7.1571 The United States suggests that the numerical analysis also attempts to avoid attributing to increased imports the negative price effects of increased capacity and minimill competition, the two other factors that the USITC found to be causing injury during the 1998-2000 period. These two factors are related because, during the investigation period, almost all new capacity for CCFRS products was minimill capacity. The greatest increase in minimill capacity occurred in 1997, which is the comparison year.[3629] Thus, the comparison year already reflects much of the capacity expansion that the USITC found was having an effect on United States prices. In 1998, the year with the second highest level of increase in minimill capacity during the investigation period, capacity increases were in line with increases in demand, so the analysis makes no adjustment to account for capacity and minimill competition in those years.[3630] Capacity increases in 1999 and 2000 were much smaller than in previous years, and demand stayed at roughly the same level. Imports remained in the market at high levels, and at lower prices than in previous years. Minimill shipments into the commercial market were at higher levels than at the beginning of the investigation period, but still reflected unit values higher than those for imports. To compete with imports, domestic producers cut prices. Accordingly, the United States makes no adjustment for these factors. The United States also makes an adjustment to the estimate to reflect the USITC's finding that the decrease in demand in the first half of 2001 "contributed to the industry's continued deterioration at the end of the period". For purposes of the Article 5.1 analysis, and as a conservative assumption, the United States notes that apparent domestic consumption of hot-rolled steel, cold-rolled steel, and coated steel was at levels comparable to those in 1996 in the first half of 2001. Accordingly, for this period, the United States reflects the decreased level of demand by using 1996 as the base period profit. The USITC's findings with regard to imports from Canada and Mexico require no adjustment to the estimate.

7.1572 The United States then explains that in the first step of the Article 5.1 evaluation, it uses a base year of 1997 for all categories. As a conservative estimate, the estimate reduces the base year operating income margin by half for the first half of 2001, to reflect that the USITC found that declining demand was a factor in causing injury during this period, but was no more important than increased imports. In the second step, the analysis estimates the level to which domestic producers' prices would have to increase during the pendency of a safeguard measure to eliminate the price effects of increased imports and to counteract the negative effects of imports from 1998 to 2000. This involves estimating the unit value needed to raise operating margins by the amounts it describes, and then adding an additional increase that would recoup the shortfall in operating income. In the third step, the process described previously produces an estimate for each category of the degree to which import producers' prices would have to increase for domestic producers to achieve the operating income margin described above. Then the United States weight averages these amounts by net commercial sales revenues. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. During the remedy phase of the investigation, the USITC staff prepared economic models on the United States market for CCFRS. The USITC staff adjusted the standard model to reflect linkages among the different categories of flat steel, and ran several permutations. This linked model indicated that a 30% increase in duties on all certain flat-rolled steel (including slab and Mexico) would result in an increase of between 20.8 and 28.0% in the sale price

[3629] USITC Memorandum INV-Y-215, Tables G04-1, G02-1, G03-1, and G06-1. Minimill capacity to produce plate and hot-rolled steel increased as much in 1997 as in all other years of the investigation period, combined.

[3630] For plate, cold rolled steel, and coated steel the increase in demand in 1998 was either greater than or roughly equal to the increase in capacity in 1998. The USITC indicated that capacity increases in line with demand were not themselves injurious. For hot-rolled steel, capacity increased by more than demand in 1998. However, imports of hot-rolled steel increased by 68% in 1998, while production decreased, indicating that the domestic producers were not engaged in competitive price reductions to gain market share and fill capacity, which the USITC identified as the way that extra minimill capacity would affect prices. USITC Report, pp. 63-65.

of imported CCFRS products (excluding Canada) in the United States.[3631] This suggests that the 30% tariff on CCFRS products is set at a magnitude that satisfies the requirements of Article 5.1.

7.1573 Based on the USITC's analysis, the United States considers that its estimation of the extent of application of the CCFRS measure necessitated modifications to the approach outlined previously. The USITC found that [t]he impact of the 1998 surge in imports on the domestic industry is undeniable". Operating income fell in spite of an increase in demand.[3632] The USITC found further that "[t]he import surge in 1998 altered the competitive strategy of domestic producers" in subsequent years, leading to "repeated price cuts" that "while stemming somewhat the tide of imports and increasing domestic shipments, did nothing to improve the industry's condition".[3633] Consequently, in 2001, "[t]he domestic industry entered a period of falling demand already in a weakened condition and deteriorated even further".[3634]

7.1574 Accordingly, the United States performs the modelling exercise described previously, but based on data for 1998, 1999, and 2000 [sic], rather than just 2000. More specifically, the United States looks at the following sets of scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1996 levels in 1998, 1999, and 2000 [sic]. The price, volume, and revenue results for scenario (i) are in the same range as the price, volume, and revenue results for scenario (ii) in 1998.

7.1575 The European Communities submits that with respect to the numerical analysis used by the United States, an aggregated analysis has been used for the whole CCFRS product bundle[3635], but details product-by-product tables in Exhibit US-56. This confirms that the United States should have undertaken a separate investigation for each of the 5 products comprised in the CCFRS category instead of relying on an aggregated basis. In addition, as a first step, the United States has chosen 1997 as its "base" year and admits that only one adjustment has been made to take account of decline in demand in 2001. On the contrary, the United States has taken the view that no adjustment was necessary to accommodate legacy costs, management decisions and purchaser consolidation since the USITC has found that these factors had not caused injury to the domestic industry. Moreover, the United States admits that no adjustment has been made to take account of the injurious effect of increased capacity and minimill competition. More specifically, the United States relies on the fact that its "base" year (1997) already corresponds to the greatest capacity increase and that capacity increases in the following year were in line with demand increase. This argument is vitiated because the mere fact that capacity increases allegedly remained in line with demand growth does not guarantee that injurious excess capacity did not exist, especially if the initial excess capacity at the outset required capacity reduction to get in keeping with demand. The European Communities notes that the United States also relies on the assertion that minimill shipments, although increasing, were sold at higher prices than imports. This reasoning ignores the fact that even if minimill prices were higher than import prices, minimill competition had an injurious effect. The negation of the injurious effect of minimill prices is particularly surprising in the light of the US argument that imports prices,

[3631] Memorandum EC-Y-050 (US-65). The public materials do not contain model results covering the safeguard measure established by the President. The United States notes that the exclusion of slab and Mexico in the model of the President's remedy (US-57) shows a substantially lower effect on import prices.
[3632] USITC Report, p. 60.
[3633] USITC Report, p. 61.
[3634] USITC Report, p. 63.
[3635] United States' first written submission, paras. 1091-1099.

although higher than domestic prices, could have caused injury.[3636] If such is the case, the same must also be true for minimill prices higher than import prices.

7.1576 The European Communities adds that, as a result of its numerical approach, the United States seems to submit that an increase of 18.9% in imports prices would be in line with Article 5.1[3637], whereas the USITC modelling indicated that a 30% additional tariff on imports including slabs and Mexico but excluding Canada would result in an increase of between 20.8 and 28.0% in imports prices.[3638] There is no need to further argue that the relevant comparison (if any) would have been with an USITC model run for imports from non-NAFTA sources. It is worth noting that, as a matter of fact, the USITC modelling for a 20% additional tariff results in an increase of between 14.0 and 18.6% in imports prices which would strongly suggest that a tariff increase of maybe more than 20% but surely less than 30% would have reached the targeted 18.9% increase in imports prices.[3639]

7.1577 The European Communities submits[3640] that in addition to these discrepancies[3641], the USITC modelling exercise had been performed with respect to imports of all CCFRS and taking account of imports from Mexico, whereas the only relevant comparison (if any) would have been with an USITC model run for imports from non-NAFTA sources. For the European Communities, the United States itself admits that the exclusion of Mexico from its modelling of the President's remedy shows a "substantially lower effect on import prices".[3642] This might explain the large discrepancies between the results of the USITC modelling exercise and the United States' *ex post* numerical analysis, but makes any comparison between them incoherent. Therefore, the United States does not have any supportive evidence that the USITC modelling suggests that a 30% tariff on CCFRS is "set at a magnitude that satisfies the requirements of Article 5.1".[3643]

7.1578 The United States responds that imports from NAFTA countries were properly considered. The United States adds that some complainants assert that the USITC "explicitly stated that a more restrictive remedy would not be necessary to address the injury it has found to be caused by increased imports".[3644] This, it argues, is incorrect. The USITC actually stated that "[w]e do not agree with the domestic industry, however, that an additional 35, 40, or 50% *ad valorem* tariff is necessary to achieve the desired result, or is otherwise appropriate".[3645] The exclusion of a 30% tariff from this enumeration suggests that the USITC did not find a measure at that level to be excessive.[3646] Further, in any event, the USITC was evaluating four-year measures, while the President applied remedies for

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[3636] United States' first written submission, paras. 548-549 (tin mill products).
[3637] Exhibit US-56.
[3638] United States' first written submission, para. 1099.
[3639] European Communities' second written submission, paras. 422-528.
[3640] European Communities' comments on replies to Panel question No. 54 at the second substantive meeting.
[3641] European Communities' second written submission, para. 527.
[3642] United States' first written submission, footnote 1385. The European Communities also notes that the United States improperly included slabs in the modelling of a remedy which excluded slabs.
[3643] United States' first written submission, para. 1099.
[3644] European Communities' written reply to Panel question No. 108 at the first substantive meeting.
[3645] USITC Report, p. 363.
[3646] Korea asserts that the USITC's explanation of its recommendation for other welded pipe is inconsistent with the measure established by the President. Korea's written reply to Panel question No. 108 at the first substantive meeting. The United States argues it has showed in its first written submission that the USITC's findings were not relevant to a consideration of consistency with Article 5.1. United States' first written submission, paras. 1205 through 1210. These same points fully rebut the arguments make by Korea in response to Panel question No. 108.

only three years.[3647] Therefore, the complainants' analysis of the USITC recommendations does not suggest any inconsistency with Article 5.1.[3648]

(ii) Tariff on tin mill products

7.1579 The United States[3649] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic tin mill steel industry and this is the starting assumption of its justification.

7.1580 The United States recalls that for tin mill, three Commissioners found serious injury. They issued separate views, but agreed on certain key aspects of the injurious condition faced by the domestic industry. Commissioner Miller found serious injury based on a decline in capacity utilization, United States shipments and sales, operating margins, average unit values, capital expenditures and employment during the period of the investigation.[3650] Commissioner Bragg treated tin mill as a component part of a single flat-rolled like product, and found serious injury based on decreasing revenues, operating margins, capacity utilization, wages and employment, and the lack of ability to finance modernization in the last two and half years of the period of investigation.[3651] Commissioner Devaney also treated tin mill as part of a single flat-rolled like product, and found serious injury based on declines in capacity utilization, operating margins, average unit values, and downward trends in employment and capital expenditures in the later portion of the period of investigation.[3652]

7.1581 For the United States, each of these determinations reflects a permissible analysis of the effect of imports on the domestic industry. Under United States law, multiple affirmative determinations by individual Commissioners as to differently defined like products constitute an affirmative determination of the USITC with regard to the largest product group that is subject to enough affirmative determinations to form a majority sufficient to support a determination of the USITC. It is the injury experienced by the producers of tin mill – the product within the intersection of the determinations of Commissioners Miller, Bragg, and Devaney – that forms the basis for deciding the extent of application of the safeguard measure. The performance of these producers is evaluated in light of the findings made by Commissioners Bragg and Devaney as to the larger industry comprising producers of tin mill and flat-rolled products.

7.1582 The United States recalls that the Commissioners rendering affirmative determinations focused on the following indicators of injury. For tin mill, these were:

[3647] The panel in *US – Line Pipe* found that the duration of a measure was a valid factor in considering whether it was applied to a lesser extent than a proposed measure with a longer duration. Panel Report, *US – Line Pipe*, paras. 7.96-7.97.

[3648] United States' second written submission, para. 205.

[3649] United States' first written submission, paras. 1170-1186.

[3650] USITC Report, pp. 72-74 and pp. 307-308.

[3651] USITC Report, pp. 283-282.

[3652] USITC Report, p. 345.

	1998	1999	2000	1st half 2000	1st half 2001
Revenues	2,120	2,033	1,974	1,008	880
Shipments	3,287	3,239	3,163	1,597	1,436
Market share	87.2%	82.3%	84.5%	84.4%	84.5%
Employment	6,322	6,075	5,733	5,884	5,584
Op. income	(78)	(141)	(119)	(25)	(65)
Margin	(3.9)%	(6.9)%	(6.1)%	(2.5)%	(7.4)%
Capital expenditures	120	146	97	29	15

Source: USITC Report, p. FLAT-C-8. Shipments in 1000 short tons; employment in number of workers; revenue, operating income and capital expenditures in US$1 million.

7.1583 The United States recalls that Commissioner Miller found that although the industry was unprofitable before and throughout the period, it suffered a serious downturn in 1999 as imports surged. Despite the increase in demand in 1999, the domestic industry "realized no gain, and in fact a serious loss, in profitability. Imports also showed their greatest increase in United States market share over this period".[3653] Commissioner Bragg stated in her opinion that although the volume of imports of carbon and alloy flat products declined towards the end of the period of the investigation, "they still remained at relatively high levels and continued to negatively impact prices for the domestic product throughout the period. By forcing domestic prices lower, imports deprived domestic producers of revenue. It should be recognized that given the worsening condition of the domestic industry over the period of investigation, the amount (level) of imports sufficient to cause serious [injury] declined correspondingly".[3654] Commissioner Miller analysed three additional potential causes of the serious injury: declining demand, purchaser consolidation, and overcapacity. Commissioner Bragg identified several potential causes of serious injury other than imports, but determined that for all flat products, "any injury sustained by the domestic industry stems solely from increased imports".[3655] Commissioner Devaney found that declining demand, increased capacity, and competition from minimills contributed to the deterioration of the industry encompassing all flat steel products. He found that declining demand had effect only at the end of the investigation period.[3656] Commissioner Miller found that declining overall demand was not causing injury. She noted that this condition began long before the investigation period, and might account for the industry's weak state in 1996, but that demand actually increased in 1999 with no improvement in the condition of the domestic industry.[3657] Commissioner Miller found that purchaser consolidation existed throughout the investigation period, and signalled the "intense price competition that exists for tin mill products, both domestic and imported.[3658] Since this factor existed throughout the investigation period, it may have had negative effects throughout, but it would not be responsible for *changes* in the industry's

[3653] USITC Report, p. 308.
[3654] USITC Report, p. 294.
[3655] USITC Report, p. 295.
[3656] USITC Report, p. 63. In footnote 224 of the USITC Report, p. 55, Commissioner Devaney joined the analysis of the majority for the causation of injury in flat products, stating that the result is the same when the analysis is performed over the entire industry as he has defined it, that is that imports are a substantial cause of serious injury.
[3657] USITC Report, pp. 308-309.
[3658] USITC Report, p. 309.

condition. Commissioner Miller found that there was overcapacity during the investigation period, but noted that the decrease in capacity utilization coincided with the import surge. She also noted that the industry's overall capacity decreased during the investigation period, and that the tin mill industry had taken steps to rationalize capacity.[3659] Although this factor may have had negative effects on the industry during the investigation period, the decline in capacity indicates that it was not responsible for any worsening in the condition of tin mill producers during the investigation period.[3660]

7.1584 The United States submits that the USITC Report details the relationship between increased imports from non-FTA sources and injury to the domestic industry. Commissioners Bragg, Devaney, and Miller found that imports caused serious injury because when an upswing in demand occurred in 1999, the domestic industry was unable to make any gain as imports surged. Non-NAFTA imports surged 51.5% between 1998 and 1999 resulting in the lowest profit margin (-6.9%) for any full year of the period of investigation. Domestic prices and average unit values were also at their lowest in 1999. Although non-NAFTA imports declined in 2000, they still were at higher levels than the 1996-1998 period. Commissioner Bragg in her analysis found that the "impact of opportunities lost during an upswing in the given cycle would not only have an immediate impact on the domestic industry by virtue of suppressed and depressed prices, lost sales, and resulting lost revenues, but would also be expected to have lingering carryover effects on the domestic industry as the cycle turned lower".[3661] Commissioner Miller found that her analysis of tin mill would not change if she had excluded Canada and Mexico.[3662] Commissioner Bragg found that her analysis that the domestic flat-rolled industry suffered serious injury from imports would not change with the exclusion of NAFTA imports.[3663]

7.1585 The United States argues that if one of the Commissioners identified a factor as causing injury, that factor caused injury regardless of the views of the other Commissioners. Accordingly, for purposes of evaluating whether the tin mill safeguard measure complied with Article 5.1, the United States concludes that non-NAFTA imports were responsible for some of the reduction in domestic producers' sales and market share, production, profits, wages, and employment beginning in 1999. The United States submits that this is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. Accordingly, for purposes of the evaluation of consistency with Article 5.1, the United States explains that it treated increased capacity, competition with minimills, and decline in demand in the latter part of the period of investigation as factors causing injury to the domestic tin mill industry.

7.1586 In evaluating the safeguard measure, the United States also considers Commissioner Miller's observation that the United States imposed anti-dumping duties on tin mill from Japan in the first half of 2000. She noted that, even so, imports continued to have a significant presence in the United States.[3664] Accordingly, the United States has not adjusted its estimate to reflect these anti-dumping duty orders.

7.1587 The United States explains that for purposes of the estimate of consistency with Article 5.1, it followed a volume-based approach for the numerical exercise. Commissioner Miller noted the significant volume of imports and the market share increase, both in 1999 and over the entirety of the investigation period.[3665] Accordingly, the United States has analysed this safeguard measure based on

[3659] USITC Report, p. 309.
[3660] United States' first written submission, para. 1177.
[3661] USITC Report, p. 293.
[3662] USITC Report, p. 310, footnotes 28 and 29.
[3663] Second Supplementary Report, p. 14.
[3664] USITC Report, p. 308.
[3665] USITC Report, p. 308.

import volumes. The United States notes that imports increased substantially between 1998 and 2000. As a first step in the analysis, the United States estimates what non-NAFTA import volume would have been if non-NAFTA imports had stayed at their 1998 market share in 1999 through 2001. It then compares the estimated import volumes with the actual import volumes for those periods, and finds that non-NAFTA imports would have been, on average, approximately 23% lower. This reduction represents a reduction in import volume roughly equivalent to the USITC modelling associated with a 30% tariff, suggesting that the 30% tariff on tin mill is set at a magnitude that satisfies the requirements of Article 5.1.[3666] Since this approach is based on the volume of non-NAFTA imports alone, the United States explains that it has concluded that no adjustment to the estimate was necessary. In order to calculate target import levels, the United States has used non-NAFTA market share for 1998, the year immediately preceding the 1999 surge in imports, and then applied it to actual apparent consumption for years 1999-2001. The United States then compares calculated target import levels to the actual import levels for each year.

7.1588 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise appear in Modelling Worksheet I. For the United States, they suggest that it applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1589 Norway[3667], Japan[3668] and Korea[3669] challenge the justification and the safeguard remedy imposed on tin mill. Norway adds that the 30% tariff overshoots the target grossly. As stated by Commissioner Miller[3670], there is intense price competition for tin mill products. The effect of a 30% tariff increase in such circumstances is clearly that imports will be drastically reduced. That is also *grosso modo* the result except for the products for which exclusions have been accorded. Either this was intended, which thus clearly is in breach of Article 5.1, or the United States had no basis for establishing that a 23% reduction amounts to the alleged serious injury caused by increased imports from non-NAFTA countries, which is also in clear breach of Article 5.1.[3671] The European Communities, Norway, Japan, Korea and Brazil also argue that even if one were to argue that the President can avail himself of the justifications presented by the three commissioners who voted in favour of imposing tariffs on tin mill products, it is clear that their suggested measures do not comply with the requirements of Article 5.1 of the Agreement on Safeguards.[3672] These complainants recall[3673] that the only commissioner that specifically addressed a remedy with respect to tin mill products, Commissioner Miller, suggested an additional tariff of 20% , declining over four years.[3674] She explained the choice of this remedy *inter alia* as follows: "The Commission's economic analysis shows that an additional tariff of 20% *ad valorem* will result in a substantial increase in the domestic industry's sales revenues and sales volumes during the first year of relief" and "The significant declines in import volumes expected from the tariff increase will help the domestic industry increase its sales revenues substantially and allow it to make significant adjustments to import competition

[3666] USITC Memorandum EC-Y-046, p. FLAT-26.
[3667] Norway's second written submission, para. 166. Norway's first written submission, paras. 358-369.
[3668] Japan's first written submission, paras. 208-213.
[3669] Korea's first written submission, paras. 206-207.
[3670] United States' first submission, para. 1176.
[3671] Norway's second written submission, para. 166.
[3672] Norway's second oral statement on behalf of all complainants, para. 31.
[3673] Norway's first written submission, para. 367.
[3674] USITC Report, Vol. I, at pp. 20 and 527. (Exhibit CC-6)

during the period.[3675] The United States argues that if looking at the same time at the Commissioners who included tin mill products in the broader category of flat products, Bragg and Devaney suggested a four year tariff starting at 40% and ending at 31%.[3676] These complainants recall that Devaney explained this choice by stating *inter alia* that: "As I have stated previously, the form of remedy that I have chosen seeks to address the ongoing injury that has occurred over a number of years, and not just in the most recent period" and "Accordingly, I believe that the significant declines in import volumes resulting from the tariff will help the industry increase it sales volumes substantially and allow it to make significant adjustments to import competition during the period of relief".[3677] They also recall that Commissioner Bragg gives extensive explanations for her choice of remedy: "I recognize that differences exist between my injury findings and remedy recommendations, thus raising an issue as to whether there is an appropriate level of symmetry between my injury findings and these remedy recommendations. Importantly I find that even the maximum remedy I am authorized by US law to recommend to the President would be insufficient to address the level of serious injury I found to exist for some of my defined domestic industries, as well as the product groupings covered at this stage of the proceedings".[3678] and "Tariffs also provide a revenue benefit directly to the US government, in contrast to quotas which arguably provide a benefit to the foreign producers who receive the quota rents".[3679]

7.1590 The above-mentioned complainants note that neither Commissioner Devaney nor Commissioner Bragg gives an explanation of how exactly they arrived at their suggested percentages, and what the effects will actually be on imports. Assuming that the Commission has performed only one economic analysis, those complainants find it hard to understand how the same figures may justify different suggestions on remedies by the other Commissioners. Furthermore, not even Commissioner Miller appropriately addressed the non-attribution aspects, which clearly should have been done given that the three other Commissioners did not attribute the injury suffered by the domestic injury to imports. In her separate determination of serious injury[3680], she admitted to a number of causes other than imports that are causing injury, but makes an affirmative determination based on the USITC methodology of looking at whether other causes are equal to or greater than imports. However, in her injury determination for tin mill products[3681], there was absolutely no discussion of non-attribution of the injury from these other causes, in clear violation of Article 5.1. It is also noteworthy that she included imports from Canada (but not from Mexico, Israel and Jordan) in her determination – and proposes that Canadian imports be subject to the proposed 20% tariff.[3682]

7.1591 Norway then argues that it is clear that the remedy suggested by Devaney, as explained by him, goes beyond what is permitted under the Agreement on Safeguards. Addressing not only current injury, or injury suffered during the POI, but also alleged "past injuries" – giving a sort of "extra punitive damages", cannot fulfil the requirements of Article 5.1 Furthermore, nowhere in his separate views on remedy is there a discussion of how his suggested remedy will be limited to only address the serious injury attributed to the increased imports affected by the measure. For the complainants, it is equally clear that the remedy suggested by Commissioner Bragg is not limited to the extent necessary to address serious injury attributed to the increased imports affected by the measure. As she explains

[3675] USITC Report, Vol. I, at p. 528. (Exhibit CC-6)
[3676] USITC Report, Vol. I, at p. 20. (Exhibit CC-6)
[3677] USITC Report, Vol. I, at pp. 533 and 534. (Exhibit CC-6)
[3678] USITC Report, Vol. I, at p. 520. (Exhibit CC-6)
[3679] USITC Report, Vol. I, at p. 522. (Exhibit CC-6)
[3680] USITC Report, Vol. I, at pp. 308-309. (Exhibit CC-6)
[3681] USITC Report, Vol. I, at pp. 527-529. (Exhibit CC-6)
[3682] Japan's first written submission, paras. 208-213; Korea's first written submission, paras. 206-207; Norway's second written submission, paras. 166-167.

herself there are asymetries in her treatment of injury and remedy. Furthermore, her criteria for establishing the level of the tariff is not based on the serious injury that she attributes to imports, but on the level necessary to "significantly improve profitability" of domestic producers.[3683] Bragg explains that her exclusions of certain countries from the injury analysis would not change her injury findings, but does not discuss and still not take into account the non-attribution aspects of other factors to the injury in relation to the establishment of the remedy.[3684]

7.1592 The European Communities argues that for tin mill products, the US Presidential Proclamation relied on 3 separate affirmative determinations based on divergent product definitions, where 3 different USITC Commissioners made 3 distinct findings. The United States has decided to take account of all the alternative factors found to have caused injury to the domestic industry, regardless of the views of other Commissioners[3685], but eventually determined that no adjustment was necessary in this respect.[3686] Another difference in the application of the numerical analogy proposed by the United States arises from the fact that the injurious effect of imports of tin mill products does not rest on prices effect, but on losses of market shares. For this reason, the United States has proposed a volume-oriented approach, aiming at maintaining imports market share in 1999 to 2001 at the level reached in 1998, prior to the 1999 imports surge. The United States has noted that non-FTA imports would then have been in average 23% lower, which would purportedly correspond to the effect of a 30% tariff increase as modelled by the USITC.[3687] Even admitting *arguendo* that the United States proposal for a numerical approach based on volume effects could have some relevance, the United States conclusion that a 23% decrease in imports would be "*roughly equivalent*" to the USITC modelling associated with a 30% tariff increase would not be supported by the USITC estimate of import decrease resulting from such tariff (from –50.5 to -29.1%). Indeed, a 20% increase in duty, resulting in a decrease in imports volume of between –30.7 to –16.6% would have appeared more adequate.[3688]

(iii) Tariff on hot-rolled bar

7.1593 The United States[3689] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic hot-rolled bar steel industry and this was the starting assumption of its justification.

7.1594 According to the United States, the USITC identified four factors other than increased imports that potentially caused injury: competition among domestic producers, inefficient domestic producers, changes in demand prior to 2001, and changes in input costs. The USITC found that none of these was a factor causing injury to the domestic industry. The USITC did not attribute any injury to competition among domestic producers. It found that this cause might explain changes in the relative market shares of domestic producers, but not their loss of 2.4 percentage points of market share to imports. The USITC also found Nucor – the source of competition among domestic producers – was not a primary source of pricing declines. Thus, increased imports were the only factor causing injury to the domestic industry in 2000. The USITC made no findings with regard to declining demand in 1998 and 1999. For purposes of this estimate, the United States notes that demand increased in 1998. Based on the USITC's finding of serious injury, for purposes of its

[3683] USITC Report, Vol. I, at p. 521. (Exhibit CC-6)
[3684] Norway's first written submission, paras. 358-369.
[3685] United States' first written submission, para. 1180.
[3686] United States' first written submission, para. 1185.
[3687] United States' first written submission, paras. 1183-1185.
[3688] European Communities' second written submission, paras. 529-532.
[3689] United States' first written submission, paras. 1102-1109.

estimate, the United States treats the injury attributable to imports from 1997 to 2000 as continuing into the first half of 2001. Non-FTA imports undersold domestic products at levels comparable to preceding years[3690], and retained a market share well above 1996 and 1997 levels. The USITC found that the decline in hot-rolled bar consumption in this period led to "further deterioration".

7.1595 The United States then bases its analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the USITC noted: for a product such as hot-rolled bar which covers a broad range of product types and values, pricing data for a more specific product can provide more probative information than average unit sales values.[3691] In the first step, the United States chooses 1997, the year before the year when the condition of the domestic industry began to deteriorate, as the appropriate comparison year, keeping in mind that imports may still have had some negative effect on the industry. It estimated that the revenue shortfall in 1998 and 2000, years in which demand did not decline, was attributable to increased imports. The United States explains that it treated half of the decline in revenue in 1999 as attributable to increased imports, and for the first half of 2001, treats the decline in revenue attributable to imports as equal to the level in 2000. In the second step, the United States calculates the amount by which the 1997 operating income margin would have to rise to recoup the shortfall in operating income described in the preceding paragraph.[3692] In the third step, it bases the pricing analysis on the USITC pricing comparisons on page LONG-87. The United States notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, the United States estimates the additional duty that would be necessary to achieve the target increase. As part of its investigation, the USITC prepared economic models on the United States hot-rolled bar market. These models indicated that a 30% increase in duties would result in an increase of between 19.6 and 24.2% in the sale price of imported hot-rolled bar in the United States.[3693] For the United States, this suggests that the 30% tariff on hot-rolled bar is set at a magnitude that satisfies the requirements of Article 5.1.

7.1596 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1597 The European Communities argues that the United States starts off by recalling that the USITC found that none of the four other factors invoked (competition among domestic producers, inefficient domestic producers, changes in demand and changes in input costs) had injurious effects, but admits that the USITC had made no finding with respect to declining demand in 1998 and 1999.[3694] Then the United States chooses 1997 as its "base" year because the industry's condition began to deteriorate that year (although one would have thought that it would chose the year before the increase in imports – choosing the "base" year as the one prior to the decline in the industry's

[3690] The unit value of imports increased in 2001 as compared to 2000. Since comparisons of comparable items continued to show underselling, this development indicates that the mix of imported products changed.

[3691] USITC Report, p. 93, footnote 554.

[3692] The United States does this by calculating the revenue shortfall in each year in which the USITC identified imports as having an injurious effect, and dividing that by actual revenue for the same period.

[3693] Memorandum EC-046, p. LONG-29 (US-64).

[3694] United States' first written submission, paras. 1102-1104.

performance, does not meet the requirement to address only the injury caused by increased imports). The United States also admits that only one adjustment has been made for 1999. Although the United States does not explicitly acknowledge it, this adjustment seems to reflect the decline in demand in 1999, although the injury caused by this other factor had (improperly) not been assessed in the causation analysis. As a result of its numerical approach, the United States has found that an increase of 22.8% in imports prices would be in line with Article 5.1[3695], whereas the USITC modelling has indicated that a 30% additional tariff on imports excluding Mexico but including Canada would result in an increase of between 19.6 and 24.2% in imports prices.[3696] [3697]

(iv) Tariff on cold-finished bar

7.1598 The United States[3698] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic cold-finished bar industry and this was the starting assumption of its justification.

7.1599 The United States explains that the USITC identified two factors other than increased imports that potentially caused injury: declining domestic demand for cold-finished bar and the effect of a purportedly inefficient domestic producer. The USITC found that the inefficiency of RTI did not cause injury to the domestic industry. The USITC considered the effect of declining demand on the domestic industry. It noted the domestic producers' observation that prices for cold-finished bar historically track demand, and observed that this appeared to be the case in 1999. Accordingly, it found the decline in the domestic industry's financial performance in 1999 to be "to a large extent attributable to declines in demand during that year".[3699] The USITC noted that demand increased in 2000, but that the domestic producers' prices decreased. Accordingly the USITC found that changes in demand did not explain the serious injury to the domestic cold-finished bar industry. These findings indicate that changes in demand were having a positive effect in 2000; therefore, no injury should be attributed to this potential cause in 2000. The USITC noted that demand declined in the first half of 2001, and that the domestic industry's performance further deteriorated.[3700] This finding indicates that some of the injury in the first half of 2001 is attributable to declining demand. These findings demonstrate that the entirety of the reduction in domestic producers' production, shipments, market share, employment, revenue, and operating income in 2000 is properly attributed to increased imports. The USITC's findings further indicate that both increased imports and decreases in demand had an injurious effect in 1999 and the first half of 2001. This is not to suggest that imports in 1996 through 1998 had no negative effects. Since the analysis of the USITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, the United States has decided to base its analysis for cold-finished bar on the changes from 1999 through the first half of 2001 only.

7.1600 The United States argues that it has treated non-import factors as responsible for half of the decline in the domestic industry's operating income in 1999. It has assumed that decreased demand was responsible for any change in performance in the first half of 2001 as compared with the full year 2000. Accordingly, it has estimated that increased imports had the same negative effect in the first half of 2001 that the United States has estimated for 2000.

[3695] See Exhibit US-56.
[3696] United States' first written submission, para. 1108.
[3697] European Communities' second written submission, paras. 533-536.
[3698] United States' first written submission paras. 1110-1119.
[3699] USITC Report, p. 107.
[3700] USITC Report, p. 107.

