. With regard to eliminating other restrictive regulations of commerce, NAFTA applies the principles of national treatment, transparency, and a variety of other market access rules to trade among the Parties. The NAFTA Parties also eliminated the application of global safeguard measures among themselves under certain conditions. There is also no question of NAFTA raising barriers to third countries, since none of the NAFTA Parties increased tariffs on trade with non-NAFTA measures. The NAFTA Parties also did not place other restrictive regulations of commerce on other WTO Members upon formation of the FTA.

27. Further explanation of the US views on NAFTA and its compliance with Article XXIV appear in the following documents: L/7176, WT/REG4/1 & Corr.1-2, WT/REG4/1/Add.1 & Corr.1, WT/REG4/5, and WT/REG4/6/Add.1. Since these are voluminous materials, we will not append them, but incorporate them into this submission by reference.

C. SERIOUS INJURY

Q3. Please comment on Korea's arguments regarding allegedly increased shipments beginning April 1999 (Korea's first written submission, para. 255). If shipments were increasing as of April 1999, how does the United States reconcile this increase with the ITC's determination of serious injury or threat thereof?

Reply

28. Korea states in paragraph 255 of its first written submission that shipments "began recovering strongly beginning in April 1999". We do not agree with this characterization. Although shipments did increase in the months following the first quarter of 1999, average monthly shipments in the

period April through August 1999 (the months following the first quarter for which data was provided in memorandum OINV-W-247) remained lower than in any prior year of the period investigated except 1994.¹¹

29. Almost all indicia of the domestic industry's condition deteriorated sharply beginning in 1998 and continuing into interim 1999. The mere fact that shipments were increasing as of April 1999 does not negate the extensive evidence of serious injury or threat thereof that continued into 1999 and that is evident by the comparison of interim 1999 with the comparable period of 1998. And, as noted above, the increased monthly shipment levels did not reach monthly levels of previous years, except 1994. Furthermore, imports also increased after the first quarter of 1999.¹² The United States does not perceive any inconsistency that would require reconciliation.

30. Korea asserted at the second panel meeting that all other indicia of an industry's health flow from shipments. The United States does not agree with this assertion. There is nothing in the Safeguards Agreement that confers primacy on shipments as an indicator of an industry's health. Clearly, increased shipments do not in-and-of-themselves translate into improved financial performance for the domestic industry. For example, shipment levels could increase merely because firms are disposing of excess inventories. Or, imports may also increase -- as they did here -- and thus maintain their growing market share and have injurious price effects that harm the domestic industry regardless of the volume of sales.

Q4. At para. 35 of its rebuttal submission, the US refers to certain data regarding shipment levels. According to the US, these shipment levels "are only approximate, because the shipment data in the USITC memorandum are presented in the form of bar charts, and not precise monthly numbers". Please provide the precise numbers used to prepare the bar charts in the relevant USITC memorandum.

Reply

31. These numbers are provided in US Exhibit -3, USITC Memorandum INV-W-247, on the last two pages, in charts entitled "Net Shipments of welded OCTG products by AISI reporting companies, by month, 1994-1999" and "Net Shipments of welded line pipe, 16 inches and under, by AISI reporting companies, 1994-1999, by month".

Q5. At para. 38 of its rebuttal submission, the US asserts that the "statement [at page II-26 of the USITC Report regarding collective operating leverage] is not associated with the performance of other pipe products". If that is the case, what is that statement associated with? Furthermore, why does the relevant section of the Staff Report begin with the observation that "[i]n addition to welded line pipe, producers manufacture and sell other products"? What is the basis on which the USITC Report found "the presence of some form of collective operating leverage"?

Reply

32. As we explained in para. 98 of our first written submission, "operating leverage" refers to the ability of a firm to increase profitability by an amount that is more than proportionate to the increase in sales volume. This is achieved by spreading fixed costs over a larger volume of products.

¹¹ See OINV-W-247, table entitled "Net Shipments of welded line pipe, 16 inches and under, by AISI reporting companies, by month, 1994-1999" (US Exhibit -3).