7.1601 The United States bases its analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the USITC noted: for a product such as hot-rolled bar which covers a broad range of product types and values, pricing data for a more specific product can provide more probative information than average unit sales values.[3701] In the first step, the United States claims that as a conservative estimate it chose 1998, a year in which demand was equivalent to its level in 2000, as the appropriate base year, keeping in mind that imports increased in that year and, thus, may have had some negative effect on the industry. To reflect the impact of non-import factors on 1999, the United States halves the base operating income margin. It estimates the revenue shortfall in 1999 through the first half of 2001, periods in which the USITC indicated that imports caused some of the decline in the industry's performance. In the second step, it estimates the amount by which the 1998 operating income margin would have to rise to recoup the shortfall in operating income.[3702] In the third step, it bases the pricing analysis on the USITC pricing comparisons on page LONG-92.[3703] Finally, it notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' cold-finished bar market. These models indicated that a 30% increase in duties would result in an increase of between 19.6 and 24.2% in the sale price of imported cold-finished bar (excluding bar from Canada) in the United States.[3704] For the United States, this suggests that the 30% tariff on cold-finished bar is set at a magnitude that satisfies the requirements of Article 5.1.

7.1602 The United States notes that these figures are lower than the tariff level of the safeguard measures established by the President and recalls that "it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market".[3705]

7.1603 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1604 The European Communities recalls that the United States has determined that 1998 should be its "base" year and made adjustments to take account of the injurious effect of declining demand in 1999 and 2001, in line with the USITC findings that this other factor caused injury in these years. Also consistent with the USITC findings, no adjustment has been made with respect to the

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[3701] USITC Report, p. 103, footnote 614.

[3702] The United States does this by calculating the revenue shortfall in each year in which the USITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[3703] This table contains confidential information. The United States has reproduced the results of this step, but not the inputs.

[3704] Memorandum EC-046, p. LONG-29 (US-64).

[3705] *US – Fur Felt Hats*, para. 35. The United States argues that in the case of cold-finished bar, it has noted that it was relatively simple and inexpensive to convert a hot-rolled bar into a cold-finished bar. If the tariff level for these two products were different, it would create an incentive for foreign producers to circumvent the safeguard measure by shifting their hot-rolled bar customers to cold-finished bar. This would undermine the remedial effect of the measures on both hot-rolled and cold-finished bar. Accordingly, the United States did not go beyond the extent necessary by applying a 30% tariff to imports of cold-finished bar.

inefficiency of one domestic producer.[3706] As a result of its numerical approach, the United States has found that an increase of 14.4% in imports prices would be in line with Article 5.1[3707] and referred to the USITC modelling indicating that a 30% additional tariff on imports excluding Mexico but including Canada would result in an increase of between 19.6 and 24.2% in imports prices. Admitting *arguendo* that the United States approach could be relevant, a 20% additional tariff, which would have resulted in an increase of between 13.3 and 16.2% in imports prices, would appear more adequate than a 30% additional tariff which patently overshoots the mark. On this specific point, the United States admits that the 30% additional tariff on cold-finished bar was designed to match the duty increase for hot-rolled bar and prevent product shifting from hot to cold-finished bar.[3708] This being said, the purported need to prevent product shifting does not allow the United States to apply a safeguard measure on cold-finished bar beyond the extent necessary to prevent or remedy serious injury caused by increased imports.[3709]

(v) Tariff on rebar

7.1605 The United States[3710] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic rebar industry and this is the starting assumption of its justification. The USITC identified four factors other than increased imports that potentially caused injury: demand changes, changes in input costs, capacity increases, and competition between domestic producers. The USITC found that none of these caused injury to the domestic industry. These findings demonstrate that the entirety of the reduction in domestic producers' performance from 1999 through 2001 was attributable to increased imports. The United States submits that this is not to suggest that imports in 1996 through 1998 had no negative effects. The United States explains that since the USITC's analysis focused on changes in industry performance, and that performance began to decline in 1999, it based its estimate for rebar bar on the changes from 1999 through the first half of 2001 only. The United States also considered the USITC's observation that the United States imposed anti-dumping duties on Turkey in 1996 and on Belarus, China, Indonesia, Korea Latvia, Moldova, Poland, and Ukraine in 2001. The USITC noted in its remedy recommendation that, although the anti-dumping duties reduced imports from these sources, imports from other sources took their place to a significant degree.[3711] In fact, even though the anti-dumping duty orders took effect in January, 2001, non-FTA imports for the first half of 2001 were only slightly lower than in the first half of 2000. Non-FTA unit values, while slightly higher than in the first half of 2000, remained far below domestic unit values.[3712]

7.1606 The United States argues that it bases its analysis of the permissible remedy on the aggregate value data, rather than the underselling data, because the USITC did not find, as it did for hot-rolled bar and cold-finished bar, that rebar encompassed a wide spectrum of products. In the first step, it chooses 1998, the year before the industry's profitability began to decline, as the appropriate base year, keeping in mind that imports increased in that year and, thus, may have had some negative effect on the prices and profitability of the domestic industry. In the second and third steps, it uses data pertaining to 1999 through the first half of 2001 to estimate how much prices would have to increase to recoup the shortfall in revenue attributable to increased imports. The United States claims that as a conservative estimate of the effect of the 2001 anti-dumping duty orders, it assumes that they are

[3706] United States' first written submission, paras. 1110-1115.
[3707] Exhibit US-56.
[3708] United States' first written submission, footnote 1399.
[3709] European Communities' second written submission, 537-540.
[3710] United States' first written submission, paras. 1120-1127.
[3711] USITC Report, p. 375, footnote 112.
[3712] USITC Report, p. LONG-C-5.

responsible for all of the 6.8% increase in average unit values in the first half of 2001 as compared with the first half of 2000. Then it deducts this amount from the estimated increase in import prices calculated in the first through third steps. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' rebar bar market. These models indicated that a 15% increase in duties would result in an increase of between 8.2% and 10.9% in the sale price of imported rebar (excluding rebar from Mexico and Canada) in the United States.[3713] For the United States, this suggests that the 15% tariff on rebar is set at a magnitude that satisfies the requirements of Article 5.1.

7.1607 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1608 The European Communities recalls that the United States has chosen 1998, "a year before the industry's profitability began to decline" as its "base" year.[3714] One adjustment had been made to take account of the effect of anti-dumping orders on imports prices in 2001. On the contrary, with reference to the USITC findings, no adjustment has been made concerning demand changes, input costs, capacity increase and competition among domestic producers. As a result of its numerical approach, the United States has found that an increase of 29.1% in imports prices would be in line with Article 5.1[3715] and referred to the USITC modelling indicating that a 15% additional tariff on imports excluding Mexico and Canada would result in an increase of between 8.2% and 10.9% in imports prices.[3716] [3717]

(vi) Tariff on welded pipe

7.1609 The United States[3718] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused the threat of serious injury to the domestic welded pipe industry and this is the starting assumption of its justification. The USITC identified two factors other than increased imports that potentially caused the industry's weakened condition: increased capacity on an overall basis and cost increases at one significant producer ("Producer X") that were unrelated to increased imports. The USITC found that the increase in capacity did not contribute in more than a minor way to the condition of the industry in 2000 or the first half of 2001. It found that the 1.5 million ton increase was only "modestly higher" than the increase in apparent domestic consumption and, therefore, not "excessive".[3719] The USITC found that the main reason for Producer X's declining performance was a drop in the unit value of sales beginning in 1999, and that the drop was largely a result of increased imports.[3720] In other words, this development was not an alternative "cause" of

[3713] Memorandum EC-046, p. LONG-27 (US-64).
[3714] United States' first written submission, para. 1124.
[3715] Exhibit US-56.
[3716] United States' first written submission, para. 1126.
[3717] European Communities' second written submission, paras. 541-542.
[3718] United States' first written submission, paras. 1128-1138.
[3719] USITC Report, p. 165.
[3720] USITC Report, p. 165.

injury, but a symptom of the injury caused by increased imports. Thus, any injury to the industry as a result of Producer X's performance was properly attributed to increased imports.

7.1610 For the United States, these findings of the USITC demonstrate that most of the reduction in domestic producers' production, capacity utilization, shipments, number of workers, and profitability in 2000 is properly attributed to increased imports. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. The USITC specifically found that "imports have had a negative effect on the domestic industry over the period we have examined".[3721] The United States notes that the USITC did find that the increase in capacity had a negative effect on the industry in 2000, albeit a "minor" amount. The data suggest that the amount is quite minor. Total domestic capacity grew by approximately 350,000 tons from 1999 to 2000, an increase of only 4.4%. The industry experienced an even higher increase in capacity, of approximately 488,000 tons, from 1998 to 1999 (an increase of 6.5%). During that period, profits fell by only 0.2 percentage points.[3722] As an extremely conservative estimate, while recognizing the imports were causing injury to the domestic industry in 1998, 1999, 2000, and 2001, the United States treats the *decrease* in the industry's performance from 1999 to 2000 as attributable to increases in capacity.

7.1611 The United States claims that it bases its estimate of the permissible extent of application on the aggregate unit value data. The USITC did not determine, as it did for hot-rolled bar and cold-finished bar, that a difference in product mix between domestic producers and importers might affect the unit value data. Moreover, the unit value data is public, and the pricing data confidential. In its estimate regarding consistency with Article 5.1, the United States also considered two issues addressed by the USITC: existing anti-dumping duty orders and a likely increase in demand for large diameter line pipe. The USITC found that existing anti-dumping duty orders covered a limited number of products and countries. Although the orders had been in place since at least 1989, they did not prevent the overall increase in imports, or even prevent increases in imports from the covered countries.[3723] Moreover, the data gathered by the USITC reflects any effect on the industry that the orders may have had. Since the United States bases its estimate regarding the measure on that data, it did not need to adjust the estimate to account for the effect of the anti-dumping duty orders. As for the likely increase in demand for large diameter line pipe, the USITC found as a general matter that "rising demand tends to ameliorate the effect of a given volume of imports". However, the United States argues, the Commissioners also found that increasing [sic] demand for standard pipe was offsetting the increase in demand for large diameter line pipe.[3724] These findings by the USITC indicate that there was no overall increase in demand for welded pipe and, therefore, no basis to conclude that increased demand would lessen the future effect of increased imports. Therefore, the United States explains that it did not attempt to incorporate this factor into its analysis.

7.1612 The United States argues that, for the first step, in light of its conservative estimate that the decrease in the domestic industry's financial performance in 2000 was attributable to increased capacity, it does not attempt to determine a domestic price that would increase operating income margins above their 2000 levels. In the second and third steps, it bases its estimate on data for 1998 through the first half of 2001, the period when imports were increasing. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' welded pipe market. These models indicated that a 15% increase in duties would result in an increase of between 9.3 and 11.5% in the sale price of imported welded pipe (excluding pipe from Canada) in the

[3721] USITC Report, p. 163.
[3722] USITC Report, p. TUBULAR-C-4.
[3723] USITC Report, p. 166.
[3724] USITC Report, p. 166.

United States.[3725] For the United States, this suggests that the 15% tariff on welded pipe is set at a magnitude that satisfies the requirements of Article 5.1.

7.1613 The United States models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1614 As regards welded tubular products, Switzerland maintains that the measure taken goes beyond the extent necessary to prevent or remedy a threat of serious injury. The Presidential proclamation imposed a straight tariff without any further explanation, while the USITC recommended a tariff rate quota. A straight tariff is more trade restrictive than a tariff-rate quota because the straight tariff imposed hits all imports whereas, with a tariff-rate quota, in quota imports can take place at the normal tariff rate and only out of quota imports will be hit by the additional tariff. In the case of welded tubular products the USITC explicitly determined that the current level of imports did not cause serious injury to the domestic industry concerned but that the industry was only approaching a state of serious injury and that "a tariff-rate quota would best address the threat of serious injury". The USITC also said that a straight tariff would affect imports even at those levels it found did not cause injury.[3726] Thus, the USITC recommended a tariff-rate quota in order to maintain access to the United States market for the products concerned and to avoid creating shortfalls during the period of relief. In addition, the USITC recognized that 1996-1998 were years of good health for the United States industry. Therefore, the United States has admitted that the measure, which was based on reducing import levels back to 1997 levels, exceeds the amount of relief necessary to prevent a threat of serious injury. In the case of welded tubular products, the USITC considered that the tariff rate quota it recommended was sufficient to prevent or remedy the threat of serious injury. However, the President of the United States without justifying the necessity of the measure, imposed a straight tariff. Because the remedy is the chosen measure and must be tailored to meet the relevant serious injury, that is the serious injury attributed to increased imports Switzerland considers that the United States must explain adequately and justify the extent of the application of the measure prior to imposing a safeguard. The United States did not provide such an adequate explanation and justification before imposing the safeguard measure and thus did not comply with the requirements of the Agreement on Safeguards.[3727]

7.1615 Similarly, Korea[3728] argues that the measure finally imposed by the United States – a straight 15% tariff – had been judged by the USITC to be overly excessive, and not limited to the extent necessary because it was applied to imports of injurious and non-injurious imports alike. The USITC provided a reasoned analysis of its recommended tariff-rate quota in the context of its threat of injury finding:

> "Given that we have found threat of serious injury, the intent of our recommended remedy is to prevent imports from rising to a level that would cause serious injury. *A straight tariff would affect all welded pipe imports, even those at levels we have found*

[3725] Memorandum EC-046, p. TUBULAR-21 (US-64).
[3726] USITC Report, Vol. I, p. 383.
[3727] Switzerland's second written submission, paras. 115-118.
[3728] Korea's first written submission, paras. 208-213.

> *did not cause serious injury*. In light of the diversity of welded pipe imports, we seek to avoid creating supply shortfalls during the period of relief."[3729]

7.1616 Korea notes that the USITC finding of only "threat" (not serious injury) establishes the level or extent of relief necessary since only that the threat of injury from imports needs to be "prevented".[3730] In fact, the USITC rejected the suggestion of Joint Respondents to use a base period of 1998-2000 or 2001 (for imports other than line pipe for which no remedy should be imposed) for purposes of establishing the in quota figure and recommended, instead, the higher level of imports from 2000 as the base.[3731] The USITC reasoned as follows:

> "We estimate that the recommended tariff-rate quota on welded pipe products will initially leave the market share, sales revenue, and profitability of the domestic industry unchanged. If import volumes increase beyond 2000 levels, then the tariff-rate quote will begin to take effect, stabilizing prices without preventing the entry of products at current levels. The tariff-rate quota should limit import growth, thereby preventing or restricting the negative impact of such growth on industry profitability.
>
> At the same time, our proposal would maintain substantial competition in the US market for welded pipe products and pose little likelihood of supply problems for domestic consumers. First, our proposed remedy for welded pipe products would still permit the same quantity of imports as in 2000 at the current low rate of duty. This amount exceeds the amount that entered in any previous year of the period of investigation."[3732]

7.1617 Korea recalls that the USITC was careful to recommend a form of remedy that did not restrict imports at levels found non-injurious and which responded at the same time to some of the concerns inherent in its like product determination and causation analysis.[3733] Thus, the USITC was careful to recommend action that "does not exceed the amount necessary to *prevent* serious injury"[3734] and recognized that demand for pipe in large-scale pipeline projects required a flexible remedy.[3735] The President disregarded the USITC's remedy recommendation and without explanation imposed a 15% tariff on all imports of welded tube products. The only reference to this choice of remedy versus the tariff-rate quota proposed by the USITC is found in a Presidential Press Release and in a Report Submitted to the United States Congress which merely asserts that it is a higher level of relief.[3736]

[3729] USITC Report, Vol. I, p. 383 (emphasis added) (Exhibit CC-6); USITC Report, Vol. I: *Views of Vice Commissioner Deanna Tanner Okun on Remedy*, p. 483 (to the same effect that there was only a threat of injury found) (Exhibit CC-6); USITC Report, Vol. I: *Views of Vice Chairman Deanna Tanner Okun on Remedy*, p. 482 (Exhibit CC-6) ("Given my finding of threat…I do not view increased tariffs as an appropriate form of remedy….").

[3730] Korea's first written submission, paras. 209-210.

[3731] USITC Report, Vol. I: *View of Vice Chairman Deanna Tanner Okun on Remedy*, p. 482, footnote 266 (Exhibit CC-6).

[3732] USITC Report, Vol. I, p. 386 (Exhibit CC-6).

[3733] Korea's first written submission, paras. 211-212.

[3734] USITC Report, Vol. I, pp. 385-386 (emphasis added) (Exhibit CC-6).

[3735] USITC Report, Vol. I, *Views of Chairman Deanna Tanner Okun on Remedy*, p. 482 (Exhibit CC-6).

[3736] *Components of the Presidential Decision at Certain Tubular Products* and *Report Submitted to the United States Congress at Certain Tubular Products*. (Exhibit CC-88) ("A tariff of 15%…will provide a higher level of relief than the tariff-rate quota recommended by a majority of the USITC Commissioners.")

7.1618 Korea submits that the most fundamental flaw in the President's remedy is that it does exactly what the USITC had avoided in its remedy recommendation – it imposes duties on imports that did not cause serious injury.[3737] The USITC clearly stated that "[a] *straight tariff would affect all welded pipe imports, even those at levels we have found did not cause serious injury*".[3738] Since the final remedy of the United States affects all welded pipe imports, the measure, on its face, exceeds the level necessary to prevent serious injury and is, therefore, in violation of the United States commitments under the Agreement on Safeguards.[3739] Given such facts, Korea argues that the United States failed to provide a justification on how its measure was limited to the necessary extent. The findings of threat/serious injury are the proper "benchmark" by which the remedy must be assessed, as the Appellate Body has said.[3740] Moreover, Article 5.1 (last sentence) states that "Members should choose measures most suitable for the achievement of these objectives." The identified "objectives" relate to, *inter alia*, whether serious injury needs to be *remedied* or whether a threat of serious injury needs to be *prevented* (Article 5.1, first sentence). So, for example, if serious injury were found, then current import levels were injurious. This would support a remedy that should apply to those import levels and a straight tariff would be appropriate. The correct remedy, therefore, depends on the particular findings by the authorities regarding the scope, nature, etc., of the increased imports, serious injury or threat of serious injury, and causation as the Appellate Body instructed in *US – Line Pipe*.[3741]

7.1619 The European Communities notes that despite the USITC findings that increased capacity had not contributed to the injury in more than a minor way, the United States has decided to treat the decrease in the industry's performance in 2000 as attributable to increase in capacity.[3742] According to the European Communities, the United States, therefore, has not attempted to determine a domestic price that would have increased income margin above 2000 levels. As a result of its numerical approach, the United States has found that an increase of 16.2% in imports prices would be in line with Article 5.1[3743] and referred to the USITC modelling indicating that a 15% additional tariff on imports excluding Canada but including Mexico would result in an increase of between 9.3 and 11.5% in imports prices.[3744] [3745] China concludes that targeting the imports that remain below such level, and have neither caused nor are threatening to cause serious injury, would imply a failure to meet the requirements of Article 5.1, as clarified by the Appellate Body in *US – Line Pipe*, that *"safeguard measures may be applied only to the extent that they address serious injury attributed to increase imports"*. Therefore, the USITC made a clear finding related to the permissible extent of the safeguard measure on welded pipe, and a proper determination that the best way to address a threat of serious injury would be to apply a tariff-rate quota. Accordingly, by deciding to impose a straight tariff that would affect all imports, including those that are not threatening to cause serious injury, the United States adopted a measure that goes beyond the extent necessary to address the threat of serious injury that the USITC found to be caused by increased imports.[3746]

7.1620 The United States responds to Korea's argument that if other welded pipe imports were held to 1997 levels, the estimated price for domestic products would be 4.3% to 6.7% higher, while the

[3737] Korea's first written submission, para. 213.
[3738] USITC Report, Vol. I, p. 383 (emphasis added) (Exhibit CC-6). USITC Report, Vol. I: *Views of Vice Chairman Deanna Tanner Okun on Remedy*, p. 438 (Exhibit CC-6) (the recommended remedy is "most likely to address the threat of serious injury").
[3739] Appellate Body Report, *US – Line Pipe*, para. 236.
[3740] Korea's second written submission, paras. 305-308.
[3741] Korea's written reply to Panel question No. 106 at the first substantive meeting.
[3742] United States' first written submission, para. 1132.
[3743] Exhibit US-56.
[3744] United States' first written submission, para. 1126.
[3745] European Communities' second written submission, paras. 543-545.
[3746] China's second written submission, paras. 307-308.

remedy would result in estimated price increases of 8.7% to 11.1%. For the United States, by arguing that Korea's criticism fails to recognize that the other welded pipe remedy addressed a threat of serious injury, and that the analysis based on data for 2000 would not establish what was necessary to stop the evolution of the existing injurious effects of increased imports into the full manifestation of that threat as serious injury.[3747]

(vii) Tariff on FFTJ

7.1621 The United States[3748] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic FFTJ industry and this is the starting assumption of its justification. The USITC identified five factors other than increased imports that potentially caused injury: the business cycle for the oil and gas industry, increases in capacity and intra-industry competition, the inefficiency of domestic producers' outdated facilities, shortage of qualified workers, and purchaser consolidation. The USITC found that the business cycle in the oil and gas industry in 2000 and the first half of 2001; capacity and intra-industry competition; and inefficiencies in domestic producers' facilities or shortages of workers were not factors causing serious injury. The USITC found that purchaser consolidation would put "some" pressure on domestic producers' prices, but would not explain the reduction in domestic production, shipments, employment and other non-price indicators that occurred.[3749] Thus, the USITC did not attribute any of the decrease in non-price factors to purchaser consolidation, and only "some" of the decrease in domestic prices.

7.1622 The United States points to the fact that the findings of the USITC indicate that most of the reduction in domestic producers' production, capacity utilization, shipments, market share, number of workers, wages, and profitability from 1999 through the first half of 2001 is properly attributed to increased non-FTA imports. For the United States, this is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. Since the analysis of the USITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, the United States bases its analysis for FFTJ on the changes from 1999 through the first half of 2001 only. The USITC did not attribute any injury to four of the five other potential causes of injury. It attributed some of the decrease in FFTJ prices, but none of the other decreases in industry performance, to purchaser consolidation. The USITC attributed domestic producers' loss of market share, decreased prices, and decreased profitability to increased imports, and to no other cause.

7.1623 The United States bases its analysis of the permissible remedy on the underselling data rather than aggregate unit value data because, as the USITC noted that "[w]e are cautious of placing undue weight on AUV information, as it may be influenced by issues of product mix".[3750] In the first step, the United States explains that as a conservative estimate it chose 1998, the year following the first significant increase in imports, as the appropriate base year, keeping in mind that imports increased somewhat in that year, and thus may have had some negative effect on the industry. The USITC found that purchaser consolidation had negative effects on the industry. The United States explains that as a conservative estimate it treated one-half of the reduction in operating income in each year as attributable to purchaser consolidation. It estimates the revenue shortfall in 1999 through the first half of 2001, periods in which the USITC indicated that imports caused some of the decline in the industry's performance. In the second step, the United States estimates the amount by which the 1998 operating income margin would have to rise to recoup the shortfall in operating income estimated in

[3747] United States' written reply to Panel question No. 50 at the second substantive meeting.
[3748] United States' first written submission, paras. 1139-1147.
[3749] USITC Report, p. 178.
[3750] USITC Report, p. 176, footnote 1087.

step 1.[3751] In the third step, it bases the pricing analysis on the USITC pricing comparisons on page TUBULAR-59 of the USITC Report. The United States notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, it estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' FFTJ market. These models indicated that a 15% increase in duties would result in an increase of between 10.5 and 12.5% in the sale price of imported FFTJ in the United States.[3752] For the United States, this suggests that the 13% tariff on FFTJ is set at a magnitude that satisfies the requirements of Article 5.1.

7.1624 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1625 The European Communities notes that the starting point is again the USITC findings that among five other factors (business cycle for oil and gas industry, increase in capacity, intra-industry competition, inefficiency of domestic producers, shortage of qualified workers and purchasers' consolidation), only the latter played a role on the decrease of domestic prices.[3753] As a first step in its numerical analysis, the United States has chosen 1998, the year following the first significant increase in imports as the "base" year and made one adjustment to take account of purchasers' consolidation.[3754] As a result of its numerical approach, the United States has found that an increase of 30.2% in imports prices would be in line with Article 5.1[3755] and referred to the USITC modelling indicating that a 15% additional tariff on imports excluding Canada but including Mexico would result in an increase of between 10.5 and 12.5% in imports prices.[3756] [3757]

(viii) Tariff on stainless steel bar

7.1626 For the United States[3758], the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic stainless steel bar industry and this is the starting assumption of its justification.

7.1627 The United States first notes that the financial data on the stainless steel bar industry were confidential in the USITC Report but notes that they were publicly available data in the prehearing report.[3759] The United States explains that it used these public data in making its estimate regarding

[3751] The United States states that it does this by estimating the revenue shortfall in each year in which the USITC identified imports as having an injurious effect, and divided that by actual revenue for the same period.

[3752] Memorandum EC-046, p. TUBULAR-23 (US-64).

[3753] United States' first written submission, paras. 1141-1142.

[3754] United States' first written submission, para. 1144.

[3755] Exhibit US-56.

[3756] United States' first written submission, para. 1146.

[3757] European Communities' second written submission, paras. 546-547.

[3758] United States' first written submission, paras. 1148-1159.

[3759] The United States submits that the USITC made data on the financial performance of the stainless steel bar industry publicly available in its prehearing report. Subsequent to issuance of that report, an additional small producer submitted data. Thus, public revelation of aggregate data available at the time of the USITC

compliance with Article 5.1, since no other public data are available. The United States notes that these data are generally reflective of the trends in indicators in the industry. This data is presented in the following table:

	1998	**1999**	**2000**	**1st half 2000**	**1st half 2001**
Production	175,171	164,376	179,090	94,890	81,750
Capacity utilization	57.8%	52.1%	55.8%	59.5%	49.6%
Shipments	169,515	158,861	173,582	92,878	84,186
Market share	60.5%	59.8%	53.5%	52.7%	54.9%
Employment	2,125	1,854	1,941	1,901	1,793
Op. income	20,885*	4,580*	2,266*	8,746*	(1,389)*
Margin	3.7%*	0.9%*	0.4%*	2.8%*	(0.5%)*
Capital exp.	81,120*	55,581*	25,250*	23,169*	12,794*
Inventory	21,130	21,302	19,392	19,435	14,894

Source: USITC Report, p. STAINLESS-C-4 and USITC prehearing report, p. STAINLESS-C-4 (US-61). Production, shipments and inventory in short tons; employment in number of workers; operating income and capital expenditure in US$1 million.

* Indicates data made public in the USITC prehearing report.

7.1628 The United States argues that the USITC identified two factors other than increased imports that potentially caused injury: a downturn in demand for stainless steel bar and increase in energy costs in late 2000 and the first half of 2001 and poor operations by domestic producers AL Tech/Empire and Republic. The USITC found that poor operations by domestic producers AL Tech/Empire and Republic, and the downturn in demand for stainless steel bar and increased energy costs prior to late 2000 were not factors that caused injury to the domestic industry. According to the United States, these findings indicate that the injury to the domestic industry in 1999, as reflected in the reduction in domestic producers' production, shipments, market share, employment, revenue, and operating income in 1999, is properly attributed to increased imports. For the United States, this is not to suggest that imports before 1999 had no negative effects. Since the analysis of the USITC focused on changes in industry performance, and as a conservative estimate of the injury attributable to imports, the United States bases its analysis for stainless steel bar only on the changes in 1999 and after. The USITC found that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001, albeit one less important than the injury caused by increased imports. The USITC further indicated that the domestic industry could have increased prices to cover increased costs in the absence of increased imports. As a conservative estimate, it treated half of the decline in the industry's performance in 2000 and the first half of 2001 as attributable to increased imports. For the United States, non-FTA imports continued in the first half 2001 at unit values far below those of the domestic producers. Although their volume and market share declined, non-FTA imports maintained a market share two percentage points higher than at any time prior to 2000 and five times higher than FTA imports.

Report would allow anyone to calculate that producer's proprietary data by subtracting out the data from the preliminary report. Accordingly, the USITC redacted all financial data on this industry from the final public version of the USITC Report.

7.1629 The United States explains that in its estimate regarding consistency with Article 5.1, it also considers existing anti-dumping duty orders. The USITC considered two groups of anti-dumping duty orders – orders imposed on imports of stainless steel bar from Brazil, India, Japan, and Spain in 1995 and orders imposed on stainless steel angles from Japan, Korea, and Spain in May 2001. The USITC found that the 1995 orders did not limit subject countries from exporting substantial, and even increased, quantities to the United States. Moreover, the data gathered by the USITC reflects any effect on the industry that the orders may have had. Since the United States bases its estimate on that data, it was of the view that it did not need to adjust the estimate to account for the effect of the 1995 orders. The United States recalls that the USITC found that it was too early to assess the effect of the 2001 orders. The United States notes, however, that these covered angles alone, which represented at most between 8 and 18% of the non-FTA imports covered by the stainless steel bar safeguard measure, and a small number of countries.[3760] The United States explains that as a conservative estimate for purposes of this calculation, it has diluted the amount of increase necessary to remedy serious injury to reflect that a trade remedy whose effects may not currently be felt already applies to these products.

7.1630 The United States explains that in its estimate regarding consistency with Article 5.1, it followed the basic steps of the methodology previously outlined, with adaptations appropriate to the facts of this domestic industry. It bases the estimate on the unit values, as there is no suggestion in the USITC Report that differences in the unit values reflect different product mixes. Drawing on the USITC's analysis, the United States uses 1998 as the comparison year. It treats the full difference in operating profits in 1999 versus 1998 and one-half of the difference in operating profits in 2000 and the first half of 2001 as compared with 1998, as attributable to increased imports. In the second and third steps, it uses data for the period of 1999 through the first half of 2001.

7.1631 The United States notes the USITC's findings[3761] with regard to imports from Canada and Mexico and concludes that no adjustment to the estimate was necessary. As a fourth step, the United States estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' stainless steel bar market. These models indicated that a 20% increase in duties would result in an increase of between 10.2% and 14.7% in the sale price of imported stainless steel bar (excluding Mexican products) in the United States.[3762] For the United States, this suggests that the 20% tariff on stainless steel bar is set at a magnitude that satisfies the requirements of Article 5.1.

[3760] Public USITC data on total imports of stainless steel angles (from all sources, both fairly and unfairly traded) in the 1998-2000 investigation period show the following figures, which are compared in the following table to total non-FTA imports of stainless steel bar from the USITC Report:

	1998		1999		2000	
	Volume	Value	Volume	Value	Volume	Value
Angles imports	9,802	20,931	16,399	27,163	17,148	32,152
Bar imports	97,552	248,724	92,341	204,223	131,184	302,546
Angles share	10.0%	8.4%	17,8%	13.3%	13.1%	10.6%

Source: USITC Report; Stainless Steel Angles From Japan, Korea and Spain, Inv. No. 731-TA-888-890 (Final) USITC Pub. 3421, p. IV-2 (May 2001) (US-62).

[3761] United States' first written submission, para 1157.

[3762] Memorandum EC-046, p. STAINLESS-42 (US-64).

7.1632 Then the United States modelled two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1633 The European Communities notes that the United States has chosen 1998 as the "base" year for its numerical analysis and made adjustments to take account of the injury caused by a downturn in demand and an increase in energy costs in 2000 and 2001, but refuses further adjustment with respect to poor operation by two domestic producers, in line with the USITC findings. The United States has also taken into account anti-dumping orders decided in 2001.[3763] As a result of its numerical approach, the United States has found that an increase of 35.1% in imports prices would be in line with Article 5.1[3764] and referred to the USITC modelling indicating that a 20% additional tariff on imports excluding Mexico but including Canada would result in an increase of between 10.2 and 14.7% in imports prices.[3765]

(ix) Tariff on stainless steel rod

7.1634 The United States[3766] submits that the USITC demonstrated that increased imports from non-NAFTA sources caused serious injury to the domestic stainless steel rod industry and this is the starting assumption of its justification.

7.1635 The United States first notes that most of the data are confidential, since the industry had a small number of producers. For purposes of explaining its estimate relating to compliance with Article 5.1, the United States has obtained ranged data for producers representing a large portion of the domestic industry. These data are within a range either 10% greater or less than the actual data. This data is presented in the following table:

[3763] United States' first written submission, paras. 1148-1156.
[3764] Exhibit US-56.
[3765] United States' first written submission, para. 1158.
[3766] United States' first written submission, paras. 1160-1169.

	1996	1997	1998	1999	2000	1st half 2000	1st half 2001
Production	120,000	120,000	113,000	107,000	96,000	55,000	39,000
Shipments	118,000	119,000	111,000	107,000	96,000	54,000	40,000
Employment	1,000	1,000	900	900	800	800	700
Wages	50,000	52,000	46,000	44,000	43,000	23,000	18,000
Op. income	5,100	4,400	5,100	(1,300)	(4,800)	1,800	(5,200)
Margin	5.0%	4.0%	6.0%	-0.2%	-7.0%	4.0%	-18.0%
Inventory	1,600	1,000	2,300	400	900	1,900	-

Source: Stainless Steel Rod (US-63). Production, shipments and inventory in short tons; employment in numbers of workers; wages and operating income in US$1 million; productivity in tons/1000 hours.

7.1636 The United States submits that the USITC identified two factors other than increased imports that potentially caused injury: downturn in demand and increased energy costs in late 2000 and the first half of 2001 and poor operations by domestic producer AL Tech/Empire. The USITC found that the poor operations by AL Tech/Empire was not a factor that caused injury to the domestic industry. The USITC found that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001, albeit one less important than the injury caused by increased imports. The USITC further indicated that the domestic industry could have increased prices to cover increased costs in the absence of increased imports. The findings of the USITC indicate that the much of the poor industry performance is attributable to increased imports. It also indicated that declining demand and increased energy costs had an effect on the domestic industry in 2000 and the first half of 2001. The United States explains that it based its analysis of the permissible remedy on aggregate unit value data because the pricing series data for domestic industry is confidential.

7.1637 The United States argues that in its estimate regarding consistency with Article 5.1, it considered existing anti-dumping duty orders. The USITC noted that anti-dumping and countervailing duty orders were imposed in 1993, 1994, and 1998 against imports of stainless steel rod from Brazil, France, India, Italy, Japan, Korea, Spain, Sweden, and Taiwan.[3767] The USITC found that the orders appeared not to have limited the ability of foreign producers in these countries to increase exports to the United States in 1999 and 2000. The data gathered by the USITC reflects any effect on the industry that the orders may have had. Since the United States bases its estimate on that data, the United States does not need to adjust the estimate to account for the effect of the 1995 orders.

7.1638 The United States explains that it followed the basic steps of the same methodology previously outlined, with adaptations appropriate to the facts of this domestic industry. To estimate the extent of the permissible remedy, it began with the fact that in 1996 the condition of the domestic industry had not yet begun to deteriorate. Therefore, 1996 would be an appropriate comparison year, keeping in mind that imports may still have been having some negative effect on the industry. As noted above, the USITC Report indicates that the injury, as reflected in the decrease in the domestic industry's performance from 1997 to 1999, was due to increased imports. Therefore, it was

[3767] USITC Report, p. 219.

reasonable to treat any amount by which operating income in each of these years is below operating profits in 1996 has having been caused by increased imports. As a conservative estimate, it treats half of the decline in the industry's performance in 2000 and the first half of 2001 as attributable to this factor. In the second and third steps, the United States uses public data for 1997 through the first half of 2001, using publicly available unit values from page STAINLESS-12 of the USITC Report. The United States notes the USITC's findings with regard to imports from Canada and Mexico and concluded that no adjustment to the estimate was necessary. As a fourth step, the United States estimates the additional duty that would be necessary to achieve the target increase. As part of the remedy phase of the investigation, the USITC staff prepared economic models on the United States' stainless steel rod market. For the United States, these models suggest that the 15% tariff on stainless steel rod (excluding rod from Canada and Mexico) is set at a magnitude that satisfies the requirements of Article 5.1.[3768]

7.1639 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1640 The European Communities notes that the United States has determined 1996, a year when the industry's condition hat not yet began to deteriorate, as the adequate "base" year for its numerical analysis and made adjustments to take account of the injury caused by a downturn in demand and an increase in energy costs in 2000 and 2001, but refused further adjustment with respect to poor operation by two domestic producers, in line with the USITC findings.[3769] As a result of its numerical approach, the United States has found that an increase of 39.0% in imports prices would be in line with Article 5.1[3770] and referred to the USITC modelling to conclude that a 15% additional tariff on imports excluding Mexico and Canada would suggest that a 15% increase in duty would be set at a magnitude that satisfies the requirements of Article 5.1.[3771] However, it is not possible to check the latter assumption, since the results of the modelling exercise had been kept confidential and no non-confidential summary has been provided. Finally, the European Communities argues that the so-called numerical analysis proposed by the United States does not demonstrate anything.[3772]

(x) Tariff on stainless steel wire

7.1641 The United States[3773] recalls that for stainless steel wire, two Commissioners found a threat of serious injury and one Commissioner found serious injury, and this is the starting assumption of its justification. They issued separate views, but agreed on certain key aspects of the injurious condition faced by the domestic industry. Chairman Koplan found a threat of serious injury based on a decline in sales and market share, increasing inventories, and a downward trend in production, profits, wages, productivity, and employment, indicating that the domestic producers could not generate adequate capital for modernization. Commissioner Bragg treated stainless steel wire as part of a single like

[3768] Memorandum EC-046, p. STAINLESS-41 (US-64) (the results of the modelling exercise are confidential).
[3769] United States' first written submission, paras. 1160-1163.
[3770] Exhibit US-56.
[3771] United States' first written submission, para. 1168.
[3772] European Communities' second written submission, paras. 554-556.
[3773] United States' first written submission, paras. 1187-1203.

product with stainless steel wire rope (terming the combination "stainless steel wire products"), and found a threat of serious injury based on decreasing domestic sales and market share in the first half of 2001, increases in inventories throughout period of investigation, and lower trends in production, profits, wages, productivity, and employment in the first half of 2001.[3774] Public data indicated that the volume of stainless steel wire rope imported into the United States was much smaller than the volume of stainless steel wire, suggesting [sic].[3775] Commissioner Devaney also treated stainless steel wire as part of a single like product with stainless steel wire rope, but found serious injury based on falling operating income levels and a decline in most indicators in the first half of 2001.[3776]

7.1642 The United States submits that each of these determinations reflects a permissible analysis of the effect of imports on the domestic industry. Under United States law, multiple affirmative determinations by individual Commissioners as to differently defined like products constitute an affirmative determination of the USITC with regard to the largest product group that is subject to enough affirmative determinations to form a majority of the USITC. It is the injury experienced by the producers of stainless steel wire – the product within the intersection of the determinations of Commissioners Koplan, Bragg, and Devaney – that forms the basis for deciding the extent of application of the safeguard measure. The performance of these producers is evaluated in light of the findings made by Commissioners Bragg and Devaney as to the larger industry comprising producers of stainless steel wire and stainless steel rope. For similar reasons, the overall determination of the USITC is treated as a threat of material injury and refer to the Appellate Body statement in *US – Line Pipe*. In the terms adopted by the Appellate Body, treating the affirmative determination of the USITC as threat of serious injury recognizes that all three Commissioners found the industry had at least passed the lower threshold of a threat. It is the degree of injury that is common to all three determinations. The Commissioners rendering affirmative determinations focused on the same indicators of injury. For stainless steel wire, these were:

	1999	**2000**	**1st half 2000**	**1st half 2001**
Production	103,484	106,547	56,698	43,347
Shipments	102,211	104,752	55,966	43,933
Market share	80.5%	77.0%	77.7%	72,7%
Employment	1,022	1,017	1,021	935
Wages	31	31	16	14
Productivity	48	50	51	46
Op. income*	7,401	5,854	7,808	(4,428)
Margin*	2.0%	2.3%	5.5%	(4.0%)
Inventory	66,688	71,313	50,589	46,271

Source: USITC Report, p. STAINLESS-C-7 and USITC Prehearing Report, p. STAINLESS-C-7. Production, shipments and inventory in short tons; employment in numbers of workers; wages and operating income in US$1 million; productivity in tons/1000 hours.

* Indicates data made public in the USITC prehearing report.

[3774] USITC Report, pp. 288-289.
[3775] USITC Report, pp. STAINLESS-14 & STAINLESS-16.
[3776] USITC Report, p. 345.

7.1643 The USITC found that "increased imports at underselling prices have played a key role in bringing about this negative trend", ending "at a point near serious injury".[3777] One or more of the Commissioners identified three other potential causes of the threat of serious injury: declining demand, raw material costs, and appreciation of the dollar. The United States recalls that Chairman Koplan and Commissioner Bragg found that some portion of the industry's declining performance in the first half of 2001 is attributable to the decline in demand for stainless steel wire. Chairman Koplan found that the decline in demand alone did not explain the injury experienced by the domestic producers, whose production and shipments declined more than apparent domestic consumption in the first half of 2001. Commissioner Bragg found that the imminent impact of imports outweighed these other factors.[3778] Commissioners Koplan and Bragg found that the industry's raw material costs had and would continue to have an impact on the domestic industry, but one outweighed by increased imports.[3779] Commissioner Bragg found that the appreciation of the dollar had and would continue to have an impact of the domestic industry, but one outweighed by increased imports.[3780]

7.1644 The United States argues that, in its view, the USITC Report details the relationship between increased imports from non-FTA sources and injury to the domestic industry. Commissioners Koplan and Bragg found that imports caused the threat of serious injury because when domestic consumption fell in the first half of 2001, after four years of steady increases, imports increased, resulting in a sharp decrease in sales and market share.[3781] As a result, domestic producers could not raise prices to cover increased costs, and their operating income plummeted.[3782] Commissioners Koplan, Bragg, and Devaney all found that underselling by imported products played a role in causing serious injury.[3783]

7.1645 The United States explains that, as a conservative approach, if one of the Commissioners identified another factor as causing injury, it considered that that factor caused injury regardless of the views of the other Commissioners. Accordingly, for purposes of demonstrating that the safeguard measures complied with Article 5.1, the United States interprets the findings of the Commissioners as demonstrating that non-FTA imports were responsible for some of the reduction in domestic producers' sales and market share, increasing inventories, production, profits, wages, productivity, and employment in the first half of 2001. This is not to suggest that imports were not having a negative effect on the domestic industry in preceding years. As Chairman Koplan found, "between 1996 and 2000, even though domestic consumption increased, the domestic industry kept prices of the domestic product in line with costs and earned only low profits because of the presence of substitutable stainless steel wire imports".[3784] Commissioner Bragg found that increased imports prevented domestic producers from taking advantage of an upswing in the business cycle during the 1996 to 2000 period.[3785] The United States assumes that the injury was to some extent attributable to the decline in demand, increasing raw material costs, and currency appreciation, but that none of the injury is attributable to NAFTA imports. The United States considers that the entirety of the decrease in the industry's financial performance was due to these factors.

7.1646 Then the United States explains that it has performed a different analysis for stainless steel wire because the Commissioners' causation analyses focused on the volume of imports and their

[3777] USITC Report, p. 164.
[3778] USITC Report, pp. 259 and 302. Commissioner Bragg treated this factor under the rubric of the "general downturn in the economy".
[3779] USITC Report, pp. 259 and 302.
[3780] USITC Report, p. 302.
[3781] USITC Report, pp. 259 and 302.
[3782] USITC Report, p. 259.
[3783] USITC Report, pp. 259, 294, and 346.
[3784] USITC Report, p. 259.
[3785] USITC Report, p. 302.

market share. In addition, the underselling data cited by Commissioner Koplan was confidential, and the average unit value data did not show similar patterns, making it unusable as a surrogate. Accordingly, the United States analyses this safeguard measure based on import volumes. It noted that imports increased substantially between 1999 and 2000. As a first step in the analysis, the United States calculates what non-NAFTA import volume would have been if non-NAFTA imports had stayed at their 1999 market share in 2000 and 2001. It then compares the calculated import volumes with the actual import volumes for those periods, and found that non-NAFTA imports would have been, on average, approximately 20% lower. This reduction represents a reduction in import volume lower than the USITC modelling associated with a 10% tariff, indicating that the safeguard measure was applied less than the extent necessary.[3786] Since, for the United States, this approach was based on the volume of non-NAFTA imports alone, it concludes that no adjustment to the estimate was necessary. In a similar vein, no adjustment was necessary to reflect the United States' conservative estimate that the decrease in the domestic industry's financial performance in 2000 was attributable to the decline in demand or increasing raw material costs. In addition, the United States argues that since its calculation did not make use of import prices, no adjustment was necessary to reflect its estimate that currency appreciation was a cause of injury to the domestic industry.

7.1647 The United States then models two scenarios: (i) the change in the price, volume, and revenue for domestic products and imports if the remedy established by the President on 5 March 2002, had been in effect in 2000; and (ii) the change in the price, volume, and revenue associated with domestic products and imports from various sources if imports had remained at 1997 levels in 2000. The United States submits that the results of this exercise suggest that it has applied the safeguard measure no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1648 The European Communities argues[3787] that the United States' arguments on Stainless Steel Wire, like its arguments for other products, amount to a reconstruction of the USITC Report unsupported by the facts on the record. Turning first to the issue of non-attribution, the European Communities explains that Commissioner Koplan had not considered the issue of rising costs, and had not ensured that the injurious effect of rising costs was not attributed to increased imports.[3788] The United States expends five paragraphs trying to explain how Commissioner Koplan analysed costs, distinguished and separated their effects, and ensured that they were not attributed to increased imports.[3789] This is five paragraphs more than the USITC. Commissioner Koplan's opinion rested on developments in interim 2001 which led him to consider that increased imports posed a threat of serious injury. He identified three factors "which contributed" to the domestic industry's decline.[3790] The first two were imports and declining demand. Thirdly, "unit costs of goods sold increased by *** percent" (all financial data for Stainless Steel Wire is confidential).[3791] He noted that "the falling prices and rising costs led to a *** percentage point loss [sic] in the operating income to sales ratio between interim 2000 and interim 2001".[3792] The European Communities points out that that is all the discussion of rising costs in interim 2001 that the USITC Report contains. Five paragraphs in the United States first written submission cannot make up for this total lack of reasoned and adequate explanation. As the financial data is confidential, there is no reasoned and adequate explanation of how the facts support the findings, especially in the absence of a non-confidential indexed version of

[3786] USITC Memorandum EC-Y-046, p. STAINLESS-40.
[3787] European Communities' second written submission, paras. 432-435.
[3788] European Communities' first written submission, para. 579.
[3789] United States' first written submission, paras. 736-740.
[3790] USITC Report, Vol. I, p. 259.
[3791] USITC Report, Vol. I, p. 259.
[3792] USITC Report, Vol. I, p. 259.

the data. There is no examination of the relevance or cause of increased costs, no separation and distinction, and thus no non-attribution. With respect to the correlation of trends, the European Communities notes in its first written submission that three other Commissioners had found that despite consistent underselling there was no correlation between pricing of imports and domestic products.[3793] Commissioner Koplan did not deal with this issue. Moreover, Commissioner Koplan did not discuss underselling at all in his discussion of interim 2001 developments and, thus, did not explain in a reasoned and adequate manner, how there was a correlation between pricing for imports and domestic pricing sufficient to establish a causal link. The USITC Report does not provide a reasoned and adequate explanation of whether NAFTA imports were causing injury and how any such injury caused was not attributed to non-excluded imports. Chairman Koplan simply concluded that imports from neither Mexico or Canada were in the top five suppliers during the period of investigation. He did not even attempt to analyse whether such imports caused any injury and does not, therefore, ensure that any such injury is not attributed to non-excluded imports.

2. General criticisms of the numerical analysis and economic model[3794]

7.1649 Korea criticises the United States' *ex post* justification of its measure which, it says, more than confirms the reverse-engineered nature of the *ex-post* methodologies.[3795] Korea argues that only the most significant errors are identified (*e.g.*, mathematical mistakes are not noted), but these errors completely undermine the legitimacy of the United States' methodologies (the "simplified numerical analysis"[3796] and "simplified economic modelling" using the COMPAS Model[3797]) for purposes of complying with Article 5.1 of the Agreement on Safeguards.[3798]

7.1650 In support of its allegations, Korea submits Exhibit 14[3799] that contains further details of its criticism of the United States' methodology[3800] as having the effect of overestimating the tariff required to restore the domestic industry to profitability. Korea submits that these methodological errors are: (i) the arbitrary and unsubstantiated addition of percentage increases to the percent increase in revenues the United States believes are necessary to restore domestic producers to profitability; (ii) the arbitrary and unsubstantiated subtraction of actual operating income margins

[3793] European Communities' first written submission, paras. 580-581.

[3794] The following section includes discussions from Korea's Exhibit 14, Korea's, United States' and the European Communities' first and second written submissions, Korea's replies to Panel questions Nos. 48, 54 and 56 at the second substantive meeting as well as additional comments on those questions, all of which deal with the United States' methodology for its justification pursuant to Article 5.1.

[3795] Korea's second written submission, para. 247 and "Critique of US Justification of Its Safeguard Measures on Certain Steel Products" (Korea Exhibit 14, "K-14").

[3796] Found in "Safeguard Measures Worksheets" at United States' first written submission, Exhibit US 56.

[3797] Found in "Modelling Results Worksheets" at United States' first written submission, Exhibit US 57.

[3798] Korea asserts that the United States' defense of the accuracy of its model is weak at best. Given that the *Felt Hats* working party (*Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951) on which the United States seeks to rely was decided more than 50 years ago, Korea questions whether it is very relevant to the issue of the required accuracy or usefulness of economic models. In any event, the United States seems to be arguing that the inherent imprecision in the "numeric exercise" and "rough estimate" is fine for purposes of defending its measure even if such analysis might be problematic for a proper non-attribution evaluation. (*US Responses to Questions from Panel*, paras. 154-156) Korea does not agree.

[3799] Supported by all complainants, Norway's second oral statement on behalf of all complainants, para. 34.

[3800] US Exhibit 56 "Safeguard Measure Worksheets" and US Exhibit 57 "Modelling Results Worksheets"

from domestic average unit values (AUVs) before adjusting domestic AUVs upwards to reach targeted commercial sales; and (iii) the assumption that domestic and imported steel products are perfect substitutes for each other, and therefore that imported AUVs must rise to equally match domestic AUVs.[3801]

7.1651 By way of illustration, Korea submits that the end result for flat products is that the United States should have concluded that imported AUVs needed to increase by 10.1% to remedy injury, rather than by the 18.9% increase suggested. This would mean that a 30% tariff that generates a 20.8% to 28.0% increase in the AUV of imports is, in fact, excessive. In fact, the USITC's estimates of the various effects of different tariff rates suggests that a tariff of about 11% to 12% would produce non-NAFTA import price increases closer to 10.1%.[3802] The United States' methodology with respect to other welded pipe is completely indecipherable. There is no justification for the targeted operating margin selected, nor can one be divined from the US discussion in the text.[3803]

7.1652 By way of general comment, Korea submits that the numerical approach used by the United States is nothing more than a snapshot of what would happen the day the tariffs are imposed.[3804] It holds constant everything that would vary two days after the tariffs are imposed (domestic quantity sold, SG&A, COGS). For example, when one imposes a tariff, import prices increase and quantity declines. Domestic prices increase and quantity sold increases (and therefore SG&A and COGS would also increase). So technically, to achieve the target total revenue needed to reach a particular "profit" margin, the average unit value of domestic product sold may not need to increase as much as the snap-shot approach would dictate. Domestic producers can hit the desired target revenue by selling more product at a slightly lower AUV than the snap-shot would dictate.

7.1653 Korea also submits that the numerical analysis and model also ignore the fact that tariffs have two effects on imports – prices and quantities – not just on prices.[3805] The numerical analysis and model ignore this effect and, therefore, overstate the increase in prices that must be achieved through tariff levels. When imports become more expensive, the United States industry can not only raise prices to generate revenue, but it can increase the quantity of sales to generate revenue. This is particularly beneficial to a capital-intensive industry with excess capacity since increased volumes also reduce unit costs. The United States model ignores both effects.

7.1654 With respect to capture of volume-related cost decreases, the United States notes that Korea argues that the numerical exercise does not capture cost savings that would occur when a safeguard measure resulted in increased sales volume, allowing domestic producers to spread fixed costs over a larger volume.[3806] The criticism is misplaced. As the United States notes in the first written submission, the price-based exercise did not attempt to capture the injurious effects of increased imports on domestic producers' sales volume or any factor other than price.[3807] Thus, the adjustment to reflect the cumulated injurious effects of imports did not include injurious effects associated exclusively with the volume effects, or any other non-price effects, of imports. Since the price-based exercise omitted the injurious effects of import volume, the United States considered it appropriate to

[3801] Exhibit K-14, p.1.
[3802] Exhibit K-14, p.1.
[3803] Exhibit K-14, p.2.
[3804] Exhibit K-14, p.2.
[3805] Korea's written reply to Panel question No. 50 at the second substantive meeting.
[3806] Exhibit K-14, p. 3.
[3807] United States' first written submission, para. 1079. Such factors would include productivity, production, capacity utilization, employment, etc.

omit the possible beneficial effects of reduced import volume that might accompany a safeguard measure.

7.1655 With respect to the second step of the numerical analysis, Korea notes that the United States calculates the percent difference in targeted revenues from Step 1 over actual revenues.[3808] This should be all that is needed to the estimate the domestic AUVs required to reach the target operating margin deemed to represent an industry not injured by imports. However, the United States then further increases the percentage by which operating margin must increase "to counteract the negative effects of imports from 1998 to 2000 and to facilitate adjustment".[3809] The United States arbitrarily picks the target operating margin rate as a measure of what it would take to do this (no rationale is offered why the target operating margin is the appropriate rate that "counteracts" and "facilitates"). Restoring revenues to the level that would yield an operating income margin "equal to a level that does not reflect the price effect of increased imports"[3810], (to a level that "remedies" injury) should be sufficient. However, the United States adds in the target operating margin again, with no explanation why this rate will accomplish the task. Korea submits that this is arbitrary. It results in overestimating the target AUV, and hence the "required" tariff. Korea submits that, in fact, this step is completely unnecessary. It would be sufficient to calculate the targeted revenues needed to achieve the targeted operating margin in the First Step, and then proceed to the Third Step (but with corrections).

7.1656 The United States responds that with regard to additions to target profit to reflect industry's existing injured condition, the United States reiterates that the ordinary meaning of "remedy" means to "rectify" or "make good"[3811], a concept that clearly encompasses addressing the accumulated effects of increased imports. The complainants have not actually disagreed with its analysis of the ordinary meaning of "remedy" and its implications, including the observation that imports have cumulative injurious effects.[3812] The additions to the target profit in the second step of its numerical exercise reflect the cumulative injurious effect of increased imports. Omitting such an addition would ignore those effects, something that the Agreement on Safeguards does not require.

7.1657 With respect to the third step of the numerical analysis, Korea submits that the methodology employed is convoluted and arbitrary as well, and factually contradicts the USITC's finding that imported and domestic products are imperfect substitutes for each other.[3813] First, it is not clear why it was necessary to decrease domestic AUVs by the actual operating margins for each year, and then increase them by the (overstated) percentage calculated in Step Two. Again, the resulting domestic AUVs are overstated. Second, the United States assumes import AUVs need to rise to exactly equal the target domestic AUVs to enable domestic producers to charge prices that generate those AUVs. This assumes imported products and domestically-produced products are perfect substitutes for each other, e.g., that imported plate must be priced at the same level as domestic plate at all times in all cases. The USITC in fact assumed that imported and domestically-produced steel products were not

[3808] Exhibit K-14, p.3.
[3809] United States' first written submission, para. 1074.
[3810] United States' first written submission, para. 1074.
[3811] United States' second written submission, paras. 180-184.
[3812] The United States argues that the European Communities has not addressed the substance of the hypothetical in paragraph 128 of the United States' oral statement regarding the accumulated polluting effects of a factory, other than to suggest that it treated imports as equivalent to pollution, when the United States' point was that the pollution was analogous to injurious effects. Thus, the United States concludes that the European Communities does not disagree with our observation that imports may have a cumulative negative effect, and that it does not disagree that these cumulative effects may be addressed by a safeguard measure.
[3813] Exhibit K-14, p.3.

perfect substitutes.[3814] Imperfect substitutes (even moderate substitutes) mean that imports can be priced lower than comparable domestic products, and domestic producers can still "make the sale". The impact of this assumption is that the percent change in import prices required to yield the target domestic AUVs is overstated.

7.1658 Korea argues that the problem of a "one-year" base period approach is inherent to the model.[3815] The model attributes all injury occurring in subsequent years as injury from imports regardless of what effects the other factors may have had in the subsequent years. The model assumes that, *ceteris paribus*, any injury after the base year is attributable to imports because it is assumed that all other factors in the market remain constant. But in Korea's opinion, *ceteris paribus* does not apply. It recommends looking simply at the developments in mini-mills versus integrated mills.[3816] It also recommends looking at the growth in capacity in pipe and tube, where the ITC recognized that injury did not exist even as late as mid-2001. For Korea, the point is that once it is demonstrated that the assumption of *ceteris paribus* is not the case – *i.e.*, other factors do not remain constant – the flaw in the United States' argument is equally obvious. All of the changes in US industry's economic and financial state are assumed by the United States' model to be attributed to imports. Korea argues that that is precisely the problem.[3817] The more isolated and fewer the data points, the less relevant the analysis becomes as a predictor of future events. The further in the past that benchmark is, the less relevant it also potentially becomes since intervening events may well affect its validity as a predictor of future behavior in the market. For example, events that gave rise to industry profitability for flat-rolled in 1997 (which had nothing to do with imports) may or may not replicate in the future (*e.g.*, high demand and favorable exchange rates gave rise to profitability in 1997). To go forward saying that 1997 is an appropriate ruler for the future, all stars would have to realign in same way for that to be a relevant benchmark for the future. Korea concludes that it is impossible to hold everything constant and the United States' model does not attempt to do so.[3818] Moreover, for example, AUVs for each flat-rolled product and welded pipe were of questionable value due to product mix issues as specifically noted by the USITC[3819] and discussed at length in Korea's Written Rebuttal.[3820] Yet, in the numerical analysis, the United States not only uses AUVs, but it also averages the AUVs for all flat products. The product mix issues multiply exponentially. There were very distinct import trends for each flat-rolled product over the period and very different prices for each flat-rolled product. No one-year "product mix" for "flat-rolled" makes any sense. The variation is too great to make an average meaningful.

7.1659 With respect to the fourth step of the numerical analysis, Korea notes that the United States compares the increase in imported AUVs required to put the industry in a state of non-injury to the import price increases the USITC estimate would result from the tariff rate imposed.[3821] For flat

[3814] The USITC concluded: "Based on data discussed in the final injury staff report, staff believes that, while there are some differences in US-produced and imported flat products, overall there is a moderate to high degree of substitution between certain US-produced and imported flat steel products". (USITC Memorandum EC-Y-046, 21 November 2001, p. FLAT-9 (Exhibit CC-10) The substitution elasticities used for flat products ranged from 2 to 7. The low end of that range represents moderate substitutability; the higher end of that range represents high substitutability, but "perfect" substitutability would be a number in the double-digits.

[3815] Korea's written reply to Panel question No. 50 at the second substantive meeting.

[3816] Korea's second written submission, paras. 169-176

[3817] Korea's written reply to Panel question No. 72 at the second substantive meeting.

[3818] Korea's written reply to Panel question No. 55 at the second substantive meeting.

[3819] USITC Report, Vol. I, p. 61, footnote 279 (flat-rolled); p. 163, footnote 1006 (welded pipe) (Exhibit CC-6).

[3820] Korea's second written submission , paras. 251 and 264; Korea's Exhibit 14.

[3821] Exhibit K-14. p.4.

products, the USITC used linked COMPAS models[3822] (which, Korea submits, is appropriate), which found that a 30% tariff on imports of all flat imports but tin would increase non-NAFTA import prices by 20.8% to 28.0%.[3823] Apparently, this is "close enough" to the 18.9% average import price the US numerical analysis generated.[3824]

7.1660 With respect to the use of average unit values, the United States reiterates that for the most part, it based the calculations on unit values, as these captured all of the products under investigation. For some products, the findings of the USITC or data in the USITC Report indicated that the difference in unit values between imports and domestic products reflected different product mixes, as well as the injurious effects of price underselling by non-FTA imports. In those cases, the United States argues that it based its calculations on the item-specific pricing comparisons conducted by the USITC.[3825] The United States argues that it sees nothing in Korea's argumentation that suggests any infirmity in the choice of AUVs or item-specific pricing data for particular products.

7.1661 With respect to Korea's criticism of the decrease in domestic AUVs by the actual operating margins for each year, and then their subsequent increase by the percentage calculated in Step Two[3826], the United States argues that this step was necessary for an accurate calculation. Had the United States not "backed out" the actual operating margin before adding the target profit margin, the estimate of the price increase necessary to achieve the target profit margin would have been higher. This, in turn, would have inaccurately inflated the estimate of the increase in import prices necessary to remedy the injurious price effects of increased imports.

7.1662 Korea submits[3827] that using the United States' numerical approach and keeping its grossly incorrect assumption about perfect substitutes, but correcting the other flaws noted above, yields the following result: Import prices for flat products would need to increase by no more than 10.1%, and the President's 30% tariff which results in a 20.8% to 28.0% price increase is excessive. In fact, the USITC's estimates of the various effects of different tariff rates suggests that a tariff of about 11-12% would produce non-NAFTA import price increases closer to 10.1%.[3828] Korea argues that it is not possible to correct the other welded pipe estimated import AUV increase (as done above for flat-rolled) of 16.2%[3829] because the proper target operating margin is unclear.

7.1663 Korea notes[3830] that the USITC found that each flat-rolled product was not a perfect substitute. They found moderate to high substitutability.[3831] Yet, the model assumes that imports and domestic production are "perfect substitutes". The effect of this error is to overstate the amount by which import AUVs needed to be increased because it assumes that import prices must equal United States prices for United States producers to "get the sale". Since imports are not perfectly substitutable, import prices do not need to be raised to the same level as those of domestic products so a lower tariff is needed. Hence, the United States tariff is not limited to the "permissible extent". The United States defense that perfect substitutability is essentially the same as "moderate to high" is indefensible from an economic point of view – which the United States knows full well. The United

[3822] USITC Memorandum "Available Information on Economic Models" (unnumbered; undated). (Exhibit CC-10)
[3823] USITC Memorandum EC-Y-050, 5 December 2001, Table 3. (Exhibit CC-10)
[3824] "Safeguard Measures Worksheets". (Exhibit US 56).
[3825] United States' first written submission, para. 1072, footnote 1375.
[3826] Exhibit K-14, p. 3.
[3827] Exhibit K-14, p.4.
[3828] USITC Memorandum EC-Y-050 5 December 2001, Table 1. (Exhibit CC-10)
[3829] "Safeguard Measures Worksheets". (Exhibit US 56).
[3830] Korea's written reply to Panel question No. 50 at the second substantive meeting.
[3831] USITC Report, Vol. I, p. 58; USITC Report, Vol. II, p. FLAT-54. (Exhibit CC-6)

States then suggested before the Panel that the imported product might be superior in quality. However, the USITC Report does not support that conclusion.[3832] Moreover, the USITC's substitution elasticity measure is relative to the United States product. In other words, it measures customer preference for the domestic product based on a variety of factors including quality, delivery times, etc.[3833] Quality is but one of a number of factors considered by the USITC in its measure of substitution elasticity – and the overall substitutability was "moderate to high" compared to the United States product.[3834]

7.1664 With respect to the treatment of domestic and imported products as perfect substitutes, the United States argues that, in the price-based exercise, the United States estimated that imports would have to sell at the same average unit value as domestic products for domestic products to achieve the target operating income levels. The complainants view this element of the calculation as presupposing perfect substitutability between imported and domestic products, when the USITC found a moderate to high degree of substitution.[3835] Assuming that domestic products would sell at a given level if imported products also sold at that level is consistent with a finding of moderate to high substitutability. To the extent that domestic and imported products could sell for different price levels, the United States notes that many purchasers felt that imported products were of higher quality than domestic products.[3836] This would suggest the existence of a price premium, such that domestic products could achieve a given average price level only if imported products were sold at a higher price level. Thus, if Korea were correct, the assumption that domestic and imported products needed to sell at the same level would be conservative.

7.1665 The European Communities argues that neither the USITC model, nor the *ex post* numerical analysis, properly deal with NAFTA imports, and thus neither allows the United States to satisfy its obligation under Article 5.1 to ensure that the measures remedies the injury allegedly caused by non-excluded imports. The USITC included imports from NAFTA countries where they were found to contribute importantly to injury, while the *ex post* numerical analysis excluded imports from NAFTA countries entirely. However, the United States was under an obligation to ensure that the injury caused by NAFTA imports was not attributed to non-excluded imports. When it comes to assessing the applicable remedy, the United States was required to determine the extent of the injury caused by NAFTA imports, and ensure that the measure did not transfer the burden of remedying such injury to non-excluded imports. In other words, the remedy analysis should have ensured that the domestic industry was *not relieved* of the injury caused by FTA imports. For the European Communities, it is not enough that the USITC concluded that NAFTA imports did not contribute importantly to serious injury. The concept of contributing importantly does not assess whether NAFTA imports caused injury. There is thus a discrepancy between both analyses and the required analysis.[3837]

[3832] USITC Report, Vol. II, Table FLAT-60. (Exhibit CC-6)

[3833] USITC Report, Vol. II, pp. FLAT-58-60, footnote 42. (Exhibit CC-6)

[3834] Korea's written reply to Panel question No. 50 at the second substantive meeting.