¹² *Id.*

33. “Collective operating leverage” refers to the combined pattern of change in profitability reported by US line pipe producers. It is “collective” in that it reflects the operating leverages of all of the line pipe facilities that comprise the US line pipe industry. The statement on page II-26 of the Report was based solely on the observation that line pipe profitability in 1997 increased at a faster rate than the increase in sales of line pipe. The Report also noted that in 1998, line pipe profitability declined at a faster rate than the decline in sales revenues; that is, operating leverage works in both directions. The term “collective” was chosen because, while costs structures are unique to each company, when combined the financial results indicate that operating leverage was present. Using the term “collective” also was intended to indicate to the reader that, individually, the level of operating leverage would differ from company to company.

34. The Panel asks why the relevant section of the Report begins with the observation (on p. II-25 of the Report) that line pipe producers make other pipe products (in the same facilities where line pipe is produced). This observation that companies generally produced other products was intended to provide additional background. The subsequent narrative and financial tables referred exclusively to line pipe. The statement regarding collective operating leverage (at the end of the section) was referring specifically to line pipe, not to line pipe and other products produced in the same facilities. This is clear if one considers the text of the Report on p. II-26 that immediately follows the reference to “collective operating leverage.” The remainder of that paragraph gives examples of collective operating leverage, which are taken *exclusively* from the financial data in Table 9 on p. II-27, which is limited to the results of operations on welded line pipe.

35. With regard to the last part of the Panel’s question, the statement regarding “collective operating leverage” was based on the observation that line pipe profitability increased and decreased more than proportionately as compared to changes in revenue. The presence of operating leverage is clearly demonstrated by this pattern and is not contingent, or even related to, the initial observation that other products are produced in the same facilities.

Q6. Why did the ITC "specifically address[] Korea's arguments that low production quantities and sales of OCTG distorted the profitability data on the line pipe industry" by checking allocation methodologies, if "Korea's argument with respect to the domestic industry's profitability data rests entirely on a faulty premise"? Why didn't the ITC specifically address Korea's arguments by pointing out this faulty premise, rather than referring to allocation methodologies?

Reply

36. The discussion of allocation methodologies in the USITC Report and the observation in the US written submission that Korea relied on a faulty premise were responses to two different, albeit related, assertions. In paragraph 95 of our first written submission, we were addressing the USITC’s consideration of arguments raised by the Korean respondents to the *USITC during the injury investigation*. Those respondents had argued that “factory overhead and SG&A were allocated based on declining production for all products, including OCTG and seamless,” and that “these increased allocated costs have reduced the profits for the welded pipe industry”. Respondents cautioned that “the difficulties resulting from declining production of other products, however, must not be attributed to the declines in welded pipe production”.¹³ The USITC considered this argument and explained that it was not misattributing difficulties resulting from production of other products, since the increases in per-unit allocated overhead and SG&A resulting from declines in the production of other products were not mistakenly or disproportionately attributed to line pipe.¹⁴

¹³ Japanese and Korean respondents’ prehearing brief, dated September 24, 1999, at 49 (US Exhibit 31).

¹⁴ USITC Report, p. I-31.

37. In paragraph 96 of our first written submission, we were addressing a related argument made by Korea raised *in this dispute*. That is, Korea has argued to the Panel that OTGC shipments fell disproportionately to shipments of line pipe and therefore that a disproportionate share of fixed costs were attributed to line pipe. In support of this statement, Korea relied solely on a statement by Commissioner Crawford in her dissenting views, which, as we demonstrated in our written submission, misread AISI data presented in USITC staff memorandum INV-W-247 (US Exhibit -3). In fact, those data showed the line pipe and OCTG shipments declined at similar times and to similar degrees. Therefore, Korea's argument that a disproportionate share of costs was attributed to line pipe was based on the faulty premise that OCTG shipments fell disproportionately to line pipe shipments.

Q7. Were Geneva Steel's line pipe production facilities also used to produce non-pipe products? Please explain.

Reply

38. There is no information on the record which directly addresses this question. However, the record suggests that most, if not all, of Geneva's line pipe production facilities were not used to produce non-pipe products.

39. A Geneva Steel executive testified at the USITC injury hearing that the company has three main finished products: cut-to-length plate, hot-rolled sheet, and line pipe. Geneva does not produce any tubular products other than line pipe. The USITC Report (at p. II-7) describes the manufacturing process for welded line pipe. Most of the manufacturing equipment described (the tube mill, welding equipment, a tool to remove the outside flash resulting from the pressure during welding, and sizing rolls to shape the tube to accurate diameters) would appear to be used only for line pipe production. The only equipment which might *theoretically* have been used by Geneva to produce its other products are the cutting tools and heat treatment machinery.

Q8. What impact did the charge booked for the closure of Geneva Steel's blast furnace have on industry operating income, both in absolute terms and relative to net sales? What would industry operating income have been without that charge?

Reply

40. We are not aware that Geneva Steel booked a charge for the temporary closure of its blast furnace, or when any such charge might even have been booked (we note that the blast furnace was closed between December 1998 and September 1999). There is no reference in Commissioner Crawford's discussion of this issue in her dissenting views (p. I-63 of the Report) to any such charge, or to any effect that it might have had on the industry's operating income. Commissioner Crawford merely referenced "the negative effects that these actions [that is, the closure of the blast furnace and Geneva's bankruptcy] have had on the company's cost structure," but she did not specify or even provide a footnote in her dissenting views indicating what, if any, these 'effects' might have been.

Q9. Did the ITC confirm or verify the Geneva Steel executive's oral testimony regarding the importance of Geneva Steel's line pipe operations from an overall margin perspective, and the 50 per cent decrease in line pipe sales between 1997 and 1998? Did the Geneva Steel executive provide any evidence/documentation in support of that testimony? How much of Geneva Steel's hot-rolled steel production was used to make line pipe?

Reply

41. We note that the Geneva executive, like all witnesses at USITC hearing, testified under oath. US law provides for criminal penalties for those who testify untruthfully in these circumstances, and witnesses before the ITC are made aware of these penalties. We are not aware that the Geneva executive provided documentation to support his testimony. Witnesses are not required to do so; as we have noted they testify to the ITC under oath. Information on how much of Geneva Steel's hot-rolled steel production was used to make line pipe is not in the record.

D. UNFORESEEN DEVELOPMENTS

Q10. In US - Lamb Meat, the Appellate Body found that "as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied." Please indicate where the United States made the required demonstration of unforeseen developments. Please provide any supporting documentation, and give specific references.

Reply

42. As the United States pointed out in its first written statement, Korea has conceded that certain conditions leading up to the increase in imports were unexpected. (para. 230) Therefore, it has not made a *prima facie* case of action inconsistent with the unforeseen developments text in Article XIX. Under *Japan – Varietals*, a panel is not permitted to construct a claim that Korea has failed to make.¹⁵

E. THE NATURE OF THE MEASURE /GATT ARTICLE XIII

Q11. With reference to para. 204 of the United States' first written submission, does the United States consider that GATT Article XIII does not "relate to" the application of safeguard measures? Please explain.

Reply

43. The question refers to the US quotation of language from *Argentina – Footwear*, in which the Appellate Body found that Article XIX “relate[s] to the same thing” as the Safeguards Agreement, “namely application by Members of safeguard measures”. The Appellate Body based this conclusion on the numerous references to Article XIX in the Safeguards Agreement. There are no such references to Article XIII. Moreover, as we have pointed out, the Safeguards Agreement adopts certain provisions of Article XIII, but not the others. Therefore, the remaining provisions of Article XIII do not “relate to” application of a safeguard measure in the sense used by the Appellate Body in *Argentina – Footwear*.

44. The Panel asked whether, in light of this view, the United States considers that the last sentence of Article XIII:2(d) applies to safeguard measures. That sentence states that

No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been

¹⁵ *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129 (“[P]anels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it”).

allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

This sentence was not incorporated into Article 5.2(a) of the Safeguards Agreement, even though the preceding two sentences of Article XIII:2(d) were incorporated verbatim.

45. In accordance with our analysis of the other provisions of Article XIII, the fact that the Safeguards Agreement incorporates the first two sentences of Article XIII:2(d), but not the last sentence, indicates that the last sentence does not apply to safeguard measures. However, the omission of that sentence does not leave Members free to prevent other Members from fully using their share of a safeguard quota. If a Member imposes a safeguard quota and applies it at a level necessary to prevent or remedy serious injury and to facilitate adjustment, any additional conditions or formalities it applies to limit the use of the quota would likely result in application of the measure beyond the extent necessary. Therefore, a measure prohibited by the last sentence of Article XIII:2(d) would likely also be prohibited by Article 5.1.