[3835] Exhibit K-14, pp. 3-4.

[3836] As a general rule, suggests the United States, the majority of purchasers viewed United States and non-NAFTA products as comparable. However, a significant number of them expressed a preference, generally finding non-NAFTA products to be superior by a two-to-one margin. USITC Report, pp. FLAT-58, LONG-81, TUBULAR-49, STAINLESS-69. The precise figures are: flat-rolled steel, 129 comparable, 64 non-NAFTA superior, 33 United States superior; long steel, 136 comparable, 44 non-NAFTA superior, 22 United States superior; tubular steel, 85 comparable, 28 non-NAFTA superior, 22 United States superior; stainless and tool steel, 87 comparable, 26 non-NAFTA superior, 10 United States superior. These evaluations of product quality would suggest that, on average, non-NAFTA products would command a price premium over domestic products.

[3837] European Communities' second written submission, para. 7.

7.1666 The European Communities also argues that the United States also stresses the numerous considerations which played a role in the President's decision (efforts engaged by workers and firms, economic and social costs and benefits of any safeguard, national economic interests).[3838] However nowhere has the United States elaborated on these other considerations.[3839]

7.1667 For Korea, an economic analysis, just like any other form of proof, is only sufficient to the extent that it is specific as to the facts, addresses the key issues in dispute, and takes into account the proper variables.[3840] For the same reason, mere assertions are not proof. Mere assertions cannot substitute for a full analysis of the facts and the basis for the conclusions, nor can mere assertions overcome a rebuttable presumption that the failure to satisfy Article 4.2(b) also fails to satisfy Article 5.1 of the Agreement on Safeguards. Yet, the United States suggests that given the inherent imprecision of economic models, its *ex post* analysis of the measure should be subject to lighter scrutiny, such as whether it is in the "ballpark". That is simply incorrect. For the same reasons, general theories about what might have occurred and what might have been addressed by the measure, are not a sufficient justification for the actual measure. It must be shown that the measure *is* limited to the permissible extent – not that it might be.

7.1668 According to Korea, what is missing from the United States' economic model is any attempt to tie the amount and nature of relief to the specific injury found.[3841] Why, for example, should the United States assume that the "accumulated effects" which must be remedied, if at all, for flat-rolled and the "accumulated effects" which must be remedied, if at all, for pipe and tube are the same? The United States does not even identify what precise accumulated effects it is targeting for each product (as opposed to giving some examples) but it doubles the operating margin for both welded pipe and flat-rolled. It is obvious that the effects would vary by industry and, in particular, the effects would vary (at least in degree) between an industry that was only threatened with injury versus one that was suffering serious injury, but the United States simply doubles the profit margin for both. Mere assertions that the United States took a "conservative" approach by merely doubling the profit margin rather than triple it or quadruple it does not answer the question of whether even *that* relief was necessary.

7.1669 For Korea, this "accumulated effects" analysis also suffers from the same problem as the "direct effect" they identify – imports were not the only cause of injury even by the USITC's own admission.[3842] Therefore, these "accumulated effects" might be from a number of causes other than imports, but the US analysis, by its own explanation, does not limit the relief to those effects produced by imports. Finally, the US analysis also ignores the fact that tariffs also have accumulated effects over the period of the measure. The more years during which the measure is to be in effect, the greater the effect on the industry.

7.1670 Finally, Korea disputes the United States' argument, made at paragraph 130 of its oral statement at the second substantive meeting, that the numerical analysis addressed only the "increase" in imports and not increased imports as a whole. Its model only measures changes in *profits* (profit shortfalls) so it is not correct that the model addresses only the *increase* in imports.[3843]

[3838] United States' written reply to Panel question No. 88 at the first substantive meeting.
[3839] European Communities' second written submission, para. 12.
[3840] Korea's additional comments on Panel question No. 54 at the second substantive meeting.
[3841] Korea's additional comments on Panel question No. 54 at the second substantive meeting.
[3842] Korea's additional comments on Panel question No. 54 at the second substantive meeting.
[3843] Korea's written reply to Panel question No. 47 at the second substantive meeting.

7.1671 By way of a general response, the United States observes again that any numerical analysis – be it the price- or volume-based exercise or economic modelling – can only indicate the order of magnitude of a safeguard measure, and cannot set a precise level.[3844] Most of Korea's comments are directed at the precision of the United States' numerical exercises, and do not detract from the United States' observation that the exercises demonstrate the consistency of the steel safeguard measures with Article 5.1.

7.1672 Finally, Korea submits that the USITC's COMPAS results do not confirm the results from the United States *ex post* analysis and model. The results are completely distinct. For flat-rolled, the COMPAS shows that a 30% tariff would produce a 20.8% to 28% increase in non-NAFTA import unit values ("prices")[3845] while the *ex post* model shows that import unit values ("prices") would increase 18.9%.[3846]

7.1673 In response, the United States submits that the price-based exercise and modelling exercise presented by the United states "produce the same results" only in that both of these exercises confirm that the steel safeguard measures were applied less than the extent necessary to prevent or remedy serious injury and to facilitate adjustment. However, this does not suggest that these exercises (or the modelling performed by the USITC staff) yield the same numerical results. [3847]

7.1674 The United States submits that, for example, the figures cited by Korea are not based on the same economic model. The 18.9% increase in import prices was calculated according to the price-based exercise described in the United States' first written submission.[3848] This figure represents the estimated degree to which import prices would have to increase for domestic producers to achieve the target operating income margin identified in our submission. Thus, it is a goal rather than an estimated effect. The other figures cited by Korea – the 20.8% to 28.0% range of projected increases in import prices – was the result produced by the multi-market or linked COMPAS model for a 30% tariff on CCFRS.[3849] Thus, it is an estimated effect rather than a goal. These are clearly two different methods of analysis. The United States compared the two results solely for the purpose of showing that a tariff of 30% would achieve import price increases in the range required to achieve the targeted operating income margin. Comparison for any other reason, such as that suggested by Korea, is both improper and meaningless. Korea's argument regarding the COMPAS results generated by the USITC staff and price-based exercise in the US first written submission is unclear. It could be interpreted in a variety of ways, each of which is incorrect. If Korea is arguing that the COMPAS results generated by the USITC staff are different from the modelling results referenced in the price-based exercise, it is plainly incorrect. The price-based exercise compared an estimated import price that would achieve target operating margins with the estimated price effect of a 30% tariff, as reported in the USITC staff's COMPAS modelling.[3850] For each product, including CCFRS, there is no difference as the exercise correctly reflected the results of the USITC staff's COMPAS modelling.[3851]

[3844] United States' first written submission, para. 1062.

[3845] USITC Memorandum EC-Y-050, 5 December 2001, Table 3. (Exhibit CC-10)

[3846] Exhibit K-14; Korea's written reply to and additional comments on its reply to Panel question No. 48 at the second substantive meeting.

[3847] United States' additional comments on replies to Panel question No. 48, 54 and 56 at the second substantive meeting, paras. 1-9.

[3848] United States' first written submission, paras. 1065-1080; Exhibits US-56 and US-57.

[3849] Memorandum EC-Y-050 (Exhibit US-65). According to Korea, since the USITC staff ran the model before the USITC issued its report, it treated only Canada as excluded from the measure.

[3850] United States' first written submission, para. 1072.

[3851] In this regard, the United States notes, the price-based exercise differed from the modelling exercise. The price-based exercise referenced the COMPAS results produced by the USITC staff, which reflect

7.1675 The United States notes that if Korea is arguing that the estimated amount that import prices would have to increase to eliminate downward pressure on US producers' prices (18.9% for CCFRS)[3852] was a projection of the actual amount that prices would increase, it has misunderstood. The 18.9% figure is clearly labeled "Needed Unit value increase for non-NAFTA imports".[3853] It represents the hoped-for increase in import prices, and not an estimate of what will actually happen. In short, the written description of the price-based exercise and the spreadsheets in Exhibit US-56 applying that exercise do not suggest a finding that "a 30% tariff yields an 18% increase in imports prices".[3854] If Korea's point is that the needed unit value increase of 18.9% is slightly below the low end of the range of estimated effects of a 30% tariff, the United States explained that "numerical estimates are necessarily limited in their ability to precisely quantify and isolate the full effect of imports and the appropriateness of remedial measures. . . . Numerical estimates may be useful to test whether a measure is set at an order of magnitude consistent with Article 5.1".[3855] The price-based exercise demonstrates that this is the case for the safeguard measure on CCFRS, as well as the other steel safeguard measures.

3. Criticisms with reference to specific products

7.1676 With respect to CCFRS, Korea argues that, in relation to the first step, there is no apparent reason one can detect for selecting 7.5% as a target operating margin for 2001.[3856] In fact, it appears it should be –3.9%, the 1996 operating margin. Correcting the methodology by eliminating step two, increasing domestic prices in step three by the percent needed to reach the target revenue (target minus actual divided by target) and calculating the percent difference between the resulting domestic AUVs and actual non-NAFTA import AUVs (this assumes perfect competition) results in the following import AUV price increase requirements:

Slab	33.6%
Plate	7.8%
Hot Rolled	17.4%
Cold Rolled	10.1%
Coated	5.4%
Average weighted by NCS	10.1%

7.1677 With regard to this comment, the United States points out that the 7.5% figure was a clerical error. The United States notes that it revised the calculation using -3.9% as the target margin for interim 2001.[3857] The correction does not change the results for certain carbon flat-rolled steel as a whole.[3858]

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tariff levels adopted by the President, but not the exclusion of both Canada and Mexico from all products. In contrast, the modelling exercise used the same inputs as the USITC did for elasticities and for full-year 2000 data, but modelled the tariff levels and country exclusions adopted by the President. The modelling exercise also involved modelling of the change in imports during the investigation period, which the USITC did not do. United States' written reply to Panel question No. 48 at the second substantive meeting. Korea argues that these differences in the use of the model would obviously change its numerical outputs.

[3852] Exhibit US-56, table labelled "Weighted based on Net Commercial Sales for FLAT Products".
[3853] Exhibit US-56, table labelled "Weighted based on Net Commercial Sales for FLAT Products".
[3854] Korea's written reply to Panel question No. 48 at the second substantive meeting.
[3855] United States' first written submission, para. 1062.
[3856] Exhibit K-14, pp. 4-5.
[3857] Exhibit US-96 contains a corrected version of the affected pages from Exhibit US-56.
[3858] United States' written reply to Panel question No. 48 at the second substantive meeting.

7.1678 Korea responds to the United States' argument that the results of the USITC model and its *ex post* analysis differ because the *ex post* analysis is based on the actual remedy taken by the President. Specifically, Korea notes that a key difference between the United States' *ex post* economic analysis and the remedy taken by the President is that the *ex post* analysis included slab, which the President excluded from the measure on flat-rolled. Therefore, the United States has not established the basic relevance of the model to the actual Presidential remedy. Korea adds that another difference between the USITC model and the US *ex post* analysis is that the United States doubled profit margins, apparently to account for "the cumulative injurious effect of increased imports." Stated simply, the USITC model does not assume an arbitrary doubling of profit margins.[3859]

7.1679 With respect to certain welded pipe, Korea notes that the tariffs were imposed on other welded pipe as a result of a finding of threat of injury.[3860] However, the United States suggests that the domestic industry producing other welded pipe experienced injury caused by imports in 2000 and before.[3861] It then concentrates is numerical analysis on 2000 for Step 1; but for Steps 2 and 3, it uses data for 1998 through the first half of 2001, "the period when imports were increasing".[3862] Given that this was a finding of threat, these increasing imports were not causing injury.[3863]

7.1680 Korea argues that the methodology for other welded pipe is completely unclear.[3864] The numerical analysis focuses only on 2001, but it is impossible to correct the flaws noted above because the target operating margin appears to have no basis. That margin, 5.7%[3865], comes from no data in the USITC staff report, nor can it be derived from various averaging options. The end result was an increase in non-NAFTA import AUVs of 16.2%.[3866] The US results[3867] show price increases sought of 4.3% to 6.7% if other welded imports are held to 1997 levels (although there does not appear to be any injury-related reason to do so), and 8.7% to 11.1% resulting from the President's remedy. The United States also notes that the USITC's models in the remedy phase of the investigation suggested that the 15% tariff imposed would increase non-NAFTA imported AUVs by 9.3% to 11.5%.[3868] That same USITC model suggested that a 15% tariff would decrease non-NAFTA imports by 22% to 34% below 2000 levels.

7.1681 Finally, with respect to the modelling results for other welded pipe, Korea notes that if other welded pipe imports were held to 1997 levels, the estimated price for domestic products would be 4.3 to 6.7% higher, while the remedy would result in estimated price increases of 8.7 to 11.1%. With regard to this comment, according to the United States, Korea's criticism fails to recognize that the other welded pipe remedy addressed a threat of serious injury, and that the analysis based on data for 2000 would not establish what was necessary to stop the evolution of the existing injurious effects of increased imports into the full manifestation of that threat as serious injury.[3869]

[3859] Korea's additional comments on Panel question No. 48 at the second substantive meeting.

[3860] Exhibit K-14, p.5.

[3861] United States' first written submission, para. 1131; United States' written reply to Panel question No. 27 at the first substantive meeting.

[3862] United States' first written submission, para. 1136.

[3863] USITC Report, Vol. I, p. 159: "We consider the industry's overall condition to be weak. Although it has not yet reached the point of serious injury, such injury appears imminent.... The years 1996 to 1998 were a period of generally good health". (Exhibit CC-6)

[3864] Exhibit K-14, p.6.

[3865] "Safeguard Measure Worksheets". (Exhibit US 56)

[3866] "Safeguard Measure Worksheets". (Exhibit US 56)

[3867] "Modelling Results Worksheets". (Exhibit US 57)

[3868] United States' first written submission, para. 1137.

[3869] United States' written reply to Panel question No. 54 at the second substantive meeting.

7.1682 Korea adds[3870] that the justification by the United States of the 5.7% profit margin for welded pipe should, at the very least, be consistent with representations made by the United States regarding the methodological approach the United States claims to have adopted (*e.g.*, the use of the one-year base period[3871], when the United States actually used an average of two periods for welded pipe – without explaining why two years was necessary rather than one[3872]). However, of greater concern is the fact that the United States now disavows its explanations of the source of the profit figures for welded pipe (1998-2001) as a "typographical error".[3873] Unfortunately, the errors are further compounded by its new explanations. The United States asserts that the tables in Exhibit US-56 "show that we based the target profit margin on 1999 and 2000 data, and did not use data for 1998".[3874] First, Korea claims to see nothing in that Exhibit which identifies the source of the profit figures. The value appearing in that Exhibit actually seems to be the simple average of 1999 and 2001 (not 2000). It is still not clear from this latest description what the United States intended to use. Second, the United States now states: "We omitted data for 2000 from the calculation because the USITC found that excess capacity had a 'minor' effect on the industry's performance in 2000".[3875] However, this most recent explanation of how it selected the proper target profit years also conflicts with its earlier explanations as to essential elements of its reasoning. Tthe United States asserts that it did not "determine a domestic price that would increase operating income margins above their 2000 levels".[3876] The United States says that this limitation on the profit level was necessary because profits declined in 2000 due to capacity increases (as opposed to imports).[3877] However, the figure of 5.7%, which it actually used as the target profit margin, is above the profit level of 4.3% for 2000.[3878] So, contrary to the US explanation, the measure did seek to increase profits to a level that exceeded 2000 profit levels. The United States recognizes on the one hand that even in the absence of imports, the industry would not have reached the 2000 level of profitability given the capacity increases, but then proceeds to use a profit target which exceeds 2000 levels. There is no consistency between the logic and the actual figures used. No more compelling is the US attempt to justify the use of 1997 import levels as a benchmark for the proper remedy for welded pipe.[3879] As noted by the USITC, the industry was not seriously injured by imports even in 2001 and continued to be profitable even in 2001. ("Our remedy is intended to halt deterioration of revenues, market share and profitability".[3880]) In fact, the USITC found that no improvements in profitability were initially necessary.[3881] Given the threat of injury finding, using 1997 as the proper level of imports makes no sense. Astonishingly, the US *ex post* analysis explicitly shows that the remedy imposed by the President was actually more

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[3870] Korea' s additional comments on the replies to Panel question No. 54 at the second substantive meeting.

[3871] United States' written reply to Panel question No. 54 at the second substantive meeting.

[3872] United States' written reply to Panel question No. 50 at the second substantive meeting.

[3873] United States' written reply to Panel question No. 50 at the second substantive meeting, footnote 141.

[3874] United States' written reply to Panel question No. 50 at the second substantive meeting, footnote 141. (emphasis added).

[3875] United States' written reply to Panel question No. 50 at the second substantive meeting. But, see footnote 141.

[3876] United States' first written submission, para. 1136.

[3877] United States' first written submission, para. 1136; United States' written reply to Panel question No. 50 at the second substantive meeting.

[3878] USITC Report, Vol. II, Table TUBULAR-18, p. TUBULAR-22 (Exhibit CC-6).

[3879] United States' written reply to Panel question No. 50 at the second substantive meeting.

[3880] USITC Report, Vol. I: Determinations and Views of The Commissioners, p. 386 (emphasis added) (Exhibit CC-6).

[3881] "We estimate that the recommended tariff-rate quota on welded pipe products will initially leave the market share, sales revenue, and profitability of the domestic industry unchanged." USITC Report, Vol. I, p. 386 (Exhibit CC-6).

restrictive and had a greater effect on import (prices and quantities) than holding imports at 1997 levels.[3882]

7.1683 With regard to this comment, the United States indicates that the target margin of 5.7% does not appear in the USITC Report. This figure is the average of profit margins for 1999 and interim 2001. The United States omitted data for 2000 from the calculation because the USITC found that excess capacity had a "minor" effect on the industry's performance in 2000.[3883] The United States adds that it did not use the 2000 operating margin as a benchmark. Instead, the United States used the average of operating income margins in 1999 (8.1%) and the first half of 2001 (3.2%) to derive a target margin of 5.65.[3884] The United States maintains that a simple average is a conservative estimate. The 1999 margin represented 12 months of data and the 2001 margin six months. A weighted average would have resulted in a target margin of 6.5%.[3885]

7.1684 Korea argues that the methodologies used by the United States assume facts and methods of analysis which are either not supported by the USITC's injury analysis or are directly contrary to the requirements of the Agreement on Safeguards.[3886] Korea refers to the errors in relation to the basic premises of the "numerical analyses". Korea submits that the numerical analyses for welded pipe and flat-rolled are entirely based on an estimate of the extent to which non-NAFTA import prices should increase to attain the "desired condition".[3887] Korea submits that a price analysis is not the appropriate analysis for welded pipe since the USITC's focus was on the effect of future increases in import volumes. Korea further submits that the import and domestic "prices" used in the numerical analyses are not reliable. The United States' numerical analyses for flat-rolled and welded pipe rely on import AUV data, but the USITC specifically found that AUV data was not reliable for either flat-rolled or welded pipe due to changes in product mix year-to-year.[3888] The United States does not justify its use of AUVs or why they were considered reliable. Further, the United States' numerical analysis merely "weight-averaged" (by the net commercial sales of each product) the targeted AUVs for flat-rolled to do its remedy calculation even though the USITC in its injury analysis never considered a "flat-rolled" AUV but always considered prices by product and AUVs by product (for cold-rolled, hot-rolled, etc.).

7.1685 Korea submits that the numerical analyses assume a base year for profitability either before the increase in imports or before the condition of the industry began to decline.[3889] This is treated as a surrogate for the condition of the industry prior to serious injury. On its face, such an analysis is inappropriate for welded pipe since the industry was never seriously injured so the concept of a "surrogate" prior to serious injury or prior to import increases is meaningless. Article 5.1 is clear that

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[3882] US Exhibit 57, Modelling Worksheet E, discussed in United States' written reply to Panel question No. 50 at the second substantive meeting.

[3883] United States' first written submission, paras. 1132 and 1136. Paragraph 1136 contains a typographical error indicating that we used data for 1998 through the first half of 2001. According to the United States, the tables in Exhibit US-56 show that the it based the target profit margin on 1999 and 2000 data, and did not use data for 1998.

[3884] The United States explains that since the spreadsheets in Exhibit US-56 presented operating income figures with one decimal place, this is rounded to 5.7% on the printout. The electronic version of the spreadsheet contains reflects the full 5.65% figure.

[3885] United States' additional comments on its written reply to Panel question No. 54 at the second substantive meeting.

[3886] Korea's second written submission, paras. 248-251.

[3887] United States' first written submission, para. 1071.

[3888] USITC Report, Vol. I, p. 61, n. 279 and p. 163, n. 1006 (Exhibit CC-6).

[3889] Korea's second written submission, para. 252.

"prevent(ing) serious injury" is the basis for the permissible extent of the measure when threat of injury is found. As of 2001, the industry still was not seriously injured.[3890]

7.1686 Korea adds[3891] that the numerical analyses improperly treat all the negative effects throughout the period of investigation as attributable to imports, and failed to consider positive economic forecasts in some instances: (i) for flat-rolled, the United States admits that it made no adjustment to reflect the injury caused by increased capacity or mini-mill competition[3892], anti-dumping and countervailing orders[3893], or legacy costs of integrated producers; (ii) for welded pipe, the numerical analysis did not adjust for the effects of existing AD orders[3894], the particular circumstances of one significant US producer[3895], or the effects of excess capacity over the entire period[3896]; and (iii) for welded pipe, the analysis fails to account for the USITC's conclusion that LDLP demand was likely to increase.[3897]

7.1687 Korea argues that for flat-rolled, as detailed in the preceding section, the United States has incorporated a number of concepts into its numerical analyses which are not properly substantiated, or worse, are directly contradicted by the USITC record.[3898] These deficiencies alone render the numerical analyses for flat-rolled useless for purposes of the justification of the permissible extent (Article 5.1 of the Agreement on Safeguards). Therefore, the United States has not demonstrated to the Panel its compliance with the requirements that the measure be limited to the permissible extent. As the Appellate Body stated in *Korea – Dairy*, such a requirement applies regardless of the form of the measure imposed.[3899] Moreover, as demonstrated in Korea Exhibit 14, after correcting the numerical analyses of the United States, the correct calculation demonstrates that only a 10.1% increase in import prices would have been necessary to achieve what the United States claims as the targeted operating margin for the US industry in their numerical analysis. However, according to the USITC Economic Model (the results of which the United States embraced in its first written submission)[3900], the 30% tariff the President imposed was expected to increase import prices by 20.8% to 28%.[3901] Therefore, the tariff imposed raises import prices by much more than is necessary to reach the targeted operating margin.

7.1688 In the case of tin mill, Korea submits that there is no "finding" as such of serious injury to tin mill products so there is no basis upon which any measure on tin mill products could be imposed. Only one Commissioner found tin mill products to be seriously injured.[3902] All the other

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[3890] USITC Report, Vol. I, p. 159 (Exhibit CC-6).

[3891] Korea's second written submission, para. 253.

[3892] United States' first written submission, para. 1093.

[3893] United States' first written submission, para. 1092. In terms of anti-dumping and countervailing orders, the United States defends its failure to adjust its estimate in its numerical analysis for the 1997 and 2000 orders on plate and the 1999 order on hot-rolled, but gives no defense of its failure to account for the 2001 hot-rolled orders.

[3894] United States' first written submission, para. 1134.

[3895] United States' first written submission, para. 1130.

[3896] United States' first written submission, paras. 1128-1129.

[3897] United States' first written submission, para. 1135; USITC Report, Vol. I, p. 166 (Exhibit CC-6).

[3898] Korea's second written submission, paras. 254-257.

[3899] Appellate Body Report, *Korea – Dairy*, para. 96.

[3900] United States' first written submission, para. 1099, n. 1385, referring to the model in USITC Memorandum EC-Y-050 (Exhibit US 65).

[3901] United States' first written submission, para. 1099.

[3902] Korea's second written submission, para. 258.

Commissioners disagreed either as to the like product or whether there was serious injury. There certainly is no "benchmark" provided as to the proper extent of the measure so the numerical analysis based on tin mill are meaningless. The numeric analysis used in this case for tin mill measures the volume reductions (as opposed to price increases) in imports needed to achieve the benchmark profitability. It is based on tin mill imports considered alone but only one Commissioner who found serious injury based her analysis on tin mill imports alone.

7.1689 For other welded pipe, Korea states that the United States imposed a remedy of 15% tariff on all imports.[3903] In contrast, the USITC had recommended a TRQ with a 20% tariff only on imports exceeding 2.6 million short tons (Koplan and Miller including Canada and Mexico) and 1.4 million short tons (Okun and Hillman, excluding Canada and Mexico)[3904] This quota was equal to import levels in 2000 because the USITC found that current levels of imports were not injurious.[3905] Korea submits that the United States seeks to substitute the USITC's specific finding regarding threat of injury and the proper remedy for threat of injury, with an *ex post* record and a substitute analysis of the timing and scope of present injury.[3906] [3907] As noted, this approach clearly deviates from the holding of the Appellate Body in *US – Line Pipe* because such an *ex post* approach is fundamentally inconsistent with and irreconcilable with the USITC's finding that imports were *not* causing serious injury at any time in the period.[3908]

7.1690 Korea states that the United States made a number of erroneous assumptions: (i) the US construct presented to the Panel is based on the new objective of correcting "declines" in industry factors during a period when the industry was not seriously injured by imports. However, the USITC specifically found that it would only be additional declines that needed to be prevented.[3909] According to the new US analysis, a safeguard measure can now be imposed to remedy "negative effects".[3910] However, Article 5.1 of the Agreement on Safeguards provides that the measure selected shall be the "most suitable" for "preventing serious injury"[3911] – not to remedy any "negative effects". It was only when the industry's overall condition transformed into an imminent threat of serious injury that such increased imports became actionable and the USITC's measure correctly addressed the need to was to prevent further increases and prevent serious injury. Secondly, the United States is wrong that the USITC did not find problems of product mix which called into question the use of AUV data.[3912] In fact, the wide disparities in products created a severe problem with such data. The USITC itself observed: "We are cautious of placing undue weight on AUV information, as it is influenced by issues of product mix".[3913] Korea challenges the United States assertions that it can substitute a new analysis of AUVs as the basis for its remedy instead of using the pricing data which the USITC actually used in its injury analysis. Thirdly, and more fundamentally, the United States cannot just

[3903] Korea's second written submission, paras. 259-260.

[3904] USITC Report, Vol. I, p. 384 (Exhibit CC-6).

[3905] USITC Report, Vol. I, p. 386 ("Our proposed remedy for welded pipe would still permit the same quantity of imports as in 2000 at the current low rate of duty.") (Exhibit CC-6)

[3906] United States' first written submission, para. 1077.

[3907] Korea's second written submission, paras. 261-273.

[3908] USITC Report, Vol. I, p. 159 (Exhibit CC-6).

[3909] USITC Report, Vol. I, p. 386 (Exhibit CC-6).

[3910] United States' first written submission, para. 1132.

[3911] "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury ... Members should choose measures most suitable for the achievement of these objectives." Article 5.1 of the Agreement on Safeguards.

[3912] United States' first written submission, para. 1133.

[3913] USITC Report, Vol. I, p. 163, n. 1006 (Exhibit CC-6).

string together piecemeal data and reach conclusions directly at odds with the underlying threat of injury determination. Korea gives three examples in this regard: (i) The United States maintains that the President's safeguard measure on welded pipe was intended to raise prices, not to affect volumes of imports.[3914] However, price levels for welded pipe were not found to be injurious by the USITC (unlike for flat-rolled).[3915] The United States' *ex post* numeric analysis confirms that the remedy was intended exclusively to achieve increasing prices. The United States has apparently adopted an *ex post* methodology for defending its measures which is "one size fits all" irrespective of the threat/serious injury finding. However, the USITC specifically relied on increasing volumes as threatening injury[3916] and those increasing volumes had to be prevented.[3917] Therefore, the US measure does not find its benchmark in the threat of injury determination. Moreover, it is not the measure "commensurate with the goals of preventing...serious injury"[3918]; (ii) Despite the claims by the United States that it was not seeking a volume reduction in imports, the USITC economic analysis which the United States cites as consistent with its *ex post* analysis[3919] demonstrates that if the 15% tariff had been imposed in 2000, it would have resulted in a 34 to 21.8% reduction in imports. Moreover, the United States confirms that the USITC's economic analysis of a 15% tariff demonstrates that based on the year 2000 imports, if the tariff had been imposed in 2000, imports would be reduced by 34 to 21.8%.[3920] Yet, the United States does not seek to reconcile this result with its statement in the previous question that it is not seeking volume reductions.[3921] Nor is any reconciliation apparent.[3922] In its analysis of welded pipe, the United States asserts that it is basing the target revenue for the industry on the levels of operating income margins in 2000. However, the operating profit levels for welded pipe in 2000 were 4.3% and the United States uses a targeted base operating income margin of 5.7% in its worksheet. The United States never explains this discrepancy. (The United States then incorporates a completely unexplained additional profit margin increase, to yield a 7.6% operating income margin as the target, which exceeds the 4.3% in 2000, which the USITC found non-injurious.); and (iii) The United States seeks to substantiate its own *ex post* reasoning in the COMPAS analysis on the grounds that it achieves revenue levels by reducing imports to 1997 levels.[3923] But, such reductions in imports cannot be justified. In fact, the USITC recognized that 1996-1998 were years of "good health".[3924] Even 1999 was a year of "mixed performance" – profitability remained stable.[3925] In fact, the USITC specifically noted that it was only in 2000 and into 2001 that the industry was "... approaching a state of serious injury".[3926] There is absolutely no basis in that determination for trying to set a remedy that achieves 1997 import levels. By its own

[3914] United States' written replies to questions from other Parties, paras. 59-60.

[3915] USITC Report, Vol. I, p. 164 (Exhibit CC-6).

[3916] USITC Report, Vol. I, p. 164 (Exhibit CC-6).

[3917] USITC Report, Vol. I, p. 386; Prices needed to be "stabilized" with the tariff only if current import levels were exceeded, p. 386 (Exhibit CC-6).

[3918] Appellate Body Report, *Korea – Dairy*, para. 96.

[3919] United States' first written submission, para. 1137, n. 1409 (citing to USITC Memorandum EC-046, p. TUBULAR-21).

[3920] Korea appreciates the United States note that the figures cited by Korea were for a 10% tariff. With a 15% tariff, the reduction is even greater.

[3921] The United States instead makes the obvious point that economic analysis is always based on past results.

[3922] The USITC did not project increases in demand or price increases, which might indicate a change in market conditions moderating the effect of the 15% tariff.

[3923] United States' first written submission, para. 1138, "Simplified Economic Model" "COMPAS Results for Certain Welded Pipe" (Exhibit US 57).

[3924] USITC Report, Vol. I, p. 159 (Exhibit CC-6).

[3925] USITC Report, Vol. I, p. 160 (Exhibit CC-6).

[3926] USITC Report, Vol. I, p. 162 (Exhibit CC-6).

admission, a measure based on achieving import levels in 1997 exceeds the amount necessary to prevent threat of serious injury.

7.1691 The United States notes that the arguments summarized in paragraphs 7.1695 and 7.1696 apply equally to the Korean arguments reflected in paragraph 7.1690.

4. Choice of one-year base period

7.1692 Korea, Japan and Norway argue that the chosen year must be evaluated in terms of its representative nature in all respects including supply, demand, and other factors of injury.[3927] Therefore, the United States would need first to establish the representativeness with respect to all these issues to demonstrate that it is representative period. The complainants submit that the United States has demonstrated that no single year of the review period is unaffected by other factors of injury in the case of flat-rolled and other welded pipe.[3928] The European Communities, Korea and Norway add that, generally, it is not sufficient to base the benchmark income margin on figures for one year alone.[3929] [3930]

7.1693 Korea adds that for flat-rolled, 1997 was used as the pre-injury from imports benchmark year for 1998-2000, and 1996 was used for 2001. However, the United States did not ensure that any "other factors" would not also distinguish the two periods such as the fact that mini-mills added significant capacity between 1996 and 2000[3931] which increased price pressure on the market.[3932] Korea argues that the United States simplistically suggests that it can use 1996 as the benchmark for 2001 for flat-rolled because 1996 was also a period of depressed demand so that this other factor of injury has been isolated.[3933] Additionally, the United States' choices of 1996 and 1997 for its analysis as years prior to injury does not account for the effect of legacy costs, which the USITC found was a problem for the industry throughout the period of investigation.[3934] In the case of welded pipe, it is not even clear where the United States got its targeted benchmark[3935] so it is impossible to comment on the validity of that benchmark apart from the fact that there is no basis in the record for the number used. Korea notes that the other welded pipe industry had excess capacity from the very beginning of the period, so there was no year that was unaffected by this other factor of injury. Further, the United

[3927] Appellate Body Report, *US – Lamb*, paras. 138-139.