46. Although it is always hazardous to attempt to ascertain the intent of the negotiators from the written text, this analysis suggests that the last sentence of Article XIII:2(d) may have been excluded from Article 5.2(a) because it was redundant. With Article 5.1 already prohibiting application of a safeguard measure beyond the extent necessary, there is no need for an additional prohibition on the application of conditions or formalities that would prevent full use of the quota.

Q12. At para. 193 of its first written submission, the United States submits that "[i]f TRQs were by their very nature 'quantitative restrictions' or 'quotas,' the tariff quota language in Article XIII would be superfluous". Does the United States consider that "export restrictions" within the meaning of GATT Article XIII:5 are "prohibition[s] or restriction[s] ... on the exportation of any product" within the meaning of Article XIII:1? Please explain. If they are, is the reference to "export restrictions" in Article XIII:5 superfluous? Please explain.

Reply

47. Yes, export restrictions are prohibitions or restrictions on the exportation of a product within the meaning of Art. XIII:1. However, the reference to "export restrictions" in Article XIII:5 is not superfluous. Article XIII contains other provisions in addition to paragraph 1. Paragraphs 2, 3, and 4 by their terms apply only to import restrictions. Thus, the reference in paragraph 5 to "export restrictions" was necessary if the "principles" of these additional paragraphs were to "extend" to export restrictions. We refer the Panel to our answers to questions 2 (a) and (b) for further discussion of this issue.

IV. ADDITIONAL QUESTIONS POSED ORALLY BY THE PANEL AT THE SECOND SUBSTANTIVE MEETING

The Panel asked for confirmation of whether the Japanese respondents indicated that there were no exports of Arctic-grade line pipe to the United States in interim 1999.

48. As explained at the Panel's second meeting, the Japanese respondents were asked to provide information concerning exports of Arctic-grade and alloy line pipe during the USITC's period of investigation. These respondents provided information on exports of alloy line pipe in 1999, but did not provide information on exports of Arctic-grade line pipe. From this, it can be inferred that there were no exports of Arctic-grade line pipe from Japan in 1999. We regret that we are unable to provide the Panel with the letter confirming this information because counsel for the Japanese respondents designated it as business confidential. It was provided at the request of the USITC staff and was treated as a supplement to the Japanese producers' questionnaire responses, as it provided

additional data of the type collected in questionnaire responses. Thus, a public version of the letter was not filed with the USITC.

The Panel asked how the USITC instructed US line pipe producers to report their production capacity.

49. A blank copy of the USITC's questionnaire to US line pipe producers is attached as US Exhibit - 32. The producers were asked (on p. 6, Question II-10) to report their "average production capability" for each full year of the period investigated and for the two interim periods. "Average production capability" is defined (on p. 6 of the General Information section of the questionnaire). The producers were asked (on p. 4, Question II-4) whether they produced other products using the same equipment and machinery used to produce line pipe; and, if so, to explain their basis for allocating capacity data.

The Panel asked whether the USITC questionnaires were sent to purchasers of line pipe before the issue of the extent to which dual-stenciled line pipe from Korea was sold for standard pipe applications was raised. The Panel also asked how the USITC identified purchasers who were to receive questionnaires. Finally, the Panel asked whether these purchasers were distributors or end-users of line pipe.

50. It is correct that the USITC sent questionnaires to purchasers of line pipe well before the "dual-stenciled" issue was raised. The petition leading to the USITC's investigation was filed on 30 June 1999. Questionnaires were sent to purchasers on 2 August 1999, with a request that responses be submitted by 19 August 1999. The "dual-stenciled" issue appears first to have been raised by Korean respondents on 24 September 1999, in their pre-hearing brief to the USITC.

51. Prior to sending out questionnaires, the USITC staff contacted petitioners and all known importers. The USITC requested that petitioners collectively identify (through counsel) their top 25 customers and that each known importer identify its top ten customers. The USITC sent purchaser questionnaires to each purchaser as identified. As is standard in most investigations, the producer and importer questionnaires also asked these firms to identify their top customers. In this investigation, USITC staff reviewed the responses to those questions to confirm its previous identification of the main purchasers.

52. The USITC received responses from 40 identified purchasers of line pipe, 31 of which reported purchasing since 1994 and therefore completed the purchaser questionnaire.¹⁶ Of these 31 purchasers, 18 were distributors, 12 were end users, and one was both a distributor and an end user.

The Panel asked whether in paragraphs 31-34 of its oral statement, the USITC is referring to the Commissioners who found serious injury or those who found threat?

53. The analysis presented in paragraphs 31-34 represents the views of all the Commissioners who issued affirmative determinations, regardless of whether the basis was serious injury or threat. Those paragraphs respond to Korea's summary assertion in paragraphs 108 and 109 of its second written submission that the USITC had not responded to arguments Korea initially made in its first written submission, concerning (i) the entry of two new producers in the industry and (ii) statements by USITC Commissioners in their views on remedy to the effect that conditions in the oil and gas industries were improving. Paragraph 34 of the oral statement refutes Korea's challenge to the US observation that announced attempts to increase prices are not the same as actual price increases.

¹⁶ USITC Report, p. II-48, n 111.

54. Korea originally raised these three arguments in reference only to the findings of the Commissioners who found serious injury.¹⁷ In its second oral statement, the United States refuted Korea's arguments as originally raised. However, the US statement on these issues applies equally to the findings of the Commissioners who found threat.

55. With respect to the two new producers, our reference to information contained in the USITC staff report would have been considered by all Commissioners. The threat Commissioners as well as the serious injury Commissioners found that capital investments in the line pipe industry involve long-lead times. (Serious injury: Report at I-20, n.122; threat Commissioners at I-42.) Also, the threat Commissioners recognized the added industrywide production capacity that resulted from the addition of these producers; but they found that there was a significant decline in capacity utilization irrespective of the added capacity.¹⁸

56. As to the price increase announcements, the threat Commissioners specifically noted that any such price increases were to have taken effect contemporaneously with the imposition of antidumping duties or effective dates of suspension agreements covering hot-rolled steel. They stated that they were persuaded that, to the extent any such announced price increases may have "stuck" in the marketplace, they are attributable in significant part to anticipated increases in raw material costs.¹⁹

It is not clear whether the United States considers the competent authorities' determination to be one finding serious injury or one finding "serious injury or threat".

57. As the United States explained in its first written submission (paragraphs 53, 56, 57), the findings and conclusions of the five Commissioners who reached affirmative determination constitute the determination of the competent authority under Article 4 that "increased imports have caused or are threatening to cause serious injury to a domestic industry." The determination is an affirmative determination for the purposes of both US law and the WTO Safeguards Agreement. We previously advised the Panel that the SGA only distinguishes between threat and present injury for a single narrow definitional purpose, that is not relevant here. There is no requirement under either SGA (or US law) to characterize the determination as primarily present serious injury or primarily threat of serious injury, as long as the Commissioners reaching an affirmative determination properly evaluated the relevant Article 4.2 factors and explained their findings and reasoned conclusions in accordance with Articles 3.1 and Articles 4.2(c).

The Panel asked for an explanation of how US law distinguishes between the "determination of the Commission" and "separate views".

58. The US safeguards statute requires the USITC to submit to the President a report of each safeguards investigation undertaken "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."²⁰ In order to meet the domestic law report requirements, the USITC's reports contain much more information than that which is required by the Safeguards Agreement. For example, the US statute, but not the Safeguards Agreement, requires the USITC to include in its report the dissenting views by members on the injury question. The statute, again in contrast to the Agreement, also requires the USITC to include in the report its remedy recommendation and the separate views by any members on remedy.

¹⁷ Korea's first submission at paras. 250, 259, 261, 262.

¹⁸ USITC Report, p. I-40, n 21 (Views of Chairman Bragg and Commissioner Askey).

¹⁹ USITC Report, p. I-48, n 88 (Views of Chairman Bragg and Commissioner Askey).

²⁰ Section 202(f) and, *by reference*, section 202(b)(1)(A) of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2252 (b)(1)(A), (f) (US Exhibit -1).

59. Specifically, section 202(f)(2) of the US safeguards statute provides:

The Commission shall include in the report [to the President] the following:

(A) The determination made under subsection (b) [whether increased imports are a substantial cause of serious injury or threat thereof to the domestic industry], and an explanation of the basis for that determination.