[3928] Complainants' written replies to Panel question No. 54 at the second substantive meeting.

[3929] European Communities', Korea's and Norway's written replies to Panel question No. 54 at the second substantive meeting.

[3930] The complainants' written replies to Panel question No. 54 at the second substantive meeting.

[3931] Korea's written reply to Panel question No. 54 at the second substantive meeting; Korea's second written submission, para. 169.

[3932] Korea's second written submission, paras. 173-175. Korea points out that the use of the 1996 benchmark as a surrogate for the uninjured condition of industry in 2001 does not relate to *imports* alone. The year 1996 is in fact a year in which mini-mill competition was also substantially lower than at any other point in the period.

[3933] United States' first written submission, para. 1094.

[3934] USITC Report, Vol. I, p. 64 (Exhibit CC-6).

[3935] According to Korea, the United States does not state in its first written submission which year it chose as the benchmark year for welded other pipe. However, in US Exhibit 56, the United States Safeguard Measure Worksheets show in Step 2 that it selects a *base* target operating margin of 5.7% for the welded other industry for 2001 (its additional calculations manipulate this figure, however, to result in a target operating margin of 7.6%.) The 5.7% base target operating margin does not correspond to *any* operating margin experienced by the other welded industry in any year of the period of investigation. The welded pipe industry had a healthy 4.3% operating margin in 2000, a year in which the USITC did not consider the industry to be injured (USITC Report, Vol. I, p. 386 (Exhibit CC-6)), so it is unclear why the United States would not have chosen a base operating margin of 4.3%, and the year 2000 as the benchmark year.

States industry's performance was affected beginning in 1999 by certain cost increases for one United States producer.[3936] Korea also notes that the USITC found only a threat of serious injury because it concluded that as of mid-2001, increased imports were not the cause of serious injury to the United States industry. If the industry was suffering injury, it could well have been the result also of other factors, not imports. (The USITC only concluded that imports played a "key role" in the negative trends.[3937]) The only finding by the USITC was that the industry was not seriously injured by imports as of the first half of 2001. Yet, it is clear that the United States action restrained imports to levels below 2000 and 2001 to improve operating results vis-à-vis an "earlier" benchmark. Therefore, the remedy should have been limited to the threat of serious injury caused by increased imports, and the use of a benchmark prior to 2001 cannot be justified.[3938]

7.1694 Brazil believes that there are two issues relating to the choice of one year basis. First, is the period chosen representative in terms of operations of the domestic industry prior to the serious injury caused by imports? Second, have the income margins been adjusted to reflect the effects on non-import factors on the margin in the representative period? The representative period may be one year or several years. Brazil suggests, however, that the year of peak industry performance is not a representative year and, therefore, 1997 is not representative.[3939]

7.1695 The United States responds that the price-based exercise was based on the year that best reflected the injurious effects of factors other than imports, while minimizing the injurious effects of increased imports. Data from other years would necessarily be a second-best choice, and lower the reliability of the exercise. The United States has described the basis for choosing the comparison year for each product.[3940] Moreover, for many products, the USITC found that imports had injurious effects for much of the investigation period. For example, for CCFRS, the USITC found that imports had injurious effects in 1998, 1999, and 2000 and did not identify injurious effects for 1996 and 1997. Thus, for purposes of confirming the Article 5.1 consistency of the President's safeguard measures, only for 1996 and 1997 was it possible to conclude that data for 1996 or 1997 reflected minimal or no injurious effects, which would make them appropriate for use in deriving a target profit margin. The limited number of years that could provide a reasonable benchmark meant that only one would be acceptable. In many cases, the available periods did not fully reflect the profitability levels that the relevant industry would achieve absent the injurious effects of increased imports. For example, the price-based exercise used 1997 as the target year for CCFRS, even though profit levels in that year did not reflect greatly increased demand in 1998 through 2000, which should have resulted in higher profits, rather than the lower profits and losses that actually occurred. Thus, for CCFRS, 1997 profit margins provide a conservative estimate of the profits the domestic industry should have made in the 1998-2000 period.[3941]

7.1696 Moreover, the United States recalled that Korea criticizes the United States on the grounds that the "choices of 1996 and 1997 . . . as years prior to injury does not account for the effect of legacy costs".[3942] However legacy costs were borne by the domestic industry throughout the entire period investigated. Korea also objects that no control is made for the increase in minimill capacity over the period[3943], but as the United States has already observed, the largest increase in minimill

[3936] Korea's first written submission, para. 161; Korea's second written submission, para. 189.
[3937] USITC Report, Vol. I, p. 164 (Exhibit CC-6).
[3938] Korea's written reply to Panel question No. 54 at the second substantive meeting.
[3939] Brazil's written reply to Panel question No. 54 at the second substantive meeting.
[3940] United States' first written submission, paras. 1089, 1096, 1106, 1115, 1124, 1136, 1144, 1156 and 1166.
[3941] United States' written reply to Panel question No. 54 at the second substantive meeting.
[3942] Korea's written reply to Panel question No. 54 at the second substantive meeting.
[3943] Brazil's written reply to Panel question No. 54 at the second substantive meeting.

capacity was in 1997, the year chosen as the benchmark for the analysis for flat-rolled. Second, Brazil objects to the fact that 1997 was a year of peak industry performance over the period and therefore cannot be representative.[3944] This ignores the fact that the years 1998 through 2000 were years of even higher demand for flat-rolled products than that seen in 1997.[3945] Thus 1997 was a conservative choice to use as a benchmark. It was a peak year in terms of industry performance during the period of investigation only because increased imports had negative effects on domestic prices in later years.

5. The use of AUV

7.1697 On the use of AUV, Brazil, Korea, Japan, Norway argue that the USITC itself has admitted that issues of changing product mix may affect the reliability of AUVs for purposes of analysis.[3946] AUVs are also inherently unreliable because they mask the dynamics of individual sources by collapsing them into a single average. For example, AUVs are totally irrelevant to determining who is exercising downward pressure on price and who is the price leader in the market. A more relevant analysis would be a comparison of the pricing behaviour of those domestic mills that are gaining market share with those domestic mills that are losing market share. This would allow the USITC to determine the price leader among the domestic mills. One could then look at how the domestic mill price leader's prices compare over time with offshore sources and whether the domestic price leader is gaining or losing market share to these offshore sources. In this case, prices for specific pricing products would be relevant, not AUVs, since AUVs do not account for how prices for products with identical or even similar specifications vary depending on the domestic mill source or the foreign source. Again, however, averages of prices for specific pricing products are of limited utility in determining price leadership in that an average does not distinguish between mills that are pricing aggressively and those that are not. The point being that a simple comparison of AUVs tells the authority nothing about who is leading the prices downward in the market. The use of AUVs as probative of pricing behavior in the market is further attenuated by the bundling of multiple products into a single CCFRS category. A comparison of AUVs for CCFRS is meaningless in that the proportions of slab, hot-rolled, cold rolled, plate and coated steel within the import AUV calculation bears absolutely no relationship to the proportions with the domestic AUV calculation. For imports, lower value added slab and hot-rolled product account for the majority of sales, whereas in the domestic market only 0.9% of slab produced is sold and only approximately 1/3 of hot-rolled produced is sold (i.e. higher value added cold rolled and corrosion resistant products make up the majority of sales of domestic product).[3947]

7.1698 Korea adds that the United States now states for the first time that the underselling data is confidential and it could not use it for that reason. No specific products are cited. However, the pricing data for non-NAFTA flat-rolled imports is largely available and is not confidential. The United States used non-NAFTA AUVs for its numerical analysis[3948] so it could have used the actual pricing data for those products. Finally, Korea argues that the United States cannot simply use

[3944] Brazil's written reply to Panel question No. 54 at the second substantive meeting.

[3945] "By any measure, the period of investigation saw significant growth in US demand for certain carbon flat-rolled steel." USITC Report, *Steel*, Inv. No. TA-201-73, USITC Pub. No. 3479, p. 56, December 2001.

[3946] Views of the Commission – USITC Report, Vol. I, p. 61, n. 279.

[3947] Complainants' written reply to Panel question No. 53 at the second substantive meeting.

[3948] United States' second oral statement, para. 130.

whatever is "available" if it is not reliable. Moreover, the numerical analysis averaged *all* flat-rolled AUVs creating additional distortions.[3949]

7.1699 For Norway, the important question is not whether one uses actual sales in a given base year or "average unit values", but the factors that are included to achieve the AUV, the choice of the base year and – not least – what is not adjusted for in the comparisons (non-attribution). For CCFRS, the AUV comparisons do not adjust for legacy costs, management decisions and capacity increases.[3950] Nor do the comparisons and injury offsets take into account purchaser consolidation[3951], declining demand[3952], dumping and CVD orders[3953] and minimill competition.[3954] Furthermore, the use of 1996 as the base year for profits[3955] instead of an average for the years preceding the increase in 1998 – or the year preceding (1997) is not well explained.[3956]

7.1700 The United States argues that the use of unit values is appropriate when imports and domestic products have comparable product mixes, as was the case for most of the products under consideration by the USITC.[3957] If products do not have comparable product mixes, a preponderance of inexpensive items in one group may create the impression that the group is selling for a lower price than another group with a preponderance of high-priced items, even if individual comparable items are priced identically. Where there are no product mix issues, unit values are useful because they reflect the entirety of the imported and domestic products. However, in some situations, a difference in product mix for imported and domestic products might limit the usefulness of unit values. In those cases, where possible, the United States relies on alternative sources of data, such as item-specific pricing data.[3958]

6. Adjustments for NAFTA imports

7.1701 The United States explains that no adjustment for NAFTA imports was necessary in the modelling exercise, which excluded NAFTA parties and developing country WTO Members accounting for less than 3% of total imports. Thus, in both of the two scenarios used in the modelling exercise – one holding covered imports in 2000 at pre-increase levels and the other subjecting covered imports in 2000 to the safeguard measures – the model results reflects changes in covered imports.[3959] The modelling of the effects of the safeguard measures treats imports from NAFTA countries and excludes developing countries as not subject to safeguard measures. The modelling of the increase in imports involves only the increase from covered sources. Since excluded sources were treated the same in each scenario, they should not affect the comparison of the price, volume, and revenue effects of the increase in imports on the one hand and the safeguard measures on the other.[3960] In addition,

[3949] Korea's written reply to Panel question No. 50 at the second substantive meeting.
[3950] United States' first written submission, paras. 1085 and 1093.
[3951] United States' first written submission, para. 1085.
[3952] United States' first written submission, para. 1086.
[3953] United States' first written submission, para. 1092.
[3954] United States' first written submission, para. 1093.
[3955] United States' first written submission, para. 1094.
[3956] Norway's written reply to Panel question No. 53 at the second substantive meeting.
[3957] The discussion of the numeric exercise in the United States' first written submission indicates the United States' reasons for considering AUVs to be preferable with regard to particular products.
[3958] United States' written reply to Panel question No. 53 at the second substantive meeting.
[3959] According to the United States, the results of this modelling appear in the COMPAS Results tables in Exhibit US-57. The "other included" line reflects changes for these covered imports.
[3960] The United States points out that although NAFTA imports were held constant as an input, the model estimates that if imports had not been at increased levels in 2000 (or if the safeguard measures were in effect during that year) the price and volume of NAFTA imports would have been higher. The changes are at

for most products, the price, volume, and revenue of domestic products and NAFTA imports change by similar amounts. The United States also concludes that no adjustment was necessary for the price- or volume- based exercises. For eight products, the exercise was based on data reflecting prices, either the unit values or the item-specific pricing data. For reasons previously explained, the exercises for tin mill steel and stainless steel wire were based on the market share effects of imports.[3961] For the two products subject to the volume-based exercise, the United States bases the analysis on whether the measure would return non-NAFTA imports to their market share prior to the increase in imports. The inputs into the exercise are the market share of non-NAFTA imports, the volume of non-NAFTA imports, and United States apparent domestic consumption prior to and during the increase in imports.[3962] This exercise focuses on the volume of non-NAFTA imports, and does not seek to guarantee domestic producers a particular volume or market share in comparison with excluded NAFTA products. Therefore, according to the United States, there is no risk that injurious volume effects (or any other injurious effects) of NAFTA imports will be attributed to non-NAFTA imports. Thus, no adjustment was necessary.[3963]

7.1702 For the eight products subject to price-based exercises, the United States also concludes that no adjustment was necessary. These conclusions are based on the USITC findings regarding each product. With respect to certain carbon flat-rolled steel, the USITC found that imports from Canada decreased over the course of the investigation period in both absolute and relative terms, and did not contribute importantly to serious injury. In item-specific comparisons, Mexican products showed mixed underselling.[3964] In addition, the USITC found in the second supplemental response that exclusion of Canadian and Mexican products "does not appreciably change price trends" and that non-NAFTA imports "were generally priced below domestically-produced certain carbon flat-rolled steel" and "led to the decline in domestic prices".[3965] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States submits that it considered that NAFTA imports traded on essentially the same terms as domestic products and, accordingly, did not have effects on domestic pricing that required an adjustment to its price-based exercise. With respect to hot-rolled bar**, t**he USITC found that Canadian imports contributed importantly to serious injury

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roughly the same level as those to domestic products, reflecting that the exclusion of NAFTA imports is not undermining the remedial effect of the safeguard measures.

[3961] United States' first written submission, paras. 1173, 1183, 1197, and 1200-1201. The United States notes in addition that Chairman Koplan found with regard to stainless steel wire that "[t]he increase in imports and the decline in the proportion of the domestic market supplied by domestic producers, at a time of *falling* domestic consumption indicates that imports are an important cause of the threat of serious injury". USITC Report, p. 259. Commissioner Bragg found with regard to stainless steel wire and wire rope that "both domestic sales and market share turned sharply lower in interim 2001", along with unfavorable developments in inventories, production, profits, wages, productivity and employments, demonstrating a threat of serious injury. She did not discuss price. USITC Report, pp. 288-289.

[3962] The United States notes in this regard that restoration of the pre-increase market share is the source for the 23% reduction in imports that the United States calculated for tin mill steel, and which Norway criticized at the Panel meeting. Norway's second oral statement (Article 5.1), para. 34. For 1999, 2000, and the first half of 2001 the United States calculated what the volume of non-NAFTA imports would have been if they had retained their 1998 market share of 10.5 percent. The United States then calculates the difference between that figure and actual imports, and calculated the average reduction over three years. According to the United States, this exercise, which appears in Exhibit US-56, indicates that import volume would have been 23.13% lower if imports had not increased their market share.

[3963] United States' written reply to Panel question No. 53 at the second substantive meeting.

[3964] USITC Report, pp. 66-67.

[3965] Second Supplementary Report, p. 5. According to the United States, NAFTA imports sold for prices lower than comparable domestic items in only 19% of the USITC's comparisons, while non-NAFTA imports sold for less than comparable domestic items in 58% of comparisons. USITC Report, p. FLAT-74, Table FLAT-77. The United States argues that this is a marked difference in the level of underselling.

based on "the sheer volume of the Canadian increase", without mentioning any price effect. The USITC found that Mexico did not contribute importantly to serious injury, as its imports actually decreased over the period of investigation.[3966] Moreover, it found that unit values for non-NAFTA imports fell to a greater degree than those for NAFTA imports, and that item-specific prices for non-NAFTA imports were less than comparable NAFTA imports.[3967] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that whatever the volume effect of NAFTA imports, they did not have an effect on the domestic industry's prices that required an adjustment to the price-based exercise.

7.1703 With respect to cold-finished bar**,** the USITC found that Canadian imports contributed importantly to serious injury based on Canada's "elevated share of the market in 2000" and "large percentage of total cold-finished bar imports". However, it did not indicate that these imports affected domestic prices. The USITC found that Mexico's share of imports was "very small and declining" and did not contribute to serious injury.[3968] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to its price-based exercise. With respect to rebar**,** all parties to the proceeding agreed that the USITC should make a negative injury finding with regard to Canadian and Mexican imports.[3969] The USITC found that the volumes of Canadian rebar were "consistently very small", and that the volume of Mexican rebar declined by 81% over the investigation period. The USITC also noted that there were no comparisons of Canadian imports with comparable products from domestic or other import sources, and that rebar from Mexico was sold at higher prices than comparable items from other import sources.[3970] Thus, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to the price-based exercise. With respect to other welded pipe**,** the USITC found that imports from Canada and Mexico, while substantial, did not contribute importantly to the threat of serious injury. The USITC plurality on this issue found that NAFTA imports were decreasing at the very end of the investigation period, while imports from other sources were increasing. The plurality also noted that Canadian standard pipe, a high-volume product, sold for higher prices than comparable pipe from non-NAFTA sources. The plurality found that, although Mexican pipe undersold comparable domestic products early in the investigation period, there were no comparisons for 2000 and interim 2001. Since they had made a threat of serious injury finding, the Commissioners in the plurality directed their focus mainly to the most recent import trends.[3971] For similar reasons, the price-based exercise relied on data for the later part of the investigation period.[3972] In light of the findings of decreasing import volume, overselling for Canadian products, and reduced sales of comparable domestic and Mexican products at the end of the investigation period, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to the price-based exercise.

7.1704 With respect to FFTJ, the USITC found that imports from both Canada and Mexico were substantial and contributed importantly to serious injury. The USITC found that imports from Canada had a large and increasing volume. The unit values for Canadian FFTJ were twice as high as those for

[3966] USITC Report, pp. 100-102.
[3967] Second Supplementary Report, p. 6.
[3968] USITC Report, p. 108.
[3969] USITC Report, pp. 115-116, footnotes 698 and 701.
[3970] USITC, pp. 115-116 and footnote 704.
[3971] USITC Report, pp. 168-170. The USITC made a divided finding with regard to whether Canadian imports were substantial and contributed importantly to serious injury. (The finding regarding Mexico a 4-2 vote.) The views of Vice Chairman Okun and Commissioner Hillman, which are discussed here, represent two of three votes for exclusion of Canadian imports.
[3972] United States' first written submission, paras. 1133-1137.

other imports or the domestic product, but the USITC expressed concern that the discrepancy might reflect different product mix. There was no item-specific pricing information to confirm that Canadian FFTJ sold for higher prices than comparable imported FFTJ.[3973] In light of these findings, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States concluded that there was no need to make an adjustment to its price-based exercise to account for Canadian imports. The USITC also found that FFTJ from Mexico undersold comparable domestic products "by substantial and increasing margins".[3974] The price-based exercise indicated that a measure of up to 30% would be commensurate with the injury related to increased imports, while the safeguard measure was a tariff of 13% in the first year. Imports of FFTJ from Mexico never accounted for more than 9% of apparent domestic consumption, and had fallen to 5.8% of domestic consumption in 2000.[3975] Accordingly, for purposes of evaluating the Article 5.1 consistency of the President's safeguard measure, the United States considers that an adjustment to reflect the injurious effects of imports from Mexico would not change the conclusion that the safeguard measure was applied no more than the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

7.1705 With respect to stainless steel bar**,** the USITC found that imports from Canada contributed importantly to serious injury, while imports from Mexico did not. Although imports from Canada increased at a lesser rate than other imports from other sources for most of the period, they increased at a higher rate in the first half of 2001.[3976] While imports from Canada sold for less than comparable domestic stainless bar in seven of ten comparisons, they sold at higher prices than comparable non-NAFTA imports.[3977] In fact, non-NAFTA imports sold for less than comparable domestic products in 40 of 43 comparisons.[3978] Imports from Mexico decreased over the course of the investigation period, and accounted for "an extremely small percentage of total imports". There were no pricing comparisons for Mexican imports.[3979] The USITC also found that imports from non-NAFTA sources accounted for all of the domestic industry's market share loss during the 1996-2000 period.[3980] In light of the larger number of instances of underselling by non-NAFTA imports, and the fact that prices for non-NAFTA imports were lower than prices for comparable NAFTA imports, we concluded that there was no need to make an adjustment to its price-based exercise. Finally, with respect to stainless steel rod**,** the USITC found that imports of stainless steel rod from Canada and Mexico did not contribute importantly to serious injury. Imports from Canada and Mexico declined over the investigation period, while "Mexico exported an extremely small volume of stainless rod to the United States in 1999 and did not export any stainless rod to the United States in 1998, 2000, and interim 2001".[3981] In light of these findings, the United States concluded that there was no need to make an adjustment to its price-based exercise.[3982]

7.1706 Korea argues that the injury from NAFTA imports was not isolated as required by Article 4.2(b) and also Article 5.1 of the Agreement on Safeguards, and the selection of a benchmark year did not correct in any way for this deficiency. The United States simply focused on non-NAFTA imports without regard to the injurious effects of NAFTA imports.[3983] Also the United States failed to

[3973] USITC Report, p. 179.
[3974] USITC Report, p. 180.
[3975] USITC Report, p. TUBULAR-C-6.
[3976] USITC Report, p. 213.
[3977] USITC Report, p. 214; Second Supplementary Report, p. 9.
[3978] USITC Report, p. STAINLESS-86, Table STAINLESS-99.
[3979] USITC Report, p. 214 and footnote 1361.
[3980] Second Supplementary Report, p. 9.
[3981] USITC Report, pp. 222-223.
[3982] United States' written reply to Panel question No. 52 at the second substantive meeting.
[3983] Korea's second written submission, paras. 213-216 and 235.

take into account the extent to which such NAFTA imports were likely to increase if all other sources are controlled, and whether such imports would effect or dilute the remedial effects of the measure.[3984]

7. Reduction in the level of the measures over a three-year period

7.1707 The United States notes that it decided to reduce the steel safeguard measures over time because Article 7.4 of the Agreement on Safeguards (and United States law) require progressive liberalization of all safeguard measures of more than one year in duration. The United States did not consider modelling results in choosing the schedule for progressive liberalization. Since the model is based on limited data from a historic time period, its results would, with the passage of time, become less reflective of the price, volume, and revenue effects of increased imports and of the measure itself. In addition, the application of the safeguard measures would itself change the effect of imports in the future, redoubling the difficulty of estimating the effect of a phased liberalization of the measures.[3985]

7.1708 In line with the Working Party's findings in *US – Fur Felt Hats*, the United States recalls that it did not attempt to predict future developments. Rather, the United States chose a level and schedule of progressive liberalization of the steel safeguard measures that would provide the relevant industries sufficient resources to adjust, while bringing the level of each measure down sufficiently that a transition to removal of the measure after the third year would not be too abrupt. The United States applied the safeguard measures for a period that would require a mid-term review, at which time it could evaluate the condition of the domestic industry and the role of imports to decide whether these required action of some sort.[3986]

7.1709 Korea notes that there is no discussion of this point in either the economic or numerical analysis. Moreover, there is no discussion or consideration of the relevant basis for such liberalization required by Article 7.4 "to facilitate adjustment" (cross-referenced in Article 5.1 "to facilitate adjustment") in any documents forming the record of this proceeding. In terms of the President's liberalization schedule for flat-rolled, for example, the tariff declines from 30% to 24% to 18%, while the USITC decline is from 20% to 17% to 14%. For "welded other", the President's measure decreases from a 15% tariff to 12% to a 9% tariff, while obviously the USITC recommended a TRQ. In the USITC remedy memos, there is no modelling of liberalization. The different scenarios take into account lower levels of measures (*e.g.*, a 5% tariff and a 10% tariff) but none use exactly the levels proposed by the USITC majority. Nor is it apparent how the President determined the liberalization schedule and therefore limited the measure to the permissible extent as required by Article 5.1.[3987]

8. Difference between the economic models to be used for non-attribution (Article 4.2(b)) and for the assessment of the measure to be applied (Article 5.1)

7.1710 Korea[3988] and Brazil[3989] argue that there is at least one significant difference in undertaking a modelling exercise for Article 4.2(b) purposes and that required for Article 5.1 purposes. Under Article 4.2(b), one is modelling past events and factors affecting those events. Thus, the outcome is a given and what is being modelled is the relative importance of the various factors which led to the outcome. Under Article 5.1, one is attempting to predict or obtain a future outcome based on past

[3984] Korea's written reply to Panel question No. 52 at the second substantive meeting.
[3985] United States' written reply to Panel question No. 55 at the second substantive meeting.
[3986] United States' written reply to Panel question No. 55 at the second substantive meeting.
[3987] Korea's written reply to Panel question No. 51 at the second substantive meeting.
[3988] Korea's written reply to Panel question No. 44 at the second substantive meeting.
[3989] Brazil's written reply to Panel question No. 36 at the second substantive meeting.

events and the influence of various factors on those events. This means that one has to make certain assumptions about, for example, supply from domestic mills and demand. If these assumptions prove correct, the model will likely provide the desired result. However, if the assumptions prove incorrect (for example, demand is stronger than assumed), the model likely will not provide the desired result. Thus, it is important that the assumptions on which the model is based be reasonable. For example, a model which does not take into account the existence of anti-dumping and countervailing duty orders and their effects on price and volume based on historical experience will not accurately predict the effect of tariffs at various levels on import volume and price.

7.1711 The European Communities[3990] submits that although the objectives of a non-attribution analysis under Article 4.2(b) and the calculation of the extent of a safeguard measure for purposes of Article 5.1 are different, the basic parameters and characteristics of the models used could be the same. For the purposes of Article 4.2(b), the data on imports and the state of the domestic industry will be a given and the model would be used to assess the correlation between increases in imports and the state of the domestic industry compared with that of other factors impacting the domestic industry and therefore to measure the extent to which serious injury suffered by the domestic industry is attributable to increased imports. For the purposes of Article 5.1, the same model could be used to test the effect that a proposed safeguard measure (a given variable) would have on the economic factors considered to constitute serious injury (dependent variables) and whether this effect would correspond to that properly attributed to increased imports. The model would not provide a complete answer to the inquiry required under Article 5.1. According to the European Communities, a WTO Member seeking to apply a safeguard measure would also have to assess, in addition, whether a safeguard measure that goes no further than preventing and remedying serious injury properly attributed to increased imports, will in fact facilitate adjustment and is in fact needed to facilitate adjustment. That is, whether the domestic industry would use the relief granted to adjust and is not able to adjust to increased imports without the assistance of safeguard measures.

9. Conclusions

7.1712 On behalf of the complainants, Norway concludes that given the legal errors committed by the United States in defining the permissible extent of the measure, it seems very unlikely that the USITC statement has any truth to it. This is also inconceivable, given the flaws in its causation analysis as well as its failure to adequately perform a non-attribution analysis. Furthermore, the USITC statement is not supported by any facts – making it a mere allegation of consistency that does not in any way rebut the arguments presented by the complainants. However even assuming, for the sake of argument, that none of the other violations of preceding Articles existed, the measures would still fail to live up to the substantive requirements of Article 5.1 of the Agreement on Safeguards. The United States claims in this respect that it can rebut the complainants' prima facie case of inconsistency with Article 5.1, by showing that the measures were commensurate with the injurious effects attributable to increased imports.[3991] The United States refers to the USITC Report and its presentation of "indicators of injury" and the description of the "interplay among those factors"[3992], but none of this represents a sufficiently detailed analysis of injurious effects attributable to imports. This is clearly not enough to rebut the presumption that the complainants so clearly establish of a prima facie case of violation of Article 5.1. In this respect it should be noted that the President chose

[3990] European Communities' written reply to Panel question No. 44 at the second substantive meeting.

[3991] United States' second written submission, para. 220; Norway argues that when this paragraph is read in conjunction with the United States' written reply to Panel question No. 114 at the first substantive meeting, the United States seems to agree that it has the burden of proving that its measures do not go beyond what is necessary.

[3992] United States' second written submission, para. 221.

measures not proposed or evaluated by the USITC. Finally, even if the Panel were to accept that the United States present only *ex post facto* justifications, this has not been done either, as Korea details in Exhibit 14 and other related documents. The United States' failure to explain and justify its measures is clearly a breach of Articles 3.1, 4.2(b) and 4.2(c) – as well as Article 5.1 of the Agreement on Safeguards.[3993]

7.1713 The United States concludes by stating that, in accordance with Article 5.1, the steel safeguard measures were applied no more than to the extent necessary to prevent or remedy serious injury caused by increased imports. The United States submits that the complainants offer arguments based on misinterpretations of Article 5.1, attempt to layer requirements onto the Agreement on Safeguards that have no grounding in the text, and assert claims that, if accepted, would undermine the fundamental purpose of the Agreement on Safeguards. Furthermore, the complainants have failed to establish a prima facie case that the United States has acted inconsistently with Article 5.1.[3994]

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7.1714 Norway argues that having established that the US measures go beyond the extent necessary to remedy injury caused by imports, a violation of the requirement in Article 7.1 that the remedy should only be applied for such period of time as may be necessary is an automatic consequence.[3995]

7.1715 The United States responds that an inconsistency with Article 5.1 does not automatically result in an inconsistency with Article 7.1 because the two provisions cover different aspects of a safeguard measure. In particular, Article 5.1 requires that the safeguard measure not be applied beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment. As the panel in *US – Line Pipe* explained, in examining which of two measures is applied to a greater extent, the analysis should "compare[] the application of the measures as a whole" and not "compare[] the application of the separate constituent parts of the measure in isolation".[3996] In performing this analysis, the panel considered the type of measure (TRQ versus quantitative restriction), the level of restriction (amount subject to lower duty rate versus quota) and duration.[3997] The United States submits that, in contrast, Article 7.1 addresses only one constituent part of the measure – the duration – which may be "only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment". A measure might be found inconsistent with Article 5.1 because its level was too high even though the chosen duration was permissible. According to the United States, therefore, an inconsistency with Article 5.1 does not automatically result in an inconsistency with Article 7.1. Norway's arguments regarding Article 5.1, even if accepted by the Panel, do not meet its burden of proof to establish an inconsistency with Article 7.1.[3998]

7.1716 Norway recalls that Article 7.1 is the temporal corollary to the requirement in Article 5.1 on the level of the remedy, and they both come as a package, as the United States seems to admit.[3999] Norway submits that the Panel should, therefore, find that the breach of Article 5.1 also entails a breach of Article 7.1 of the Agreement on Safeguards.[4000]

[3993] Norway's, second oral statement on behalf of the complainants, paras. 29-37.
[3994] United States' second written submission, para. 179.
[3995] Norway's first written submission, paras. 370-371.
[3996] Panel Report, *US – Line Pipe*, para. 7.97.
[3997] Ibid., para. 7.96.
[3998] United States' first written submission, paras. 1212-1214.
[3999] United States' first written submission., para. 1212.
[4000] Norway's second oral statement on behalf of all complainants, paras. 36-37.

K. PARALLELISM

1. Basis and features of the parallelism requirement

7.1717 Japan and Brazil point out that Articles 2.1 and 2.2 establish the basic requirements for imposing safeguards measures. Article 2.1 requires a determination of: (1) increased quantities of the "*product … being imported*"; (2) serious injury or threat thereof to a domestic industry; and (3) a causal link between "such increased imports" and serious injury, or threat thereof, to the domestic industry. Article 2.2 provides that "[s]afeguard measures shall be applied to a *product being imported* irrespective of its source". The Appellate Body held that Articles 2.1 and 2.2, read in concert, create a "parallelism" requirement for safeguard measures.[4001]

7.1718 The European Communities, Japan, Korea, Switzerland, Norway and New Zealand point out that the Appellate Body has emphasized several times the requirement that there must be a parallelism between the scope of a safeguard investigation and the scope of the measures imposed as a result thereof: "the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2".[4002] A gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only "if the competent authorities "establish explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards".[4003] [4004]

7.1719 The complainants recall that the Appellate Body found in *US – Wheat Gluten* that the United States' approach of including NAFTA imports in the scope of the investigation but excluding them – under certain conditions – from the scope of safeguard measures violates this principle, unless it is established through reasoned and adequate explanation that non-NAFTA imports alone satisfied the conditions for the application of a safeguard measure. In a subsequent case also involving a United States safeguard measure before the Appellate Body (*US – Line Pipe*), a footnote had been inserted in the relevant USITC Report which purported to conclude that non-NAFTA imports alone satisfy the conditions of the Agreement on Safeguards. However, the Appellate Body considered that the reasoning in this footnote did not amount to "reasoned and adequate explanation".[4005]

7.1720 The European Communities points out that the requirement of parallelism is nothing but an obligation to carry out the full analysis required under Articles 2.1 and 4.2 of the Agreement on Safeguards. If the parallelism requirement is not respected, a safeguard measure is imposed on products that have not been found to be imported in increased quantities or have not been found to cause serious injury. The wrongly included products may be of a different kind than those found to

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[4001] Japan's first written submission, paras. 301-302; Brazil's first written submission, para. 222 (emphasis added).

[4002] Appellate Body Report, *US – Wheat Gluten*, para. 96. This principle was already established in Appellate Body Report, *Argentina – Footwear (EC)*, paras. 111-113 and most recently confirmed in Appellate Body Report, *US – Line Pipe*, paras. 188 and 198.

[4003] Appellate Body Report, *US – Wheat Gluten*, para. 98.

[4004] European Communities' first written submission, paras. 598-599; Japan's first written submission, paras. 302-305; Korea's first written submission, para. 182; Switzerland's first written submission, paras. 324-325; Norway's first written submission, paras. 364-366; New Zealand's first written submission, paras. 4.169 and 4.172.

[4005] European Communities' first written submission, paras. 600, 602; Japan's first written submission, para. 304; Korea's first written submission, para. 181; China's first written submission, paras. 559-562; Switzerland's first written submission, paras. 326-327; Norway's first written submission, paras. 379-380; New Zealand's first written submission, paras. 4.170-4.171; Brazil's first written submission, para. 223.

have been imported in increased quantities and to cause serious injury or to come from different sources than those subject to the determinations.[4006]

7.1721 The United States notes that several complainants conclude from the Appellate Body's reasoning in *US – Line Pipe* that the competent authorities must conduct a separate parallelism evaluation of each of the Article 4.2(a) factors, the establishment of a causal link based on trends in imports and other indicators, and non-attribution.[4007] The United States argues that the sole requirements under Articles 3.1 and 4.2(c) are for the competent authorities to publish "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law," and providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." The Agreement does not require the use of a particular structure or format for the report, or a particular analysis. As the Appellate Body concluded in *US – Line Pipe*: "[W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures.[4008] [4009]

2. Scope of the parallelism requirement

(a) Exclusions of imports from free-trade areas

7.1722 The European Communities argues that the exclusion by the United States of four countries from the safeguard measures (Canada, Mexico, Israel and Jordan) infringes the parallelism principle.[4010] Similarly, Japan and Brazil argue that the safeguard measures in this case violate the principle of "parallelism" in Articles 2.1 and 2.2 because the President excluded NAFTA countries from the measure without an adequate and reasoned investigation of non-NAFTA imports. The USITC's analysis of non-NAFTA imports in its report in this case was far too abbreviated and incomplete to comply with the Agreement on Safeguards. The USITC's follow-up in response to USTR's request for information offered little improvement.[4011] Likewise, New Zealand submits that the United States has failed to respect the parallelism requirement. The United States has excluded certain imports that were included in its investigation among the increased imports causing "serious injury" from the application of a safeguard measure, but it has failed to establish "explicitly" or to provide a "reasoned and adequate explanation" to show that the imports not excluded from the measure meet the conditions for the application of a safeguard. This lack of parallelism relates to, *inter alia*, the exclusion of imports from the United States FTA partners. [4012] [4013] Norway argues that exclusion of imports from FTA partners is not precluded *per se*, but requires that all the necessary determinations be made – and explained in a reasoned and adequate manner – on the basis of the imports that are subject to the measure. One consequence of this is that correct increased imports and causation analyses have to be made *after* the exclusion from the investigation.[4014] Having failed on these counts, Norway submits that the United States violates the parallelism principle.[4015]

[4006] European Communities' first written submission, para. 601.
[4007] Japan's first written submssion , para. 305
[4008] Appellate Body Report, *US – Line Pipe*, para. 158.
[4009] United States' first written submission, paras. 748-749
[4010] European Communities' first written submission, paras. 594-595.
[4011] Japan's first written submission, para. 308; Brazil's first written submission, para. 228.
[4012] The factual background to these exclusions is outlined above in Part II A, paras. 2.11-2.12.
[4013] New Zealand's first written submission, para. 4.174.
[4014] Norway's second written submission, para. 182.
[4015] Norway's first written submission, paras. 396-397; Norway's second written submission, para. 187.

(i) Exclusion of NAFTA imports

7.1723 New Zealand argues that the United States has done here precisely what it did in *US – Wheat Gluten* and *US – Line Pipe*. It conducted its safeguards investigation on the basis of the total quantity of subject imports, but then imposed the measure only on the products of those countries that are not members of the NAFTA.[4016] In both *US – Wheat Gluten* and *US – Line Pipe*, the Appellate Body held that the failure to correlate imports subject to the measure with the imports on which the injury determination was based, violated the parallelism requirement.[4017]

7.1724 New Zealand contends that the United States did not meet the key parallelism requirements in the case of their investigation into steel imports. In its Report, the USITC made affirmative findings that imports from both Mexico and Canada of CCFRS constituted a substantial share of total imports and that imports from Mexico contributed importantly to the serious injury allegedly caused by imports. The important role played by imports from NAFTA sources as part of the USITC's investigation into imports from all sources was quite explicit. [4018] New Zealand submits that the finding in the Second Supplementary Report is just as flawed as the similar finding by the USITC in the *US – Line Pipe* case. In that case, the United States argued that the determination in respect of non-NAFTA imports had been substantiated by the USITC in footnote 168 to its report. In that footnote, the USITC had indicated that it would have reached the same result "had we excluded imports from Canada and Mexico from our analysis".[4019] The USITC noted that non-NAFTA imports increased significantly over the period of investigation and that the level of non-NAFTA imports was higher during the later part of the period of investigation than in the first years.[4020] It also stated that the average unit prices of the non-NAFTA imports placed these imports among the lowest-priced imports.[4021] The Supplementary Report makes an assertion that "increased imports of CCFRS from non-NAFTA countries are a substantial cause of serious injury to the domestic industry". However, this assertion is not supported by any reasoned or adequate analysis. According to New Zealand, the USITC, failed to evaluate the share of the domestic market taken by non-NAFTA imports and failed to evaluate other factors relevant to the situation of the industry concerned. It did not examine the impact of NAFTA imports on the domestic industry if these exports were to be excluded from the measure. The USITC also failed to make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and it failed to demonstrate the causal link between increased imports from non-NAFTA sources and serious injury involving a genuine and substantial relationship of cause and effect. Moreover, there is no acknowledgement in the Second Supplementary Report that the USITC had earlier determined that imports of both Mexico and Canada, considered individually, accounted for a "substantial share" of total imports and that imports from Mexico "contributed importantly" to the serious injury. The failure by the USITC to explain in its Supplementary Report its earlier findings reinforces the conclusion that the United States has failed to provide an adequate and reasoned explanation to support its exclusion of imports from its NAFTA partners from the application of the safeguard measure.[4022]

[4016] Appellate Body Report, *US – Line Pipe*, para 186; Appellate Body Report, *US – Wheat Gluten*, para 98.

[4017] Appellate Body Report, *US – Line Pipe*, para 197; Appellate Body Report, *US – Wheat Gluten*, para 98.

[4018] New Zealand's first written submission, paras. 4.177-179; see also Japan's first written submission, para. 309-311.

[4019] USITC statement quoted in Appellate Body Report, *US – Line Pipe*, para 189.

[4020] Ibid.

[4021] Ibid.

[4022] New Zealand's first written submission, paras. 4.181-4.185.

7.1725 Similarly, China and Switzerland submit that neither the USITC Report (and the supplemental report) nor the Presidential Proclamation indicated whether imports from Canada and Mexico were excluded from the scope of the investigation. China and Switzerland consider that it is established, prima facie, that the United States included these imports in the scope of its investigation for each of the products concerned.[4023] The United States failed to show that imports actually included in the scope of the safeguard measure alone satisfied the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards. The Second Supplementary Report of the USITC is not a sufficient analysis establishing through an adequate and reasoned explanation that all other imports without those of Canada and Mexico (and Jordan and Israel) alone fulfilled the conditions of being imported in such increased quantities so as to cause or threaten to cause serious injury to the domestic industry.[4024]

(ii) Exclusion of imports from Israel and Jordan

7.1726 China, Switzerland, Norway and the European Communties consider that the exclusion of Israel and Jordan from the application of the measures is inconsistent with the United States obligations under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4025] The complainants argue that the USITC Report should have mentioned that imports from Israel and Jordan were "excluded" from the scope of the investigation. Secondly, if such mention is not present, it should be concluded, *a priori*, that these imports were included in the scope of the investigation for each of the products concerned. China submits that in the present case, neither the USITC Report (and the Second Supplementary report) nor the Presidential Proclamation indicated whether imports from Israel and Jordan were excluded from the scope of the investigation. Without any proof to the contrary, China considers that it is established, prima facie, that the United States included these imports in the scope of its investigation.[4026]

7.1727 China notes in this regard that the USITC Second Supplementary Report only indicates on this point that "the Commission indicates, in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners".[4027] Commissioner Bragg states only that "Given that imports from Israel and Jordan, respectively, are either negligible or nonexistent for each of my affirmative determinations, as discussed in my separate views on remedy, I note that the recommended exclusion of imports from Israel and Jordan, respectively, from my injury analyses does not change my analyses or affirmative injury findings"[4028] In light of the precise determinations of the Appellate Body, especially in the *US – Line Pipe* case, China and Norway submit that the United States failed to establish "explicitly" that increased imports from sources other than Israel and Jordan satisfy the conditions as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.[4029] Norway adds that the violation of parallelism does not address whether Jordan and Israel could have been excluded from the measure by virtue of Article 9 of the Agreement on Safeguards.[4030]

[4023] China's first written submission, para. 580; Switzerland's first written submission, para. 346.

[4024] China's first written submission, para. 588.

[4025] European Communities' first written submission, paras. 612; Switzerland's first written submission, para. 33 et seq.; Norway's first written submission, para. 390.

[4026] The complainant's first oral statement on parallelism, para. 729; China's first written submission, paras. 571-572.

[4027] USITC Supplementary Report, 4 February 2002, p. 4.

[4028] USITC Supplementary Report, 4 February 2002, p. 19.

[4029] China's first written submission, paras. 576-578; Norway's first written submission, para. 379; Switzerland's first written submission, paras. 337-345.

[4030] Norway's first written submission, para. 380.

7.1728 New Zealand also argues that the exclusion of imports from Israel and Jordan is inconsistent with the parallelism requirement. Imports from all sources, including Israel and Jordan, were included in the USITC's increased imports determination. However, Section 403 of the Trade and Tariff Act of 1984, 19 U.S.C. & 2112, and Section 221 of the United States-Jordan Free Trade Area Implementation Act authorize the President to exclude imports from Israel and Jordan, respectively, from any safeguard action under Section 201. In line with the recommendations made by the USITC on Remedy[4031] Proclamation No. 7529 clearly states that the safeguard measures applied to CCFRS do not apply to imports originating from, *inter alia*, Israel and Jordan. New Zealand submits that the United States should have provided a reasoned and adequate explanation establishing explicitly that imports from sources other than Israel and Jordan "satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards". Yet no such reasoned or adequate explanation is provided in the USITC Report. The statements of the USITC[4032] and of Commissioner Bragg[4033] in the Second Supplementary Report do not meet the requirements for justifying an absence of parallelism. Accordingly, the exclusion of Israel and Jordan from the application of the measures is therefore also inconsistent with the United States obligations under Articles 2.1 and 4.2 of the Agreement on Safeguards.[4034] [4035]

7.1729 The United States contends that the USITC's findings regarding the minuscule quantity of imports from Israel and Jordan satisfy the requirement to provide findings and reasoned conclusions that imports from other sources by themselves caused serious injury. The USITC found that imports from Israel were "small and sporadic" and that there were "virtually no imports" from Jordan. The USITC's finding that the exclusion of imports from Israel and Jordan would not change its conclusions met the requirements of Articles 3.1 and 4.2(c).[4036] In fact, since the USITC Reported percentages with a single decimal place, imports from Jordan were less than the rounding error in some of the USITC's statistics. During the entirety of the investigation period, there were no imports from Israel for four of the ten covered products (cold-finished bar, rebar, stainless steel rod, and tin mill). For CCFRS and hot-rolled bar, imports from Israel were never more than 0.01% of total imports. For stainless steel wire, imports from Israel never rose above 0.1% of total imports. For welded pipe, there were essentially no imports after 1998, and imports before that time never amounted to more than 0.4% of total imports. For FFTJ and stainless steel bar, imports after 1997 were never more than 0.3% of total imports. In this situation, the observation that there were "virtually no imports from Jordan" and that imports from Israel were "small and sporadic" provides a succinct – and thoroughly reasonable and adequate – explanation of why exclusion of such imports would not change the determinations of the USITC or of the individual Commissioners. Any further analysis would simply repeat verbatim the conclusions provided elsewhere in the USITC Report. It comports with the Article 3.1 requirement of findings and reasoned conclusions. If a particular factor is so insignificant that it does not change the results of the analysis – which the record shows was the case for imports from Israel and Jordan – a reasoned explanation of that conclusion says just that, and no more. There was nothing more to be said about imports from sources other than Israel and Jordan except what the USITC said – that exclusion would not change the conclusions of the USITC or the

[4031] USITC Report, Vol. 1, p 366 and footnote 69.

[4032] Second Supplementary Report, 4 February 2002, p 4 (Exhibit CC-11).

[4033] Ibid., p 19 (Exhibit CC-11).

[4034] It was noted that, in contrast to the substantial level of imports to the United States from Canada and Mexico, imports to the United States from Israel and Jordan were negligible. It would also appear that the United States could exclude imports from Jordan under Article 9 of the Agreement on Safeguards. Nevertheless, the approach taken by the United States to excluding imports from Jordan and Israel from the application of the safeguard remains inconsistent with its obligations in regard to parallelism.

[4035] New Zealand's first written submission, para. 4.187-4.189.

[4036] USITC Report, p. 366; Second Supplementary Report, p. 4.

individual Commissioners.[4037] Article 3.1 of the Agreement on Safeguards requires that a competent authority set forth findings and reasoned conclusions on all issues of fact and law. The USITC set forth such findings and reasoned conclusions – both for all imports and for non-NAFTA imports. Because exclusion of imports from Israel and Jordan could not have affected the data on which the USITC relied to make its findings and conclusions, it could not have affected the findings and conclusions themselves with respect to either all imports or non-NAFTA imports. In other words, the findings and conclusions the USITC reached were equally applicable if imports from Israel and Jordan were excluded. Additionally, Article 3.1 requires an authority to address all "pertinent" issues in its report. Consequently, the report need not address issues that are not "pertinent", which would be the case if that issue did not affect the underlying data on which the authority relied to make its findings and conclusions.[4038]

(iii) Existence of a de minimis rule?

7.1730 The European Communities and New Zealand argue that in relation to Israel and Jordan, the USITC appears to have applied a *de minimis* exception instead of providing the detailed analysis and evaluations required by Article 4.2 of the Agreement on Safeguards. It considers that these imports were indeed small and sporadic but nowhere substantiated this and nowhere established that the remaining imports would have satisfied the Agreement on Safeguards. The European Communities submits that there is no *de minimis* rule in the Agreement on Safeguards. Where fair trade is restricted, every ton counts.[4039]

7.1731 In response, the United States submits that the reasoning expressed above in relation to Israel and Jordan does not, as the European Communities charges, read a *de minimis* rule into the Agreement on Safeguards. Rather, it comports with the Article 3.1 requirement of findings and reasoned conclusions.[4040]

7.1732 The European Communities and Switzerland respond that the United States has not provided a legal basis for a *de minimis* clause for FTA partners in the Agreement on Safeguards. The United States tries to excuse its failure to comply with the substantive requirements in the Agreement on Safeguards by referring to Article 3.1. The European Communities' claim is, however, not merely one of defective statement of reasons. Failure to provide an adequate explanation to show that a substantive requirement has been met is a violation of the substantive requirement.[4041] The European Communities and Switzerland point out that the USITC Report of October 2001 contains no separate determination whatsoever for Israel and Jordan, whose import data are not even disaggregated from the "all minus NAFTA" data.[4042] Since there is no such thing as a *de minimis* rule for FTA partners in the Agreement on Safeguards[4043], and since the principle of parallelism was enunciated by the Appellate Body in broad and unqualified terms, even if excluded countries were the smallest exporters of a particular product, the United States is not entitled to rebut the prima facie case made be the European Communities by relying on the magnitude of the unlawful exclusion. Also, even assuming that the hypothetical assertion made by the United States was relevant, it was not demonstrated

[4037] United States' first written submission, paras. 754-759.
[4038] United States' written reply to Panel question No. 97 at the first substantive meeting.
[4039] European Communities' first written submission, paras. 616, 621; New Zealand's second written submission, para. 3.147.
[4040] United States' first written submission, paras. 754-759.
[4041] European Communities' second written submission, para. 438; Switzerland's second written submission, para.108.
[4042] European Communities' second written submission, para. 450; Switzerland's second written submission, para.108.
[4043] European Communities' first written submission, paras. 616 and 621.

through a reasoned and adequate explanation before the relevant determinations were made or before the measures were taken. *A fortiori* it cannot be justified *ex post* in dispute settlement.[4044] [4045] The European Communities insists that a *de minimis* exclusion in favour of the United States FTA partners – Israel and Jordan, and also NAFTA countries – is not in the text of the Agreement on Safeguards. This, says the European Communities, must be contrasted with the *de minimis* clause which is in the Agreement on Safeguards – that is, the one set out in Article 9.1 in favour of developing countries. The European Communities also notes that there are several other WTO texts where *de minimis* clauses are clearly set out, such as Article 5.8 of the Anti-Dumping Agreement, Articles 27.10, 27.11 and 27.12 of the SCM Agreement and Article 6.4 of the Agreement on Agriculture. The European Communities argues that if the drafters of the Agreement on Safeguards had wanted to write a *de minimis* clause for FTAs in the Agreement, they perfectly knew how to write it.[4046]

7.1733 The European Communities also contends that it is not possible to claim that there is any determination whatsoever on imports from all sources minus NAFTA, Israel and Jordan amongst those identified by the United States as the determinations under review. As for Jordan, footnote 69 to the USITC remedy recommendations[4047] makes clear that the United States legislation on the basis of which the United States eventually excluded Jordan from the safeguard measures[4048] entered into force about two months after the October determinations were made. This further confirms that the October determinations do not exclude imports from Jordan. It also shows that later findings and decisions based on such legislation cannot be related to the original October 2001 determinations.[4049] Furthermore, even in the Second Supplementary Report, the only references to Jordan and Israel are cross-references to the remedy recommendations pages of the October 2001 USITC Report, supplemented by a generic and unreasoned statement that excluding imports from Israel and Jordan would not change the conclusions of the Commission or individual Commissioners.[4050] However, without a reasoned and adequate supporting explanation, such conclusion should have the same fate as that reviewed by the Appellate Body in *US – Line Pipe*.[4051] Two irrelevant findings in the Second Supplementary Report do not make a relevant one. In other words, the sum of the findings on non-NAFTA imports, and the statements on the individual impact of imports from Israel and Jordan does not amount to a finding that the imports caught by the safeguard measures, alone, underwent a recent sudden sharp and substantial increase consistently with Article 2.1 of the Agreement on Safeguards and, moreover, caused serious injury to the domestic industry. The remedy recommendations are not, even under United States law, increased imports and injury determinations. For some product groups, moreover, imports from Israel are not discussed at all.[4052] Furthermore, there is no breakdown of imports from Israel and Jordan in the Second Supplementary Report either.

7.1734 As regards what the United States means by "small and sporadic" imports which "could not have affected any of the data the USITC used", the European Communities points to the imports of hot-rolled bar from Israel during all the five years of the period of investigation. The European

[4044] For the avoidance of doubt, the European Communities provides in Exhibit CC-108 to this submission some examples of the size of excluded NAFTA imports compared to imports from included countries in the present case.

[4045] European Communities' second written submission, para. 459.

[4046] European Communities' written reply to Panel question No. 60 at the second substantive meeting

[4047] USITC Report, Vol. I, p. 366.

[4048] *United States-Jordan Free Trade Area Implementation Act*, Public Law 107–43—28 September 2001, 19 U.S.C. 2112, available on the internet at the address: "http://thomas.loc.gov/"

[4049] European Communities' second written submission, paras. 4.66-4.68.

[4050] USITC Second Supplementary Report, p. 4; see also United States first written submission, paras. 755-769.

[4051] Appellate Body Report, *US – Line Pipe*, para. 196.

[4052] USITC Report, Vol. I, pp. 399 and 405.

Communities argues that if these imports were legitimately excluded because, to use the United States formula, they are small and sporadic, then the sources of Denmark, New Zealand, Ireland, Singapore, Hong Kong, Cyprus and Monaco should also have been so considered.[4053] The European Communities points out that it was forced to resort to sources outside the USITC Report to compile these data, since no breakdown of import data from Israel and Jordan can be found in the USITC Report. Thus, even if a *de minimis* exclusion for FTA partners was allowed, *quod non*, and even if there was an implied determination, *quod non*, there is certainly no reasoned and adequate explanation therefor in the Report. Although the size of excluded exports from Israel and Jordan might appear small in this case, upholding this type of exclusion paves the way for an uncontrolled and unlimited relaxation of the standards in the Agreement on Safeguards. The European Communities questions what is the limit to *de minimis*? [4054]

7.1735 New Zealand submits that it, in no way, disputes the fact that imports from Jordan and Israel may indeed be considered negligible. The point is that if the United States wished to exclude imports from Israel and Jordan from the application of the safeguard, it could have excluded them at the outset of its investigation to determine imports causing injury. However it did not do so. Accordingly, this means that the United States cannot now seek to avoid its obligation to provide a "reasoned and adequate explanation that establishes explicitly" that imports covered by the measure "satisfy the conditions for the application of a safeguard measure".[4055] A statement that simply notes the negligible nature of certain imports certainly does not meet these conditions.[4056] The reasoned and adequate explanation that the Appellate Body spoke of is an explanation that would "establish explicitly" that imports covered by the measure "satisfy the conditions for the application of a safeguard measure".[4057] The United States seeks to twist this by referring instead to a "reasonable and adequate explanation of the findings by the USITC … that the exclusion of imports from these FTA partners would not change their conclusions".[4058] [4059]

7.1736 The United States repeats that it is not arguing that a *de minimis* rule should be read into the parallelism analysis articulated by the Appellate Body. Instead, the United States has argued that, when imports from certain countries are so minuscule that their exclusion will – quite literally – not change the numeric data examined by a competent authority in its causation analysis, the competent authority has fully complied with its obligation under the Agreement to provide a reasoned and adequate analysis of the issue by explaining that exclusion of these volumes will have no impact at all on its findings in a particular case. As a substantive matter, parallelism requires that imports from sources that were not excluded (the "covered sources"), by themselves, satisfy the requirements of the Agreement on Safeguards. Article 3.1 would require findings and reasoned conclusions for that finding. In the case of imports from sources that are zero, or essentially zero when compared with imports from covered sources, a full and complete explanation would indicate that the findings and reasoned conclusions remain unchanged because the exclusion of imports from such sources does not change the underlying data in any way. That is exactly the explanation that the USITC provided. Thus, the United States does not contend that the Agreement on Safeguards contains a *de minimis* requirement, as it does not. Rather, as a legal matter, the USITC Report complied with Articles 3.1 and 4.2(c) by stating that imports from Israel and Jordan were isolated and sporadic, and did not

[4053] European Communities' second written submission, para. 473.
[4054] European Communities' second written submission, paras. 475-476.
[4055] Appellate Body Report, *US – Line Pipe*, para 188.
[4056] New Zealand's second written submission, paras. 3.145-3.146.
[4057] Ibid.
[4058] United States' first written submission, para 754.
[4059] New Zealand's second written submission, para. 3.147.

change the analysis in any way. Thus, Articles 3.1 and 4.2(c) do not require any further explanation.[4060]

(b) Developing country exclusions

7.1737 The United States contends that there was no obligation to perform a parallelism analysis with regard to excluded developing countries. The exclusion of WTO Members from application of a safeguard measure pursuant to Article 9.1 is an exception to Article 2.2 and, as such, is not subject to parallelism. Parallelism derives from the use of the term "products . . . being imported" in both paragraphs 1 and 2 of Article 2. Article 9.1 provides that "[s]afeguard measures shall not be applied against a product originating in a developing country Member" under certain conditions. Thus, it acts as an exception to the Article 2.2 obligation that "[s]afeguard measures shall be applied to a product being imported irrespective of source". This exception relates exclusively to the application of a safeguard measure, and not to the underlying investigation or determination of serious injury. Thus, a Member may include developing country Members in the investigation and determination of serious injury, but still exclude them from the safeguard measure if the Article 9.1 criteria so require. In *US – Wheat Gluten*, the Appellate Body confirmed that Article 9.1 acts as an exception to parallelism. Since Article 9.1 acts as an exception only to the application of the safeguard measure, the United States argues that it was under no obligation to exclude developing country exports from the analysis of whether imports increased. Indeed, Article 4.2(a) requires the competent authorities to evaluate "the rate and amount of the increase in imports of the product concerned". Absent an exception to this requirement, which Article 9.1 does not provide, the USITC was required to include developing country imports in its analysis of injury.[4061]

(c) Product exclusions

7.1738 The European Communities argues that another failure to respect parallelism arises from the fact that many specific products were excluded from the safeguard measures on the basis of individual requests. The European Communities and China argue that these exclusions have been made without carrying out a proper increased imports and injury determination, i.e. more precisely without determining whether or not serious injury could still be caused by imports of products other than the ones concerned by the exclusions.[4062]

7.1739 More specifically, New Zealand points out that Proclamation No. 7529 provided for the exclusion from the application of the safeguard measure of certain specified products and provided that requests for the exclusion of other products would be considered in the future. Since 5 March 2002, in total 727 products have been excluded from the application of the safeguard measure. All of these products were included in the USITC's investigation and determination that increased imports were causing serious injury to the United States domestic industry. New Zealand argues that in this regard, as with the exclusion of FTA partners, the United States fails to comply with the requirement of parallelism. The United States has at no time established "explicitly", or provided any "reasoned and adequate explanation" to show, that imports of non-excluded products taken alone meet the conditions for the imposition of a safeguard measure. The exclusion of certain imports from the application of the safeguard measure on a product-by-product basis, in the manner followed under the United States "products exclusions" process, when those imports were included in determining whether all of the requirements of the Agreement on Safeguards had been met for the taking of a

[4060] United States' written reply to Panel question No. 60 at the second substantive meeting.
[4061] United States' first written submission, paras. 775-777.
[4062] European Communities' first written submission, paras. 609-611; China's first written submission, para. 618.

safeguard measure, has implications for all aspects of the USITC's determination and undermines the conclusions reached by the USITC on each aspect of that determination. New Zealand submits that it deprives the safeguard measures in this case of any legal basis. As a result, the United States has not acted in conformity with its obligations under the Agreement on Safeguards.[4063]

7.1740 The United States contends that the Agreement on Safeguards does not support the complainants' assertion of a new type of parallelism, which would preclude the exclusion from a safeguard measure of an imported item covered by the determination of serious injury. "Parallelism" as enunciated by the Appellate Body derives from the obligation under Article 2.2 to apply safeguard measures to an imported good "irrespective of its source". Since exclusions based on physical characteristics are neutral as to source, they do not raise parallelism concerns.[4064] The United States argues that other provisions of the Agreement on Safeguards confirm that scope parallelism is not required. Article 5.1, first sentence, allows a Member to apply a safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". The obligation under the first sentence places a limit on the application of a safeguard measure, but does not restrict a Member's discretion to apply a measure to a lesser extent. The admonition to "choose measures most suitable for the achievement of these objectives" indicates further that there are many permissible options for the extent to apply a safeguard measure, and that a Member is free to choose among them. The text of Article 5 indicates, further, that a safeguard measure need not apply equally to all of the items covered by a determination of serious injury. The second sentence of Article 5.1 envisages the application of quantitative restrictions, which place no restriction on imports below the quota level, while prohibiting imports above that level. The Appellate Body has also recognized that a safeguard measure may take the form of a tariff-rate quota.[4065] In that situation, one tariff applies to imports below a specified level, and another tariff to imports above that level. Exclusion of products from the scope of a safeguard measure is no different from the application of a tariff rate quota or quota, in that some imports covered by the determination of serious injury are unaffected by the measure, while others are.[4066]

7.1741 The United States also points out that it undertook the exclusion of particular products from the scope of the safeguard measures at the behest of exporters and exporting Members, including the European Communities.[4067] Exporting Members' desire for exclusions was the subject of consultations under Article 12.3 of the Agreement on Safeguards. European Communities officials made public statements to the effect that satisfactory resolution of exclusion requests was necessary to defuse the dispute regarding application of the steel safeguard measures.[4068] The United States assumed that Members such as the European Communities would not request exclusions if they believed such an action to be inconsistent with the United States' WTO commitments. That the European Communities, having received the treatment it requested, now considers such treatment to be inconsistent with WTO rules, appears to be a change in its position. In any event, if it now has a different view, it would seem to be more logical to seek revocation of the exclusions, rather than performing an additional parallelism inquiry.[4069]

[4063] New Zealand's first written submission, paras. 4.190-4.192.
[4064] United States' first written submission, paras. 760-763.
[4065] Appellate Body Report, *Korea – Dairy*, para. 96.
[4066] United States' first written submission, paras. 764-766.
[4067] "Lamy Waffles on Steel Compensation", Highlights Exclusions, *Inside US Trade* (28 June 2002) (Exhibit US-59).
[4068] Ibid.
[4069] United States' first written submission, paras. 767-768.

7.1742 New Zealand responds that there is no legal basis in the Agreement on Safeguards nor in general international law for a restraint or prohibition on a WTO Member which is harmed by a violation of the WTO Agreements, from seeking to mitigate that harm and then proceeding to a legal challenge. A relevant analogy from domestic law is the position of a party to a contract who seeks to mitigate its loss arising from breach by another party, but does not thereby lose the right to sue for breach. Indeed in some legal traditions, the wronged party is under a duty to mitigate their loss.[4070]

7.1743 The European Communities considers that the principle of parallelism has been enounced in more general terms than the United States suggests. In *US – Wheat Gluten*, the Appellate Body clarified that the imports included in the determinations made under Article 2.1 and 4.2 of the Agreement on Safeguards should correspond to the imports included in the application of the measure, under Article 2.2.[4071] However, the Appellate Body based itself on the phrase "product being imported" – which is in no way linked to the origin notion in Article 2.2. The Appellate Body's conclusion that "a product" must have the same measuring for the purposes of the investigation as when it comes to imposing a measure is not dependent on the origin of the product. The European Communities submits that it should be noted that Article 2.2 does not employ the term "origin" but the broader term "source", which is sufficiently broad to cover situations like the product exclusions at issue in this dispute. Furthermore, by its terms, the obligation in Article 2.2 of the Agreement on Safeguards is not limited to the case when all imports with a certain origin are first included in the investigation and later excluded from a measure. A partial discrimination based on the "source" is as prohibited as a total discrimination.[4072]

7.1744 The European Communities notes that the United States tries to defend its product exclusions by relying on Article 5.1 of the Agreement on Safeguards. To start with, even if the product exclusions may not violate Article 5.1 of the Agreement on Safeguards, this would not make them *ipso facto* consistent with Articles 2 and 4. The European Communities further disagrees that such exclusions comply with Article 5.1 since all the products eventually excluded were counted in making findings under Article 2 and 4 of the Agreement on Safeguards, when the United States' authorities decided the level of remedy necessary to remedy serious injury they had before them the injury allegedly caused by all increased imports. A "lesser extent" decision must be spread over all the products investigated.[4073]

7.1745 The European Communities considers that the there is no logical or legal reason to distinguish cases where, on the one hand, the two import scopes diverge because all imports originating in a certain country are excluded from the measures, and those in which the two import scopes diverge because certain imports are excluded on the basis of the importing/using interest of certain United States companies, or still other criteria. In both cases, the imports included in the determinations made under Articles 2.1 and 4.2 do not correspond to the imports included in the application of the measures, contrary to the Appellate Body's teachings.[4074] The language of Article 2.2 of the Agreement on Safeguards is sufficiently broad to allow the same rationale developed so far by the Appellate Body to what the United States terms as "product exclusions". Indeed, the principle of parallelism is inherent in the whole Agreement on Safeguards: not just in Article 2.2 or Article 2 altogether, but also in Articles 4 and 5. The European Communities points out that in *Argentina – Footwear (EC)*, the case in which the principle was first enounced by the Appellate Body, the

[4070] New Zealand's written response to the Panel question 93 at the first substantive meeting.
[4071] United States' first written submission, para. 761, referring to Appellate Body Report, *US – Wheat Gluten*, para. 96.
[4072] European Communities' second written submission, paras. 488-495.
[4073] European Communities' second written submission, paras. 488-495.
[4074] Appellate Body Report, *US – Line Pipe*, para. 181.