(B) If the determination under subsection (b) is affirmative, the recommendations for action made under subsection (e) and an explanation of the basis for each recommendation.

(C) Any dissenting or separate views by members of the Commission regarding the determination and any recommendation referred to in subparagraphs (A) and (B).

(D) The findings required to be included in the report under subsection (c)(2) [the results of the Commission's examination of factors other than imports which may be a cause of serious injury, or threat of serious injury, to the domestic industry].
* * * ²¹

60. Under subparagraph (A) of the US statute, the USITC must include in the Report to the President both "the determination" and "an explanation of the basis for that determination". In all USITC reports on safeguards investigations, the *determination* precedes the explanation, and the latter is contained in the *Views* of the Commissioners who agreed with the determination. For example, in the *Line Pipe* investigation, the *determination* is set out at pages I-3-I-5 of the USITC Report. The determination states that the Commission, and specifically Chairman Bragg, Vice Chairman Miller, and Commissioners Hillman, Koplan and Askey determined that line pipe is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the domestic industry producing a like or directly competitive article. In other words, the determination indicates that these five Commissioners reached an affirmative determination, which is the only *determination* made by the competent authorities. The required findings and explanation of the basis for the affirmative determination (under both US law and Article 3.1 of the Safeguards Agreement) are set out in the respective *Views* of those Commissioners voting in the affirmative.

61. It appears that the mention in section 202(f)(2)(C) to "any dissenting or separate views by members of the Commission regarding the determination and any recommendation referred to in subparagraphs (A) and (B)" is intended to refer to "any dissenting views by members of the Commission regarding *the* determination referred to in subparagraph (A) [*i.e.*, the injury determination]" and to "separate views by members of the Commission regarding any recommendation referred to in subparagraph (B) [*i.e.*, recommendations for action]." This becomes clear when subparagraph(f)(2)(C) is read in the context of subparagraph (e)(6), which states that—

Only those members of the Commission *who agreed to the affirmative determination* under subsection (b) are eligible to vote on the recommendation . . . Members of the Commission *who did not agree to the affirmative determination* may submit, in the report required under subsection (f), *separate views* regarding what action, if any, should be taken under section 203. (Emphasis added)

²¹ The remaining items required to be included in the report to the President relate to the industry's adjustment plan and to the likely effects of the remedy action recommended by the Commission.

Thus, in referring to *separate* views, subparagraph (e)(6) cross-references to subparagraph (f)(2)(C). These are the only two references in the statute to *separate* views. This suggests that *separate* views as used in subparagraph (f)(2)(C) refers to *views* on remedy.

62. While the two commissioners who reached their affirmative determination in *Line Pipe* on the basis of threat of serious injury labeled their explanation as *Separate Views*, those views form part of the basis for the USITC's affirmative determination.²² They are not "separate views" as that term is used in Section 202(f)(2)(C). In fact, other related statutory provisions further demonstrate that the findings and conclusions contained in the Views of Chairman Bragg and Commissioner Askey form part of the basis for the USITC's affirmative determination on the question of serious injury or threat thereof.

63. Section 330 (d)(1) of the Tariff Act of 1930, as amended, provides that, if the commissioners voting on the serious injury question in a safeguards investigation "are *equally divided* with respect to that determination, then the determination agreed upon by *either* group of Commissioners may be considered by the President as *the* determination of the Commission." (Emphasis added). The use of the terms "equally divided" and "either" demonstrates that the law contemplates only two generic types of determinations by the USITC—either an affirmative determination or a negative determination. This is further emphasized by the incorporation of the possibilities of present serious injury and threat of serious injury into one definition for the purposes of deciding whether the USITC's *determination* is affirmative or negative.²³ When the vote is equally divided, the President is not given the choice of which of the two determinations to act on, but rather he must choose which group of Commissioners' determination constitutes the determination of the Commission. Thus, in all instances, including an equally split vote, US law provides for only one operative determination of the competent authorities.

²² In this regard, we note that there is no formal Commission rule as to how particular Commissioners label their views.

²³ Sections 330(d)(1)(A) and (d)(3), 19 U.S.C. §1330 (d)(1)(A) and (d)(3)(US Exhibit -2).