European Communities had not brought a claim under Article 2.2 of the Agreement on Safeguards. Rather, it had relied on the logical continuum set out in Article 2.1 and underlying the entire Agreement. If the Appellate Body had exclusively linked the principle of parallelism to Article 2.2, in finding its violation in *Argentina – Footwear (EC)* it would have made findings *extra petitum*, i.e. beyond the claims made by the complainant, contrary to its own teachings.[4075] It is clear from the wording of Article 9.1 that when the drafters of the Agreement on Safeguards wanted to limit a provision to certain country origin they knew how to do and actually did so. When enouncing the principle of parallelism the Appellate Body had before it clear language in the Agreement on Safeguards referring to country-based scope limitations. Yet it did not so limit the principle of parallelism. It rather referred to parallelism between sources investigated and sources covered by the measures.[4076] [4077]

7.1746 The European Communities further points out that there are other WTO texts where the term "source" is employed in a broader sense than the term "origin" or "country of origin". Thus, for example, the Illustrative List of TRIMS annexed to the Agreement on Trade–Related Investment Measures mentions as a TRIM "the purchase or use by an enterprise of products of domestic *origin or* from any domestic *source*".[4078] Also, in the Anti-Dumping Agreement, the reference to "*sources* found to be dumped" in Article 9.2 is a reference to sources of supply, not to countries of origin. If the Panel were to accept the US-created labels such as "scope parallelism" and "product exclusions", it would enable the United States, next time it takes a safeguard measure, to carefully fashion its "product exclusions" to cover even all products from Canada, or Mexico, or Israel, or Jordan, or all of them together, and then claim that, because it achieved this result through what it terms "product exclusions", it is not subject to the principle of parallelism. It would be too easy indeed to circumvent the principle of parallelism.

7.1747 Similarly, for China, the parallelism requirement contained in Article 2.1 and 4.2 of the Agreement on Safeguards is also relevant to the practice of excluding certain products that were included in the injury determination from the application of the measure. There is nothing in WTO case law to suggest that the requirement of parallelism should be limited to the sources of imports. The basic rationale is the same. A safeguard measure should only be applied to products if the data relating to increased imports of those products meets the relevant threshold of "increased imports", and if the data relating to those products shows that the increased imports are causing serious injury a safeguard measures can be imposed on those same products.[4079] China disagrees with the United States which considers that if the products covered by the injury determination are broader than the products covered by the measure itself, the measure should be viewed as less restrictive and therefore consistent with Article 5.1 of the Agreement on Safeguards, and with the spirit of the WTO overall. In fact, China considers that the proportionality requirement of Article 5.1 does not allow an authority to reduce the scope of application of a measure compared to its scope of investigation, and that the parallelism requirement fully applies to the scope of products. China adds that the only solution legally possible to exclude, from the scope of application of measures, products included in the scope of investigation, would possibly to rely on the notion of "public interest" contained in Article 3.1 of the Agreement on Safeguards. However, this would require reasoned and adequate explanation in

[4075] Appellate Body Report, *India – Patents (US)*, para. 92, where the Appellate Body concluded that "[t]he jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference."

[4076] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 113-114.

[4077] European Communities' written reply to Panel question No. 62 at the second substantive meeting.

[4078] Illustrative List, para. 1(a) (emphasis added).

[4079] China's second written submission, paras. 313-314.

accordance with Article 3.1 but, according to China, this has never been forthcoming from the United States.[4080]

7.1748 In contrast, Japan contends that the parallelism obligation applies only to sources subject to the investigation, not to specific products. Current jurisprudence on parallelism is limited to sources, *i.e.* countries, and not products. The fundamental textual basis for the Appellate Body's interpretation of the parallelism requirement in all of the disputes addressing this issue to date is Article 2.2. In *US – Wheat Gluten*, the Appellate Body held that Articles 2.1 and 2.2, read in concert, create the requirement stating: "[t]o include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the Agreement on Safeguards. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted".[4081] Article 2.2, in setting the general MFN rule for safeguard measures, is first and foremost aimed at addressing the source of imports, and together with Articles 2.1 and 4.2, requires that injury and remedy be based on the same universe of sources. Indeed, in Japan's view, if the products covered by the injury determination are broader than the products covered by the measure itself, the measure is less restrictive than it would be otherwise, which is consistent with the purpose of Article 5.1. It should be noted that Article 5.1 provides the maximum limit of the protection. A WTO Member can lessen the degree of protection, within its discretion, by narrowing the scope of products subject to a safeguard measure. Moreover, Article 3.1 reads "exporters and other interested parties could present evidence and their views…as to whether or not the application of a safeguard measure would be in the public interest". This implies that the Agreement on Safeguards allows Members to exercise discretion to take into consideration a broad range of economic interests other than that of the injured domestic industry. Indeed, during the course of an investigation the competent authority should gather information on such other interests so that it can inform the final decision. In some cases, a portion of the products subject to a safeguard measure could be essential to maintaining the competitiveness or high-quality of products produced by downstream industries in an importing country. If damage to such downstream industries outweighs the benefit enjoyed by the domestic industry producing products which are generally like or directly competitive with the imports, then a small part of the imported products could be excluded from the measure for the sake of the public interest. This is particularly true in this case, as restrictions on steel imports can have extensive negative effects on United States industrial users. It is important to understand that the product exclusions issued by the United States in this particular case apply on an MFN basis. Hence there is no discrimination between countries, either *de jure* or *de facto*. If producers in other countries are able to produce and ship to the specification as set forth in the excluded product definition, they are entitled to reap the benefits of that exclusion. Indeed, this is why some requesters have strenuously objected to any quantity restrictions being placed on their exclusions.[4082] Japan also finds it odd that a country whose exporters have benefited from exclusions would now find fault with this limited method by which the United States has tried to liberalize the measure. Yet, the exclusions in themselves do not absolve the United States from abiding by its obligations under the Agreement. The fact that a limited set of products are not subject to the measure does not change this fundamental fact.[4083]

[4080] China's second written submission, paras. 342-344.

[4081] *See* Appellate Body Report, *US – Wheat Gluten*, para. 96 (emphasis original); *see also* Appellate Body Report, *US – Line Pipe*, para. 180.

[4082] Japan's second written submission, paras. 191-194; Japan's written reply to Panel question No. 92 at the first substantive meeting.

[4083] Japan's written reply to Panel question No. 93 at the first substantive meeting.

7.1749 Similarly, Brazil submits that product exclusions are addressed by Article 5.1,which limits a remedy to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Authorities are at liberty to adjust the scope of the remedy to ensure that it is limited to the extent necessary to prevent or remedy serious injury. Article 2.2 is only relevant in that exclusions must be on an MFN basis.[4084] Korea also does not agree with the position of New Zealand concerning "scope parallelism". In Korea's view, parallelism in Articles 2.1 and 2.2 of the Agreement on Safeguards refer to sources of imports. National authorities always retain the ability not to impose safeguard measures even when conditions for safeguard relief have been met. So long as the exclusion of certain products is done on an MFN basis, the fact that certain products are excluded from a measure is not in itself a violation of parallelism. Indeed, to contend the opposite is tantamount to requiring the United States to impose a measure that is *greater* than it knows to be necessary.[4085] Korea also argues that product exclusions are not addressed by Article 2.2 since that Article deals with the MFN requirement concerning product sources.[4086]

7.1750 New Zealand submits that Article 2.1 provides that a Member can only apply a safeguard measure to "a product", if "such product" meets the conditions relating to increased imports, causation and serious injury. The purpose of parallelism is to ensure that the products subject to the safeguard measure have themselves met the conditions necessary to justify the application of that measure. Where, as a result of exclusions, the products to which the safeguard measures apply no longer meet the conditions of Article 2, then there is no justification under the Agreement for the application of a safeguard measure.[4087] New Zealand recalls that the exclusions process has "resulted in the exclusion of approximately one-quarter of covered steel imports from the safeguards investigation".[4088] Accordingly, the excluded products represent a very substantial portion of the total imports considered by the USITC, which provided the basis for the United States imposition of a safeguard measure. In relying on Article 5.1 in defence, the United States appears to be admitting that certain products – around one quarter of the total – that they had counted in their determination of increased imports causing injury were in fact not in any way responsible for that injury. Indeed, the published criteria for excluding products from the safeguard measure – which focus on whether or not competitor domestic products exist – suggests that these products could not have caused serious injury in the first place. The USTR Federal Register Notice relating to exclusions reads in relevant part:[4089]

> "Each request will be evaluated on a case-by-case basis. USTR will grant only those exclusions that do not undermine the objectives of the safeguard measures. In analysing the requests, USTR will consider whether the product is currently being produced in the United States, whether substitution of the product is possible, whether qualification requirements affect the requestor's ability to use domestic products, inventories, whether the requested product is under development by a United States producer who will imminently be able to produce it in marketable quantities and any other relevant factors."

7.1751 New Zealand appreciates the candour with which the United States, having utilized imports of such products to establish the necessary thresholds for the imposition of a safeguard measure, now admits that such products were apparently all along not causing injury. This would of course also appear to carry the implication that such products should have been excluded from the "like product"

[4084] Brazil's written reply to Panel question No. 59 at the second substantive meeting.
[4085] Korea's written response to Panel question No. 92 at the first substantive meeting.
[4086] Korea's written reply to Panel question No. 62 at the second substantive meeting.
[4087] New Zealand's written reply to Panel question No. 62 at the second substantive meeting.
[4088] United States' first written submission, para 40.
[4089] Federal Register Vol. 67 No 75, 18 April 2002 (Exhibit CC-19).

groupings utilized by the United States; further underlines the flawed nature of the United States causation analysis which proceeded on the basis that these products like all others included in the like product category caused serious injury; and demonstrates the inherently flawed nature of the United States approach to remedy. The United States could have excluded such products from its determination at the outset of its investigation on the basis that they were not like products. However, as with FTA imports, it did not do so and included them in its investigation and subsequent determination. Accordingly, to the extent that the United States may wish after making this determination to exclude such products, just as in the case of FTA exclusions, the United States is obliged to provide a "reasoned and adequate explanation" that establishes "explicitly" that imports of non-excluded products taken alone meet the conditions for the imposition of a safeguard measure. The United States has at no time made any attempt to provide such an explanation.[4090]

7.1752 New Zealand insists that there is no basis in terms of logic or principle for a distinction between "scope" parallelism and "source" parallelism. The Appellate Body's decisions in *US – Wheat Gluten* and *US – Line Pipe* were focussed on exclusions of products by *source*, but the reasoning and language used in those decisions must logically extend also to exclusions of product *types*. The basis of the *Wheat Gluten* decision, as confirmed by *US – Line Pipe*, is that the phrase "product being imported" has the "*same* meaning … in both Articles 2.1 and 2.2".[4091] In support, New Zealand relies on the broad principle enunciated by the Appellate Body which counters any suggestion that the restrictive focus on sources was deliberate: "… the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2".[4092] The Appellate Body also saw the concept as one relating broadly to the issue of parallelism between the "scope" of the investigation and of the measure in *US – Wheat Gluten*, where it rejected the United States' argument based on Article 9.1 of the Agreement on Safeguards as irrelevant. The United States argument that exclusion of products "is no different from a tariff rate quota or quota, in that some imports covered by the determination of serious injury are unaffected by the measure, while others are"[4093] is nonsensical. In the case of a tariff-rate quota or quota, the measure is still imposed on the basis of a determination of increased imports causing injury of the products to which the tariff-rate quota or quota is subsequently applied. The situation flowing from product exclusions is quite different – it results in a situation where safeguard measures are imposed on a certain group of products on the basis of a determination based on an analysis of imports of a much larger group of products. This situation is one in which the legal foundation for the very imposition of the safeguard measure is flawed since the data analysed to substantiate the measures relates to products that do not correlate to the products that are actually subject to the safeguard.[4094]

7.1753 The United States insists that Article 5.1 clearly allows a Member to apply a safeguard measure less than the extent necessary to remedy or prevent serious injury, as long as it complies with the MFN obligation under Article 2.2. Thus, a Member has discretion to exclude particular items entirely from the measure or to grant a limited quantity exclusion with regard to particular items. However, New Zealand argues that the Appellate Body reports stand for the "broad principle" of scope parallelism. The United States submits that no such principle exists. Therefore, either complete exclusion (or reduced application of a safeguard measure) to particular items within the like product is consistent with the Agreement on Safeguards. That does not suggest that exclusion or reduced application is required. complainants essentially accept that exclusions are not mandatory.[4095]

[4090] New Zealand's second written submission, para.3.157-3.160.
[4091] Appellate Body Report, *US – Wheat Gluten*, para 96 (emphasis in original).
[4092] Ibid.
[4093] United States' first written submission, para 766.
[4094] New Zealand's second written submission, paras. 3.161-3.163.
[4095] United States' second written submission, paras. 206-209.

Article 2.2 states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source". This text places a limitation on application of a safeguard measure, namely that it be applied without regard to the source of the product. In this sense, source can have only one meaning – referring to the origin of the product in question.[4096] This limitation is unrelated to the type of the product in question. Thus, it does not affect a Member's discretion to apply the measure at different levels to different types of the product, as long as the measure does not differentiate among types of product based upon their source.[4097]

7.1754 Norway argues that if the decision to exclude a particular product is based on an incorrect definition of the imported product, i.e. on artificial groupings of different products as in the present case, then the whole analysis is flawed and so also the product exclusion. This is particularly so as the overbroad categories will have led to injury findings in respect of a broader category of products. When some products within the category is later excluded their contribution to the "increased imports" and "serious injury" will still be factored into the remedy decision for the remaining products - making the remedy exceed the level permitted by Article 5.1. If a proper definition of the imported product has been performed, then any product exclusion will relate to the "whole" of the product as there are no "sub-products", meaning that the remedy is set at zero. This is permitted.[4098]

7.1755 The United States also notes that the European Communities' position on this question remains self-contradictory. European Communities steel producers continue to request exclusions from the steel safeguard measures. The European Communities itself has never suggested to the administrative authorities considering these requests that they are inconsistent with WTO rules. Nor has the European Communities requested the United States to revoke exclusions previously granted at the request of European Communities steel producers, which would be the fastest way to secure the removal of exclusions that the European Communities professes to find inconsistent with WTO rules.[4099]

7.1756 The European Communities disagrees with the view that the fact that a Member may have expressed a position in respect of product exclusions affects its right to claim their illegality.[4100] That right is nowhere restricted under the Agreement on Safeguards and, in the absence of such a restriction, a WTO Member has broad discretion in deciding whether to bring a claim against another Member under the DSU.[4101] Product exclusions, moreover, are not granted to WTO Members. Even assuming that product exclusions were a benefit accruing to Members, *quod non*, admitting that soliciting such exclusions would take away a Member's right to challenge them as WTO-incompatible

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[4096] The New Shorter Oxford English Dictionary defines "source" as "[t]he derivation of a material thing; a place or thing from which something material is obtained or originates." The New Shorter Oxford English Dictionary, p. 2957. The dictionary gives as an example of this definition "Transylvania was the oldest source of gold in the classical world." Ibid.

[4097] United States' written reply to Panel question No. 62 at the second substantive meeting.

[4098] Norway's written reply to Panel question No. 58 at the second substantive meeting.

[4099] United States' written reply to Panel question No. 62 at the second substantive meeting.

[4100] United States' first written submission, para. 760. The United States refers to the press article in its Exhibit US-59 in support of its contention. The European Communities would observe that Commissioner Lamy's statements reported in the press article were made while clarifying that exclusions "would not solve the underlying problem of the illegality of the United States safeguard, which is litigated in the World Trade Organization" (Ibid., p. 2, *in fine*). The exclusions were discussed in the context of the European Communities' evaluating whether or not to exercise its right, under Article 8.3 of the Agreement on Safeguards, to suspend equivalent concessions to the value of products which were granted safeguard relief in the absence of an absolute increase in imports, after the United States had refused the European Communities requests for tariff cuts as the appropriate form of compensation under Article 8.

[4101] Appellate Body Report, *EC – Bananas III*, para. 135.

would be like asserting that the victim of a usurer cannot denounce him because she asked a delay or reduction in the repayment of usurious interests.[4102]

3. The findings required

(a) General discussion

7.1757 The European Communities, China, Norway and Switzerland submit that in order to comply with the parallelism requirement, competent authorities must establish, through an analysis of the imports that are covered by the safeguard measures, that these are being imported in increased quantities and that they are causing serious injury.[4103] Japan, China, Switzerland and Norway add that if a WTO Member decides to exclude a country from the application of a safeguard measure, it must establish "explicitly" that increased imports from sources covered by the measure satisfy the conditions set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. Furthermore, the WTO Member must provide a "reasoned and adequate explanation" of how the facts support such a determination.[4104]

7.1758 China adds that the findings of the competent authorities must be based on a sufficient "reasoned and adequate explanation" of how the facts support the determination, in light of the conditions for the application of a safeguard measure set out in Articles 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards. In other words, it is not sufficient to indicate "explicitly" that the non-NAFTA imports "alone" caused injury in order to comply with the obligation of "parallelism". The following elements should, at least, be contained in the findings of the competent authorities: (i) evaluation of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards (i.e. the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment)[4105]; (ii) evaluation of other factors relevant to the situation of the industry concerned[4106]; relationship between the movements in imports (volume and market share) and the movements in injury factors[4107]; and (iii) a determination whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements.[4108] [4109]

7.1759 Korea recalls that the Appellate Body in *US – Line Pipe* further clarified what a complainant is required to show to make a prima facie case that a safeguard measure has been imposed in violation of such requirement. The Appellate Body said that it was enough to make a prima facie case of the absence of parallelism to demonstrate that the USITC considered imports from all sources in its investigation and that that exports from Canada and Mexico were excluded from the safeguard measure at issue.[4110] Then, it is up to the imposing party to show that the competent authorities have established explicitly, through a reasoned and adequate explanation, that imports from non-excluded

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[4102] European Communities' second written submission, paras. 488-495.
[4103] European Communities' first written submission, para. 603.
[4104] Japan's second written submission, para. 184; China's first written submission, para. 563; Switzerland's first written submission, para. 328; Norway's first written submission, paras. 367 and 371.
[4105] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.
[4106] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.
[4107] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[4108] *See* Appellate Body Report *US – Wheat Gluten*, para. 69.
[4109] China's first written submission, paras. 587 and 589.
[4110] Appellate Body Report, *US – Line Pipe*, para. 187.

sources alone were correctly found to support affirmative determinations under Articles 2 and 4 of the Agreement on Safeguards.[4111] [4112]

7.1760 The United States contends that the text of the Agreement on Safeguards, as interpreted by panels and the Appellate Body, does not require separate findings specific to non-NAFTA imports for all the Article 4.2 factors. The sole requirements under Articles 3.1 and 4.2(c) are for the competent authorities to publish "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law", and providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". The Agreement does not require the use of a particular structure or format for the report, or a particular analysis. As the Appellate Body concluded in *US – Line Pipe*: "we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself … ".[4113] [4114]

7.1761 In response, Japan asks how else – without separate findings specific to non-NAFTA imports for all Article 4.2 factors – would a Member ever know that the imports subject to the safeguard measure are, in fact, the ones causing serious injury if no causation evaluation is completed for these imports by the competent authority. Japan submits that the United States expects the complainants to simply accept that the examination of the various factors having an impact on the domestic industry would have produced the same results had the USITC considered them in comparison with non-NAFTA imports. Even more appalling, according to Japan, is the United States' reasoning for its repeated failure to comply with the parallelism requirement. It boldly believes that it only needs to state explicitly the conclusion that non-NAFTA imports alone caused or threatened to cause serious injury, and does not need to provide an explanation for such findings including the results of each step of the analytical process leading to that conclusion.[4115] [4116]

7.1762 China argues that, far from being redundant, separate findings specific to non-NAFTA imports for all the Article 4.2 factors – as an other factor of injury – was the only way for the United States to comply with the WTO requirements, i.e. with the need to show that non-NAFTA imports were able, alone, to cause serious injury to the United States industry.[4117]

7.1763 Japan adds that "[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous".[4118] As the Appellate Body found in *US – Wheat Gluten* and *US – Line Pipe*, a mere recitation of the facts without a detailed analysis of whether the non-NAFTA imports alone cause serious injury is insufficient to limit the application of the measure to any subset of total imports.[4119]

7.1764 The United States points out that the complainants return repeatedly to the argument that the USITC's analysis of non-NAFTA imports does not meet the Appellate Body's requirement in *US –*

[4111] Appellate Body Report, *US – Line Pipe*, paras. 187-188 and 198.
[4112] Korea's second written submission, paras. 207-208.
[4113] Appellate Body Report, *US – Line Pipe*, para. 158.
[4114] United States' first written submission, paras. 749-750.
[4115] United States' first written submission, paras. 752-753; United States' written replies to the questions from the Parties, para. 18 (in response to a question posed by the European Communities).
[4116] Japan's second written submission, paras. 185-190.
[4117] China's second written submission, para. 318.
[4118] Appellate Body Report, *US – Line Pipe*, para. 194.
[4119] Japan's first written submission, para. 304.

Line Pipe to provide "a reasoned and adequate explanation that establishes explicitly" that non-FTA imports caused serious injury.[4120] This focus improperly elevates the Appellate Body's description of an obligation above the words of the text. Articles 3 and 4 do not require an "explicit" finding, and the Appellate Body has never related such a requirement to the text of the Agreement on Safeguards. Nor is "explicitness" necessary to provide the findings and reasoned conclusions required under Article 3.1, or the "detailed analysis" required under Article 4.2(c). Appellate Body reports do not make an "explicit" explanation a separate requirement. The term first appeared in the context of parallelism in *US – Wheat Gluten*, in the finding that the USITC's analysis of imports from Canada did not provide an "explicit determination relating to increased imports, *excluding imports from Canada*".[4121] The Appellate Body then used the same term in *US – Line Pipe* to describe its finding that the USITC's more detailed analysis in that case still did not establish explicitly that increased imports from non-NAFTA sources alone caused serious injury.[4122] In both cases, it used the term in connection with the absence of a "clear and unambiguous" statement that increased imports from non-NAFTA sources alone caused serious injury. It then inquired as to whether the explanations of the statements that the USITC did make provided a "reasoned and adequate explanation", but did not require that the explanation be "explicit". Thus, the Appellate Body's use of the term "explicit" is best understood as referring to the competent authorities' formal conclusion as to whether non-FTA imports have caused serious injury, and does not require an "explicit" recitation of the results of each step of the analytical process leading to that conclusion.[4123] [4124]

7.1765 New Zealand does not agree that the Appellate Body guidance can be "best understood" in this way. For this would reduce the requirement for a "reasoned and adequate explanation" to a simple requirement for a conclusion by way of mere assertion that even if FTA imports had not been included, the result would have been the same. This is of course precisely the basis on which the United States seeks to justify itself in relation to NAFTA imports. It is also precisely the basis on which the Appellate Body in *Korea – Line Pipe* rejected footnote 168 of the USITC Report as a "reasoned and adequate explanation of how the facts support [the] determination".[4125] It should be recalled that the Appellate Body noted in that case that the explanation must "leave nothing merely implied or suggested; it must be clear and unambiguous".[4126] Further, as the Appellate Body found in that case as well as in *US – Wheat Gluten*, a mere recitation of the facts without a detailed analysis of whether the non-NAFTA imports alone cause serious injury is insufficient to apply the measure to less than total imports.[4127]

7.1766 Similarly, the European Communities argues that the United States engages in a series of rather extraordinary propositions many of which fly in the face of the Appellate Body's reports addressing the principle of parallelism.[4128] It is true that the Agreement on Safeguards does not contain the words "explicit findings", it does not even contain the word parallelism altogether. Yet,

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[4120] China's first written submission, paras. 588-89; Japan's first written submission, para. 316; New Zealand's first written submission, paras. 4.178-179; Switzerland's first written submission, paras. 355-357.

[4121] Appellate Body Report, *US – Wheat Gluten*, para. 98 (emphasis in original).

[4122] Appellate Body Report, *US – Line Pipe*, para. 194.

[4123] The Appellate Body has found with regard to a finding of causation that "[t]hese steps are not legal 'tests' mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities." Appellate Body Report, *US – Lamb*, para. 178.

[4124] United States' first written submission, paras. 752-753.

[4125] Appellate Body Report, *US – Line Pipe*, para 195.

[4126] Ibid., para. 194.

[4127] New Zealand's second written submission, para. 3.151.

[4128] European Communities' second written submission, para. 452.

the "parallelism" requirement is clearly discernible from the text, and the Appellate Body has clarified that such legal principle does exist and that it entails that there must be an explicit finding and a reasoned explanation that imports covered by a measure, these alone, satisfy the requirements of Articles 2 and 4 of the Agreement on Safeguards. The absence of expressed findings and/or reasoned explanations was precisely the flaw that the Appellate Body found in the measures at issue in *US – Line Pipe*.[4129] The United States also insists that the Appellate Body did not require that the underlying justification for conclusions relating to non-excluded imports be explicit. The European Communities submits, however, that it fails to show how an explanation which is not even spelled out may really be adequate in the light of the Appellate Body's clear indications and its conclusion that the sum of findings on all imports and findings on Canada and Mexico does not yield a finding on "all imports minus NAFTA".[4130] In fact, there is not even an implicit finding.[4131]

7.1767 Switzerland also argues that the United States plays with words and in any case did not even provide an adequate and reasoned explanation establishing that non-FTA imports caused serious injury. The Appellate Body[4132] said that the United States had to demonstrate that the USITC provided a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources satisfied the conditions for the application of a safeguard measure.[4133]

(b) Findings made by the USITC in this case

(i) Imports from free-trade areas

7.1768 The European Communities argues that there is no consideration in the main USITC Report of the need to ensure parallelism between the findings of increased imports, serious injury and the measures to be imposed. There is however a belated, but inadequate, attempt to take into account the principle of parallelism in the Second Supplementary Report.[4134]

7.1769 According to the European Communities, the explanation in the Second Supplementary Report relates to the exclusion of Canada and Mexico from the scope of the safeguard measure in relation to six of the ten products (i.e. all excluding tin mill products, rebar, stainless steel rod and stainless steel wire). With respect to imports from Israel and Jordan, the USITC merely "indicates, in accord with its findings in the Views on Remedy, that exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or individual Commissioners".[4135] [4136]

7.1770 The European Communities submits that the explanations in the Second Supplementary Report are insufficient to repair the failure to respect the principle of parallelism in the main Report.[4137] A finding that imports from Canada or Mexico, individually, do not constitute a substantial share or did not contribute importantly has no relation with the issue of whether non-excluded imports alone meet the standards for imposition of safeguard measures. Furthermore, the references to the

[4129] Appellate Body Report, *US – Line Pipe*, para. 196.
[4130] Appellate Body Report, *US – Line Pipe*, para. 196.
[4131] European Communities' second written submission, paras. 454-457.
[4132] Appellate Body Report, *US – Line Pipe*, para. 188
[4133] Switzerland's second written submission, para. 105.
[4134] European Communities' first written submission, paras. 604-605.
[4135] Second Supplementary Report, p. 4.
[4136] European Communities' first written submission, paras. 606-608.
[4137] European Communities' first written submission, para. 613.

USITC October 2001 Report upon which the United States relies do not consider the most recent import trends (full 2001).[4138]

7.1771 As regards tin mill products, rebar, stainless steel rod and stainless steel wire, the European Communities submits that the Panel can already conclude that the United States violated Articles 2.1 and 4.2 of the Agreement on Safeguards on the basis that the United States has not even made a finding that those particular imports covered by the safeguard measures alone fulfilled the conditions contained in the Agreement.[4139]

7.1772 According to the European Communities, the analysis provided in the Second Supplementary Report for the remaining six products is flawed as it suffers from the same defects as the main Report. For example, it does not consider the most recent period or contain data on 2001 imports even though this was available when the Second Supplementary Report was produced. In any event, there is no demonstration or adequate explanation for a sudden, recent sharp and significant surge in non-NAFTA imports of CCFRS, hot-rolled bar, cold-finished bar, carbon and alloy fittings, stainless steel bar and certain tubular products.[4140]

7.1773 Switzerland maintains that, in its original Report, the USITC unquestionably analysed the various safeguard factors based on total imports, including FTA imports. In addition, instead of making all necessary determinations on the basis of the imports that are subject to the measure, the USITC simply adds the recurrent assertion that exclusion would not change the determination based on all imports. These unfounded generalisations do not correspond to the Appellate Body's standard and are clearly wrong. The United States only writes about what it thinks it does not have to do, but it does not and cannot show that that it did fulfil the WTO requirements. According to Switzerland and Norway, the principle of parallelism does not mean that a WTO Member can exclude whatever imports it wishes by saying that such exclusions would not affect the end result. As the Appellate Body clarified, what competent authorities have to establish is that imports from sources outside free trade areas alone meet the requirements of Article 2.1 and 4.2 of the Agreement on Safeguards.[4141] This means that, assuming that the exclusion of certain imports from the measure is allowed, all the necessary determinations must be made – and explained in a reasoned and adequate manner – on the basis of imports that are subject to the measure.[4142] Norway adds that one consequence of this is that correct increased imports and causation analyses have to be made after the exclusion from the investigation.[4143]

7.1774 In this case, the United States competent authorities' explanation relevant to the question of parallelism appeared in various sections of the USITC Report. Some of the discussion appeared in the portions of the report containing the analysis for all imports. Some of the discussion also appeared in the analysis specifically pertaining to non-FTA imports in the Second Supplementary Report. These two documents were meant to be read together, as reflected in the designation of the later-prepared portion as "supplemental". The USITC's findings with regard to most of the requirements of Article 4.2 appeared in the USITC's analysis of all imports. Insofar as the exclusion of FTA imports did not change these findings, the USITC was not required to repeat them. For example, the exclusion of FTA imports did not change the shipments of the domestic producers, their employment

[4138] European Communities' second written submission, para. 482.
[4139] European Communities' first written submission, para. 614.
[4140] European Communities' first written submission, paras. 620, 622, 623.
[4141] Appellate Body Report, *US – Line Pipe*, para. 198.
[4142] Switzerland's second written submission, paras. 103-104; Norway's second written submission, para. 182.
[4143] Norway's second written submission, para. 182.

levels, their profits and losses, or trends in those indicators. The Agreement on Safeguards did not require the USITC to perform these analyses again to satisfy the parallelism requirement.[4144]

7.1775 The United States argues in response that in order to support its conclusions concerning non-NAFTA imports, the USITC Report contains for each industry: (i) a specific finding that non-NAFTA imports increased; (ii) a finding, in the analysis of all imports, that the industry was seriously injured; (iii) findings, in the analysis of all imports, concerning the pertinent conditions of competition in the industry; (iv) a specific finding describing the causal link between the non-NAFTA imports and the domestic industry's serious injury; and (v) findings, in the analysis of all imports, concerning factors other than imports that were alleged to cause serious injury.[4145]

7.1776 The United States insists that the USITC's provision of findings and analysis concerning non-FTA imports, and continued reliance on portions of its analysis of all imports that remained applicable, was a permissible means to comply with Articles 3.1 and 4.2(c). The USITC's issuance of the supplementary report after it finished its analysis of all imports does not make the supplemental report an "*ex post facto* analysis". The USITC provided the response prior to the decision to apply the safeguard measures, which meets the requirement under Article 2.1 of the Agreement on Safeguards to apply a measure "only if that Member has determined" that increased imports of a product are causing serious injury.[4146]

7.1777 The European Communities takes issue with the proposition that the scope of imports has no impact on the assessment of the domestic industry situation.[4147] For one thing, the first of the factors that domestic authorities must evaluate under Article 4.2(a) is precisely concerned with import trends. Given the symmetry that must exist between the import data used for the determinations and the imports subject to a measure, clearly this means that import trends that are relevant under Article 4.2(a) must be assessed exclusively on the basis of imports to be covered by the measure.[4148] The European Communities recalls that the USITC had made "affirmative determinations" (that is, it had found that these imports did not meet the statutory standards for exclusion) for hot-rolled bar, cold-finished bar, carbon and alloy fittings, and stainless steel bar originating in Canada and CCFRS and carbon and alloy steel fittings from Mexico.[4149] To the extent that Proclamation No. 7529 excluded those imports from the scope of the measures[4150], it cannot have been based on the October 2001 determinations, which did not determine that they could be excluded.[4151]

7.1778 The European Communities submits that adding some *ex post* comments on all imports minus NAFTA is not tantamount to meeting the requirements of the Agreement on Safeguards in respect of "all imports minus FTAs". In other words, even the *ex post* conclusions in the Second Supplementary Report still include imports from sources – Israel and Jordan – which were later excluded from the safeguard measures. Finally, there is no reasoned or adequate explanation in the USITC Report as to why making an injury finding for non-FTA imports was "redundant".[4152] Further elaborating its argument, the European Communities adds that USITC determinations on pp. 17-18 of its Report are: (i) determinations on imports from all sources, or (ii) determinations on imports from Canada and (iii)

[4144] United States' first written submission, paras. 749-750.
[4145] United States' first written submission, paras. 778-788.
[4146] United States' first written submission, para. 751.
[4147] *See* e.g. United States' first written submission, para. 750; United States' written reply to Panel question No. 95 at the first substantive meeting.
[4148] European Communities' second written submission, paras. 460-463.
[4149] Proclamation No. 7529, para. 5.
[4150] Proclamation No. 7529, para. 8.
[4151] European Communities' second written submission, para. 449.
[4152] European Communities' second written submission, paras. 460-463.

from Mexico, individually considered. The determinations on imports from all sources are neither modified nor, more specifically, turned into determinations complying with the principle of parallelism, by the individual determinations on imports from Canada and Mexico. Thus, even assuming that only imports from Canada and Mexico, and not also Israel and Jordan, had been exempted from the United States measures under review, those measures and their underlying findings and determinations do not comply with the principle of parallelism. They remain determinations that do not establish explicitly, through a reasoned and adequate explanation, that imports covered by the measures, alone, were being imported in such increased quantities and under such conditions as to cause serious injury. Specifically, one cannot in any way "subtract" from a determination based on imports from all sources the additional determinations relating to Mexico and/or Canada and claim that, by implication, the result of this "subtraction" is a determination and an explanation that satisfies the parallelism principle.[4153]

7.1779 New Zealand argues that in its December 2001 Report, the USITC had made affirmative findings that imports from both Mexico and Canada of CCFRS constituted a substantial share of total imports and that imports from Mexico contributed importantly to the serious injury allegedly caused by imports. The important role played by imports from NAFTA sources as part of the USITC's investigation into imports from all sources was quite explicit. These earlier findings are then studiously avoided in the Second Supplementary Report. The failure by the USITC to explain its earlier findings reinforces the conclusion that the United States has failed to provide an adequate and reasoned explanation to support its exclusion of imports from its NAFTA partners from the application of the safeguard measure. While the United States claims that the necessary analysis of non-NAFTA imports is somewhere to be found in the more general analysis applicable to all imports, these claims have no foundation. The USITC Report and Second Supplementary Report fail to evaluate the share of the domestic market taken by non-NAFTA imports and failed to evaluate other factors relevant to the situation of the industry concerned. The USITC did not examine the impact that NAFTA imports would have on the domestic industry if these exports were to be excluded from the measure. The USITC also failed to make any finding on the relationship between the movements in imports (volume and market share) and the movements in injury factors, and it failed to demonstrate the causal link between increased imports from non-NAFTA sources and serious injury involving a genuine and substantial relationship of cause and effect.[4154]

7.1780 The European Communities recalls that, for several product groups, the USITC made affirmative determinations against imports from Canada and/or Mexico[4155] – that is, it determined that imports from Mexico and/or Canada did "account for a substantial share of total imports" and did "contribute importantly to the serious injury" pursuant to Section 311(a) of the NAFTA Implementation Act.[4156] At any rate, the individual determinations on imports from Mexico and Canada are irrelevant to show compliance with the principle of parallelism because they are based on a standard – that in Section 311(a) of the NAFTA Implementation Act – that is quite different from the WTO ones. Under WTO rules, all imports must be counted (or excluded from the beginning), not only the first five exporting countries, and all injury causes must be evaluated. A further reason is that the determinations of 22 October 2001 do not disaggregate the import data from Israel and Jordan

[4153] European Communities' second written submission, paras. 466-467; European Communities' second oral statement on Parallelism, para. 4.

[4154] New Zealand's second written submission, paras. 3.152-3.153.

[4155] These are the product groups listed at para. 449 of the European Communities' second written submission (for Canada: Hot-Rolled Bar, Cold-Finished Bar, Carbon and Alloy Fittings, Stainless Steel Bar; for Mexico, Certain Flat Steel and Carbon and Alloy Steel Fittings).

[4156] Quoted in the European Communities' second written submission, para. 444, footnote 349.

(in fact, not even the Second Supplementary Report does).[4157] In conclusion, all one is left with (in the sense of relevant determinations) after examining the original USITC Report are determinations based on imports from all sources.[4158]

7.1781 The United States responds that a consequence if the European Communities' argument were to be upheld would be that competent authorities could never revise their report, once issued, or provide additional information if the Member evaluating application of a safeguard measure considered that additional information related to their determination would be useful. Indeed, if the European Communities were correct, the competent authorities could not even correct ministerial errors in the report. Nothing suggests that the Agreement on Safeguards places such a straitjacket on the competent authorities.[4159]

7.1782 The European Communities submits that the United States' position is contradictory. On the one hand, the United States argues that all the relevant determinations are contained in the USITC Report of 22 October 2001. Clearly these determinations do not relate to non-FTA imports *alone*. Therefore, they do not support the measures taken by Proclamation No. 7529. On the other hand, the United States appears to contradict itself because, in its attempt to show that it complied with the parallelism requirement, it refers to information that was "reported" by the USITC on 4 February 2002 and appears to treat it as if it were new findings able to justify the safeguard measures.[4160] Should the United States argue, that these additional "reports" are in fact new determinations that the conditions for the application of safeguard measures are met, and should the Panel accept them as determinations or additional explanation relevant to the October 2001 determinations, the European Communities submits that they are also inadequate because they disregard 2001 data, and fail to consider excluded imports in the causation analysis.[4161] The determinations contained on pp. 1 and 17-18 of the USITC Report of 22 October 2001 include no "increased imports" determinations exclusively referring to imports from excluded sources. On the contrary, they concern imports from all sources. The legal conclusions of the competent authorities are that increased imports *from all sources* caused injury to the United States industry. In view of these determinations, the measures taken by the President, excluding imports from certain sources, are without legal basis and cannot stand.[4162]

(ii) Demonstration required with respect to non-excluded imports

7.1783 Norway argues that NAFTA imports were used by the United States to justify a finding both of "increased imports" and "serious injury".[4163] Japan submits that non-NAFTA imports must be analysed on their own. In other words, it is not possible to make any conclusions about non-NAFTA imports based on analyses of total imports on the one hand and NAFTA imports on the other.[4164] Similarly, China argues that there must be a reasoned and adequate explanation that establishes explicitly that imports from non-FTA partners satisfied the conditions for the application of a safeguard measure, and in particular that injury was not due to FTA partners, treated as 'other

[4157] European Communities' second written submission, paras. 466-467; Oral statement presented by the European Communities on Parallelism at the second substantive meeting of the Panel, para. 4.
[4158] European Communities' written reply to Panel question No. 59 at the second substantive meeting.
[4159] United States' written reply to Panel question No. 59 at the second substantive meeting.
[4160] United States' written reply to Panel question No. 129, para. 239; United States' first written submission, para. 751.
[4161] European Communities' second written submission, paras. 439-440.
[4162] European Communities' second written submission, paras. 441-442.
[4163] Norway's written reply to Panel question No. 59 at the second substantive meeting.
[4164] Japan's written reply to Panel question No. 59 at the second substantive meeting.

factors'.[4165] Likewise, Korea submits that the Appellate Body has made clear that, in order to satisfy the parallelism requirement, the United States must meet *all* the conditions of Article 2.1 on the basis of the same imports that are subject to the measure under Article 2.2.[4166] Therefore, all conditions of Articles 2.1 and 4.2 of the Agreement on Safeguards must be satisfied before the parallelism analysis is complete. Imports from non-NAFTA countries must be clearly and unambiguously shown to satisfy all the conditions of Articles 2.1 and 4.2. It also follows directly from that analysis that imports from NAFTA countries thus become a potential "other factor" of injury. Finally, Korea stresses that "mere assertions" cannot substitute for the complete and detailed analysis[4167] required by Articles 3 and 4 of the Agreement on Safeguards.[4168]

7.1784 Norway argues that the USITC's general discussion of causation, and the role of alternative causes, never once addressed the role of non-NAFTA imports as distinguished from all imports. No attempt at factual analysis for non-NAFTA imports was ever made. The response to USTR request was no better. Norway argues that there was no factual analysis, only the simple statement that "the same considerations that led us to conclude that increased imports of CCFRS are a substantial cause of serious injury to the domestic industry are also applicable to increased imports of CCFRS from all sources other than Canada and Mexico". [4169] [4170] According to Norway, it should be clear that such a statement does not fulfil the requirements of the Agreement on Safeguards.[4171]

7.1785 The United States admits that the discussion the USITC provided in its analysis of all imports concerning the issues of increased imports and causal link would not automatically be applicable to non-NAFTA imports. However, for each pertinent domestic industry, the USITC provided a particularized discussion of increased imports and causal link for non-NAFTA imports. The USITC frequently found in its analysis of increased imports that overall import trends were the same for non-NAFTA imports as they were for all imports. In such circumstances, the USITC's analysis of causal link for non-NAFTA imports focused on the same periods as did the analysis for all imports. This follows from the point that the nature and timing of the serious injury suffered by the domestic industry were the same regardless of the set of imports examined. Additionally, in its discussion of causal link for all imports, the USITC made findings concerning factors other than imports that were alleged to cause serious injury. As discussed further below, these findings often focused on data pertaining to the United States industry or the United States marketplace as a whole. Such findings were equally applicable with respect to an analysis pertaining to non-NAFTA imports as they were to an analysis pertaining to all imports. This consequently was another set of findings that the USITC was not obliged to repeat in the sections of its report dealing specifically with non-NAFTA imports.[4172]

7.1786 The European Communities also points out an examination of the actual text of the Second Supplementary Report reveals additional flaws: as regards the increased imports assessment, for the "absolute increase" the USITC simply provides the import data and observes that "imports have

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[4165] China's second written submission, para. 310.

[4166] Korea does not agree that this parallelism can be achieved legally except on the basis of a finding that all imports meet the conditions of Article 2.1 and that all imports are the subject of the measure in Article 2.2 as discussed at length in the subsequent section on MFN.

[4167] See United States' first written submission, para. 770; Appellate Body Report, *US – Line Pipe*, para. 194.

[4168] Korea's second written submission, paras. 216-219.

[4169] USITC's Second Supplementary Report, dated 4 February 2002, p. 5 (Exhibit CC-11).

[4170] Norway's second written submission, para. 183.

[4171] Norway's second written submission, paras. 184-187.

[4172] United States' first written submission, paras. 784-786.

increased" without any further qualification.[4173] This effectively continues applying the "any increase" standard which the Appellate Body has clearly ruled out.[4174] To the extent that the USITC refers to import projections for 2001-2002[4175], it underlines that the same projections were not made for other product bundles. As regards causation, the USITC failed to separate and distinguish the impact of excluded imports and did not attribute them to the imports covered by the measures. The underselling analysis was not performed for all the product bundles, or was limited to one product.[4176] There is no analysis of coincidence in trends.[4177]

7.1787 The United States reiterates that the complainants continue to disregard that findings relevant to the parallelism analysis are found throughout the USITC Report. While many of the pertinent findings are in the section of the report issued as the Second Supplementary Report, which deals specifically with non-NAFTA imports, there are also pertinent findings in the analysis of all imports. The findings are not limited to a discrete section of the report. First, the USITC expressly found, for each pertinent like product, that increased non-NAFTA imports caused serious injury or threat of serious injury. Second, the analysis of non-NAFTA imports contains not only a description of how such imports increased, but a particularized causation analysis. Third, the USITC's analysis of all imports contains findings concerning serious injury, conditions of competition, and causes of serious injury that were also equally pertinent to and part of the analysis of non-NAFTA imports. The USITC's particularized causation analysis served to separate and distinguish the effects of non-NAFTA imports from the effects of NAFTA imports. Because in the particularized causation analysis the USITC considered only non-NAFTA imports, the USITC separated the volume and pricing effects of non-NAFTA imports from those of NAFTA imports. The USITC's analysis also incorporated from the analysis of all imports those factors that were unchanged regardless of which imports were analysed.[4178]

7.1788 The European Communities argues that a major omission, and indeed a fatal flaw, of the Second Supplementary Report is that it nowhere considers imports from Canada, Mexico, Israel and Jordan as an "other factor" causing injury and did not measure its nature and extent, so as to ensure that injury caused by imports from these four countries is not attributed to the imports on which the actual measures were imposed. The USITC directly jumped into some generalizations about the injurious effects caused by non-NAFTA imports and concluded that "the same considerations that led us to conclude that increased imports [of each of the seven products] are a substantial cause of serious injury are also applicable to increased imports [of these products] from all other sources other than Canada and Mexico".[4179] However, these conclusions are fundamentally vitiated for each of these seven products, because the USITC did not redo the causation analysis by considering the excluded imports as other factor.[4180] The failure of the USITC to consider excluded imports as an "other factor" for injury is all the more glaring as the USITC itself acknowledges in its Report that these imports contributed importantly to the serious injury caused by the total imports. Specifically, the USITC

[4173] See e.g. USITC Second Supplementary Report, p. 5 (Carbon and Alloy Hot-Rolled Bar); p. 6 (Cold-Finished Bar).

[4174] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129, upholding the findings in Panel Report, *Argentina – Footwear (EC)*, para. 8.161; see also Section C above.

[4175] United States' first written submission, para. 867, concerning certain tubular products other than OCTG.

[4176] USITC Second Supplementary Report, p. 7 (Cold Finished Bar), where the underselling analysis was only performed for "one inch round C12 L 14", and based on confidential data; p. 8 (Carbon and Alloy Fittings).

[4177] European Communities' second written submission, paras. 478-481, 486.

[4178] United States' second written submission, paras. 158-161.

[4179] Second Supplementary Report, pp. 6, 7, 8, 10, 11, clarification added.

[4180] See Sections IV.F.6 (b), (d), (e), (g), (h), (i), above.

found that the following imports from NAFTA countries accounted for a "substantial share of total imports and contributed importantly to the serious injury suffered by the domestic industry": CCFRS (from Mexico); hot-rolled bar (from Canada); cold-finished bar (from Canada); certain tubular products (both from Canada and Mexico); carbon and alloy fittings (both from Canada and Mexico); stainless steel bar (Canada).[4181] The European Communities adds that the reference to "other factors" (as opposed to imports) in the Appellate Body Report in *US – Lamb* and "factors other than increased imports" in Article 4.2(b) must be read as a reference to other factors than imports covered by the measure. It would be absurd if at the same time, a Member imposing safeguard measures could assess the causal link without proceeding to "non-attribution" of the effects of NAFTA imports. In fact, it would be tantamount to making an assessment of the causal link based on all imports, included NAFTA imports, since in that case the competent authorities would not have "ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports".[4182] Basing itself on this statutory standard, the USITC did not examine whether NAFTA imports caused serious injury. It only examined whether they contributed importantly to serious injury. The very conclusion, for some of them, that imports from certain sources "did not contribute *importantly*" does not mean that there such imports did not cause injury, and did not require, therefore, to be subjected to non-attribution.[4183]

7.1789 Japan submits that the shorthand method used by the United States in determining whether non-NAFTA imports are a substantial cause of serious injury, is tantamount to a finding that non-NAFTA imports alone satisfy the requirements of increased imports and causation. This approach was found to be insufficient by the Appellate Body in both *US – Wheat Gluten* and *US – Line Pipe*. All of the analyses required for finding serious injury caused by increased imports must be performed with respect to non-FTA imports only in order to justify imposition of a safeguard measure on non-FTA imports only.[4184]

7.1790 The United States responds that, in concluding that non-FTA imports are a substantial cause of serious injury, the USITC made findings that non-FTA imports, viewed alone, satisfied the increased imports and causation requirements.[4185] The United States also argues that parallelism did not require the USITC to treat excluded imports from FTA partners as a "factor other than increased imports" under Article 4.2(b). The USITC Report contains the USITC's analysis with regard to total imports, its analysis of non-FTA imports, and its analysis of FTA imports. The findings and reasoned conclusions in these analyses separate and distinguish the injury attributable to non-FTA imports from the injury attributable to FTA imports, and ensure that the one was not attributed to the other.[4186] The USITC Report contains the USITC's explicit conclusions with regard to total imports, its explicit conclusions that the exclusion of FTA imports would not change those conclusions, and explicit conclusions that non-FTA imports were a substantial cause of serious injury. This combination of conclusions has the effect of separating and distinguishing the injury attributable to non-FTA imports from the injury attributable to FTA imports. The USITC began its analysis by making a series of conclusions regarding total imports and the injury they caused to the domestic industry. These conclusions identified the injury attributable to total imports, separated and distinguished the injury attributable to increased imports from injury attributable to other factors, and ensured that injury attributable to other factors was not attributed to total imports. This process would by itself separate injury attributable to the combination of FTA and non-FTA imports from injury attributable to other

[4181] European Communities' first written submission, paras. 624-626.
[4182] Appellate Body Report, *US – Lamb*, para. 185.
[4183] European Communities' written reply to Panel question No. 91 at the first substantive meeting.
[4184] Japan's written reply to Panel question No. 96 at the first substantive meeting.
[4185] United States' written reply to Panel question No. 96 at the first substantive meeting.
[4186] United States' first written submission, para. 769.

factors. The USITC also analysed the injury caused by non-FTA imports. It typically couched the results of this analysis in terms of whether the exclusion of FTA imports would change its conclusions with regard to total imports. Since there were only two factors – non-FTA imports and FTA imports – that could possibly be responsible for the injury attributable to imports from all sources, the comparison of conclusions with regard to non-FTA imports with the conclusions with regard to total imports by process of elimination indicates any injury attributable to FTA imports.[4187]

7.1791 For example, the United States points out that with regard to hot-rolled bar, the USITC noted that non-NAFTA imports increased at a greater rate than imports from other sources (i.e., FTA imports). It noted further that non-NAFTA imports increased significantly in both absolute and relative terms, especially at the end of the period, which caused domestic producers to lose market share, suffer decreased profits and, in some cases, enter bankruptcy. It noted that the bulk of the domestic industry loss in market share was a result of non-NAFTA imports, and that unit values for non-NAFTA imports decreased at a greater rate than unit values for total imports. Finally, the USITC noted that non-NAFTA imports undersold domestic products by greater margins than did total imports.[4188] Therefore, FTA imports were responsible for a minor portion of domestic producers' lost market share, suffered a shallower decrease in unit values, and did not set the low prices in the market.[4189]

7.1792 China responds that the parallelism principle implies that NAFTA imports be excluded from both the scope of application of the measure and the scope of the investigation. As a consequence, they must be considered as "another factor" and must be subject to a proper non-application analysis. The non-analysis requirement is contained in the parallelism requirement.[4190] The United States is wrong when it affirms that "the findings and reasoned conclusions in these analyses separate and distinguish the injury attributable to non-FTA imports from the injury attributable to FTA imports, and ensure that the one was not attributed to the other". The analysis conducted by the United States was superficial and incompatible with the WTO requirements.[4191] The "causal link" analysis also requires a coincidence in time between the increased imports and the injury suffered by the domestic industry. It may well be, in this particular case, that imports from NAFTA partners are, for example, the only one which mainly coincided in time with the injury suffered by the domestic industry. However, without carrying out a "causal link" analysis specific to NAFTA imports (or non-NAFTA imports), the United States were not in a position to establish "explicitly" that the injury suffered by the industry was caused by increased imports from sources covered by the measure, and not by increased imports from NAFTA partners.[4192] China also argues that the United States wrongly considers that for each product analysed in the report, the USITC properly established that increased imports from non-NAFTA countries caused serious injury to the domestic industry.[4193]

7.1793 Korea argues that, to achieve that parallelism, the Appellate Body has made clear that *all* the conditions of Article 2.1 must be examined on the basis of the same imports which are subject to the measure under Article 2.2. It also follows directly from that analysis that imports from NAFTA countries become an "other factor" of injury. As the Appellate Body has stated in other contexts, the only means for determining whether imports caused injury is to establish that "other factors" causing

[4187] United States' first written submission, paras. 770-772.
[4188] Second Supplementary Report, pp. 5-6.
[4189] United States' first written submission, para. 773.
[4190] China's written reply to Panel question No. 30 at the second substantive meeting.
[4191] China's second written submission, paras. 319-320.
[4192] China's second written submission, para. 323.
[4193] China's second written submission, para. 326.

injury were separated and distinguished.[4194] Since non-NAFTA imports *alone* ("by themselves") must cause *serious* injury[4195], then the injurious effects of NAFTA imports must be separated and distinguished. In the place of such an analysis, the United States proposes that the Panel simply "assume" that "FTA imports did not change these findings, (so) the USITC was not required to repeat them".[4196] According to the United States approach, the Appellate Body admonition regarding the need to establish "explicitly" or "clearly and unambiguously"[4197], would be substituted with an assumption.[4198] Korea adds that a key element of a parallelism analysis is to ensure that injury from NAFTA imports is not attributed to non-NAFTA imports, thereby justifying safeguard action based on all imports but imposing safeguard relief only on some imports. The underlying theory of parallelism is that the term "imports" has the same meaning in Article 2.1 and Article 2.2. Therefore, since NAFTA imports should not be considered "imports" for purposes of Article 2.2, imports from NAFTA suppliers should be separately evaluated as a "factor other than increased imports" to ensure that the injurious effects, if any, from NAFTA imports are not improperly attributed to non-NAFTA imports. The United States' position would mean that injury could well be caused by NAFTA imports, but such imports could still be excluded from the measure. A measure could then be applied to repair injury caused by NAFTA imports only against non-NAFTA imports. This would violate the fundamental principle behind parallelism.[4199]

7.1794 Korea also argues that, alternatively, the United States maintains that it was obvious that NAFTA imports were not an "other factor" of injury. It also states that NAFTA imports may be so insignificant that a separate analysis is not necessary.[4200] Yet, Canada and Mexico were very significant suppliers in flat-rolled and welded non-OCTG. In flat-rolled, the USITC noted that Canada and Mexico were among the five largest suppliers[4201] and that Mexico's import increases were greater than all non-Mexican sources[4202] and Mexican AUVs were the lowest of all imports.[4203] In the case of welded non-OCTG, Canada accounted for 35% of all non-OCTG welded pipe imports. "Canada was the top supplier of welded non-OCTG products...for each of the most recent three years...(,)141% greater than (those)...from the second largest source ...".[4204] Mexico was also among the five largest suppliers and significantly undersold United States producers and increased imports by 94% over the period.[4205] Clearly, those NAFTA imports could have caused injury. However, the United States did not conduct an analysis of the Article 4.2 factors including the injurious effects of those imports because it maintains that none is necessary or required.[4206] Neither the facts nor the Agreement on Safeguards support this position. The remaining United States arguments are equally unconvincing. The United States would like to substitute its analysis that NAFTA imports did not constitute a substantial share of imports and did not "contribute importantly" to the injury in the place of the required non-attribution analysis under the Agreement on Safeguards. This analysis may meet

[4194] Appellate Body Report, *US – Line Pipe*, para. 211 (affirming Appellate Body Report, *US – Lamb*, para. 179).
[4195] Appellate Body Report, *US – Line Pipe*, para. 194.
[4196] United States' first written submission, para. 750.
[4197] Appellate Body Report, *US – Line Pipe*, para. 194.
[4198] Korea's second written submission, paras. 210-212.
[4199] Korea's written reply to Panel question No. 30 at the second substantive meeting.
[4200] United States' first written submission, para. 750.
[4201] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4202] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4203] USITC Report, Vol. I, p. 66 (Exhibit CC-6).
[4204] USITC Report, Vol. I, p. 167 (Exhibit CC-6).
[4205] USITC Report, Vol. I, p. 168 (Exhibit CC-6).
[4206] United States' first written submission, paras. 749 and 769.

the United States law, but it does not satisfy the requirements of Article 4.2 of the Agreement of Safeguards.[4207]

7.1795 Brazil submits that the NAFTA imports have two effects which must be accounted for in the analysis. First, they increase the level of imports and affect the competitive situation between the imports and the domestic like product. Thus, the analysis of the role of imports in causing serious injury to the domestic industry is changed by the exclusion of NAFTA imports and this must be reflected in the analysis of the causal link between imports and serious injury. Second, NAFTA imports may themselves be a cause of the serious injury to the domestic industry. As such, NAFTA imports are a factor other than the imports subject to investigation/remedies that fall under the non-attribution requirement of Article 4.2(b). Unless the analysis is adjusted to reflect both of these effects of excluding NAFTA imports, the parallelism requirement cannot be met.[4208] Brazil also argues that, absent an appropriate non-attribution analysis of non-NAFTA imports, an analysis such as is required under Article 4.2(b) for all other factors, it is impossible to determine whether there is a genuine and substantial link between non-NAFTA imports and serious injury to the domestic industry. The effects of a factor which could, either individually or in combination with other factors, be the predominant cause of serious injury would simply not have been distinguished from the effects of the subject imports.[4209] The United States' contention that it need not conduct a non-attribution analysis treating excluded NAFTA imports as a "factor other than increased imports" under Article 4.2(b) is contrary to the logic underpinning the Appellate Body's holdings in *US – Wheat Gluten* and *US – Line Pipe*. Controlling for the effect of imports from excluded NAFTA sources is part and parcel of this requirement. Thus, increased imports coming from sources that are eventually excluded from the safeguard measure must be treated as an "other" factor in the causation/non-attribution analysis. Imports are a causal factor with respect to the issue of serious injury because they compete with the domestic like product. It would undermine the causation analysis required by the Agreement on Safeguards if a competent authority could render some portion of those imports meaningless simply by excluding certain sources from a measure. It is necessary to control for the causal importance of imports from excluded sources, so as not to attribute injury to subject imports caused by imports from those excluded sources. This is fundamental to the non-attribution requirement. A competent authority cannot ascertain a genuine and substantial causal link unless it separates and distinguishes other causal factors. While it may be true in any given investigation that there is a genuine and substantial relationship of cause and effect between increased imports and serious injury, the relevant issue is different where import sources are excluded. Under such circumstances, it is not enough that the competent authority separates and distinguishes all of the other causal factors other than the subject and excluded imports. If the competent authority does not separate and distinguish the effect of imports from excluded sources, it could potentially sanction a measure against subject imports for which there may not be a genuine and substantial causal link to serious injury.[4210] [4211]

7.1796 Brazil submits that the USITC did not conduct any specific evaluation of non-NAFTA imports. Rather, it evaluated NAFTA imports, concluding that the exclusion of NAFTA imports

[4207] Korea's second written submission, paras. 213-215.
[4208] Brazil's written reply to Panel question No. 91 at the first substantive meeting.
[4209] Brazil's written reply to Panel question No. 30 at the second substantive meeting.
[4210] The causation standard is affirmatively not just a contributory cause standard. As the Appellate Body has held, there must be a "*genuine and substantial* relationship of cause and effect between increased imports and serious injury." Appellate Body Report, *US – Lamb* at para. 179 (emphasis added), citing Appellate Body Report, *US – Wheat Gluten*.
[4211] Brazil's second written submission, paras. 102-105.

would not change its findings of injury and causation as to total imports.[4212] However, this finding does not meet the obligation to explain how the facts support a finding that non-NAFTA imports alone caused serious injury or threat of serious injury. As such, it does not reflect a proper non-attribution analysis of NAFTA imports. The USITC's analysis of non-NAFTA imports, therefore, did not meet the Appellate Body's standard as set forth in *US – Line Pipe*, which requires a "reasoned and adequate explanation that establishes explicitly" that such imports alone caused serious injury to the domestic industry.[4213]

7.1797 Similarly, Norway maintains that it is clearly the implication of the statement by the Appellate Body in *US – Line Pipe* that the United States had to perform a separate non-attribution analysis in order to "demonstrate, consistent with our ruling in *US – Wheat Gluten*, that the USITC provided a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources 'satisfied the conditions for the application of a safeguard measure …'".[4214] The United States is, therefore, under an obligation to analyse excluded imports as an alternative cause of injury, and consequently to conduct a non-attribution analysis for such excluded imports, together with any other factors found to be causing injury. As the Appellate Body has stated, the United States must provide a reasoned and adequate explanation which establishes explicitly, in a manner which leaves nothing merely implied or suggested and which is clear and unambiguous that the injury caused by excluded imports is not attributed to non-excluded imports. The United States did not perform this analysis – thus failing to meet this criterion.[4215]

7.1798 The United States insists that it is not required to treat NAFTA imports as an "other" possible cause of injury in its "parallelism" analysis. Such an analysis is not required under Article 4.2 of the Agreement on Safeguards. The second sentence of Article 4.2(b) of the Agreement – which is the provision of the Agreement that requires a competent authority not to attribute to imports the effects of other factors – specifically states that, "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".[4216] Accordingly, the Agreement on Safeguards indicates that a non-attribution analysis is only required for factors "other than imports" that may be causing injury to the domestic industry, even when certain imports are excluded from the remedy. Article 4.2(b), thus, does not require that an authority conduct the same type of analysis with respect to imports from sources not included in the remedy as it does for factors other than imports. The United States submits that, accordingly, as a matter of law, the complainants' arguments have no foundation in the language of the Agreement. Notwithstanding the lack of an explicit requirement in the Agreement on Safeguards, however, the USITC did, in fact, properly isolate the effects of NAFTA from non-NAFTA imports in its parallelism analysis. In particular, the United States expressly separated and distinguished the price and volume effects of

[4212] As noted in Brazil's first written submission, the USITC actually found in several cases that imports from NAFTA countries contributed importantly to the serious injuries of the domestic industry! For example, in the USITC's flat-rolled steel analysis, the USITC found that imports from NAFTA accounted for a substantial share of total imports and Mexican imports contributed importantly to the serious injury caused by imports. USITC Report Vol. I at 66. Similarly, in its hot-rolled bar and cold-finished bar analysis, the USITC found that Canadian imports represented a substantial share of total imports and contributed importantly to serious injury caused by imports. Ibid., at 100, 107.

[4213] Brazil's second written submission, paras. 102-105.

[4214] Appellate Body Report, *US – Line Pipe*, para. 188.

[4215] Norway's second written submission, paras. 198-199.

[4216] Agreement on Safeguards, Article 4.2(b).

non-NAFTA imports from those of NAFTA imports as an integral part of the its parallelism analysis.[4217] [4218]

7.1799 Moreover, insofar as the complainants contend that the USITC attributed to non-NAFTA imports effects due to NAFTA imports, the United States contends that they have misread the USITC Report. These complainants overlook that the USITC, in its analysis of non-NAFTA imports, found a causal link between non-NAFTA imports, viewed alone, and the serious injury experienced by the pertinent domestic industry. Because NAFTA imports were not considered in the USITC's particularized causal link analysis, their effects were already excluded when the USITC found that there was a causal link between the non-NAFTA imports and the serious injury. Further analysing NAFTA imports as an alternate cause of serious injury, as advocated by the European Communities and Korea, would have been redundant and hence was unnecessary.[4219]

7.1800 Japan submits that treating NAFTA imports as "other factor" for the purposes of non-attribution would make it abundantly clear that if a measure is imposed on non-NAFTA imports only, then the injury analysis must likewise be conducted on this basis.[4220] New Zealand argues that the "parallelism requirement" is a broad one and goes well beyond one aspect (namely non-attribution) of one stage (namely, a determination as to causation) of establishing the conditions for the application of a safeguard measure. The Appellate Body made clear that the competent authority must provide "a *reasoned and adequate explanation* that *establishes explicitly*" that the non-excluded imports "satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards".[4221] The 'conditions for the application of a safeguard measure' include but go well beyond simply establishing causation. For example, a competent authority would also have to establish that the increased imports requirement had been met.[4222]

7.1801 The United States finally reiterates that the USITC's analysis fully satisfies the requirements of Articles 2 and 4 of the Agreement, as articulated by the Appellate Body in *US – Line Pipe*, that an authority establishes explicitly "through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for application of a safeguard measure …"[4223] The USITC found that non-NAFTA imports, considered alone, satisfied the conditions for application of a safeguard measure when it separated and distinguished non-NAFTA imports in its analysis of increased imports and causation, the areas in which distinguishing between imports from different sources was appropriate and necessary, and adopted other pertinent portions of its analysis of all imports that did not change depending on the set of imports examined.[4224]

[4217] United States' first written submission, paras. 451-455 and 769-774; United States' written reply to Panel question No. 95 at the first substantive meeting.

[4218] United States' second written submission, paras. 149-151 and 162.

[4219] United States' second written submission, paras. 162-165.

[4220] Japan's written reply to Panel question No. 30 at the second substantive meeting; Japan's written reply to Panel question No. 91 at the first substantive meeting.

[4221] Appellate Body Report, *US – Line Pipe*, para 188 (emphasis in original).

[4222] New Zealand's written reply to Panel question No. 30 at the second substantive meeting.

[4223] Appellate Body Report, *US – Line Pipe*, para. 198.

[4224] United States' second written submission, para. 166.